

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE
BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER
&
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1301/PUN/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

Emptoris Technologies India Private Limited, C/O IBM India Private Ltd. #12,Subramanya Arcade-1, Bannerghatta Main Road, Bengaluru-560029	Vs.	DCIT, Circle-1(2), Pune
स्थायी लेखा सं./PAN No. : AABCC 3721 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.1346/PUN/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

DCIT, Circle-1(2), Pune	Vs.	Emptoris Technologies India Private Limited, C/O IBM India Private Ltd.#12,Subramanya Arcade-1,Bannerghatta Main Road, Bengaluru-29
स्थायी लेखा सं./PAN No. : AABCC 3721 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

Cross Objection No.11/PUN/2018
(निर्धारण वर्ष / Assessment Year :2010-2011)

Emptoris Technologies India Private Limited, C/O IBM India Private Ltd. #12,Subramanya Arcade-1, Bannerghatta Main Road, Bengaluru-560029	Vs.	DCIT, Circle-1(2), Pune
स्थायी लेखा सं./PAN No. : AABCC 3721 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Nageshwar Rao
& Rajendra Agiwal, AR
राजस्व की ओर से /Revenue by : Shri Ashok Babu, DR

सुनवाई की तारीख / Date of Hearing : 21/01/2019

घोषणा की तारीख/Date of Pronouncement 09/04/2019

आदेश / ORDER

Per D.Karunakara Rao, AM:

There are three appeals for consideration. The cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-13, Pune dated

27.07.2015 for the Assessment Year 2010-11 and the assessee has also filed the Cross Objection vide C.O. No.11/PUN/2018.

2. Since the issue involved in the appeal of assessee and Revenue are common, therefore, they are heard together and disposed off by this consolidated order.

3. For the sake of completeness, first we shall take the appeal of the assessee in ITA No.1301/PUN/2015 and the facts mentioned therein.

ITA No.1301/PUN/2015 (By Assessee)

4. The concise grounds raised by the assessee in its appeal are as under:-

Emptoris Technologies India Private Limited (hereinafter referred to as the 'Emptoris India' or 'the Company' or 'the Appellant' or 'the Assessee') respectfully craves leave to prefer an appeal against order passed by the Commissioner of Income Tax (Appeals) - 13, Pune ('CIT(A)') dated July 27,2015, under section 250 ('Impugned order') of the Income-tax Act, 1961 ('Act') in relation to the order passed by Deputy Commissioner Of Income Tax Circle- 1 (2), Pune ('AO') on the following grounds which are without prejudice to each other:

That on the facts and in the circumstances of the case and in law:

A. Grounds of appeal relating to transfer pricing matters

1. Ld. AO/TPO/CIT(A) have erred in making/confirming addition of INR 3,62,43,991 to the total income declared by Appellant.

2. Ld. AO/TPO/CIT(A) erred, in not accepting economic analysis undertaken by the Assessee in accordance with the provisions of the Act read with the Rules, substituting the same, selectively accepting / rejecting companies as comparable by applying inconsistent and incorrect criteria and in holding that the Assessee's international transaction of software development services are not at arm's length.

3. Ld. TPO/AO/CIT(A) have erred, in including/rejecting certain companies applying unreasonable comparability criteria. Appellant craves leave to contest /selection/ rejection of all comparables (names not being specified herein in V interest of brevity) by Ld. TPO / Ld. CIT(A).

Although some of the companies were chosen/ rejected as comparable in transfer pricing study, upon consideration of more complete details some such com parables were found to be not comparable OR comparable for different reasons, appellant craves leave to urge the same at the time of hearing.

*4. Ld. TPO/AO/CIT(A) have erred, by rejecting certain comparable companies identified by Appellant using earnings from **export sales less***

than 75% of the total sales as a comparability criterion and accepting functionally different companies as comparable.

5. *Impugned order erred in upholding inconsistent and incorrect application of turnover criteria, persistent losses, related party and other criteria for selecting/ rejecting comparable companies.*

6. *Ld. TPO/AO/CIT(A) have erroneously computed margins of the comparable companies and failed to consider that appellant enjoyed tax free holiday.*

7. *Ld. TPO/AO/CIT(A) have erred by **incorrectly computing working capital adjustment.***

8. *Ld. TPO/AO/CIT(A) have erred in computing the arm's length price without giving benefit of 5 percent under the proviso to section 92C of the Act;*

9. *Ld. TPO/AO/CIT(A) for different have erred in not making suitable **adjustments to account for differences in risk profile of the Appellant vis-a-vis comparables.***

10. *Ld. TPO/ AO/ CIT(A) have erred, by considering an incorrect amount of interest under section 234B of the Act and section 234C of the Act in the assessment order.*

Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.

5. From the above it is evident that (i) the **exclusion** of certain comparables, (ii) the granting of adjustment on account of working capital as well as the risk profile of the assessee (Ground Nos.7 & 9) are the issues to be adjudicated by us. Other grounds are either general or premature and they are dismissed as such.

6. Brief facts of the case are that the assessee is a subsidiary of Emptoris Inc. USA. The assessee company is **software development** engaged in rendering, support services as well as testing/documentation services to its associated enterprises. M/s. Emptoris Technologies India Pvt. Ltd. is a captive service provider of such services to its parent company, USA. The assessee is a 100% export oriented unit registered under the Software Technology Parks of India (STPI) Scheme of the Government of India. During the year under consideration the assessee entered into the following international transactions with its AE :-

Sr. No.	Nature of the transactions	Amount (Rs.)	Method adopted
1	Provision of software	30,35,55,414,	TNMM

	development services and other related support services		
2	Reimbursement of Expenses	5,22,097	Actual expenses
3	Recovery of Expenses	9,60,721	Actual expenses
	Total	30,50,38,232	

7. The assessee, in its transfer pricing study report, used Transactional Net Margin method (TNMM) as most appropriate method with the Profit Level Indicator (PLI) of Operating Profit/Operating Cost (OP/OC). Assessee's TP study determined the average net margin of the 13 comparable companies at 4.84% as against the assessee's net margin of 9.44%. On this basis, the assessee contended that its international transactions of rendering of software development and support services are at the arm's length. Thereafter, a reference u/s.92CA(1) of the Act was made to the TPO by the Assessing Officer for computation of arm's length price in relation to the international transactions. Accordingly, notice u/s.92CA(2) of the Act was issued vide TPO-1 dated 23.04.2013. During the course of TP proceedings, Id. AR of the assessee appeared and filed the details as called for. Eventually, the TPO worked out the average net margin of the final set of 11 comparables at 26.81% after allowing the working capital adjustment and passed order u/s.92CA(3) of the Act working out the transfer pricing adjustment of Rs.4,81,70,670/-. Thereafter, the Assessing Officer added the amount of Rs.4,81,70,670/- to the assessee's total income assessing total income at Rs.4,81,70,670/- as against its total returned income of Nil and passed the assessment order dated 06.05.2014 u/s.143(3) of the Act.

8. Aggrieved with the order of the Assessing Officer, the assessee preferred appeal before the CIT(A). In the appellate proceedings, the assessee reiterated the submissions as was made before the TPO/Assessing Officer. The CIT(A) partly allowed the appeal of the assessee. Aggrieved with the same, the assessee is in further appeal before us.

Before the Tribunal

9. Before us, Id. AR for the assessee argued that the assessee is engaged in the business of software development and associated activities for its parent company. The TPO proposed adjustment of Rs.4.82 crores (Rounded off) in his order dated 15.01.2014. The CIT(A) gave part relief and confirmed the various additions. At the end of the first appellate proceedings, the TP adjustment stands at Rs.362,43,991/- in place of Rs.4.82 crores.

10. At the outset, Id. Counsel for the assessee filed a chart and submitted that if the six comparables are excluded, the assessee's profit margin is within the margin of $\pm 5\%$. Therefore, the profit declared in the return filed by the assessee does not need any TP adjustment. In this regard, Id. AR for the assessee submitted the following six comparables are required to be excluded. They are :-

- i) Persistent Systems Limited (Persistent Systems);
- ii) Sasken Communications Technologies Limited(Sasken);
- iii) Kals Information Technology System Limited (Kals);
- iv) Thirdware Solution Limited (Thirdware);
- v) Goldstone Technologies Limited (Goldstone); and
- vi) Acropetal Technologies Limited (Acropetal)

11. Referring to each of the above comparables, Id. AR for the assessee narrated the following reasons given by the TPO & CIT(A) for inclusion on one side and submitted the reasons justifying for exclusion of the comparables. The contents of the said chart are extracted here as under :-

Name of comparables	Companies retained by TPO	Companies retained by CIT(A)	Reasons justifying the exclusion of comparables by assessee
Persistent Systems	<p>1. Appellant has failed to demonstrate as to how turnover affects the profitability and more specifically that with the increase in turnover profitability increases (Refer page 12 and 18 of the TP order)</p> <p>2. Appellant has not submitted any criterion for considering any profit earned as super profit and</p>	<p>1. Cannot exclude Persistent Systems on the basis of turnover filter (Refer page 25 of the CIT(A) order)</p> <p>2. Differences between software services and software product as enunciated in AS 17, Safe harbour rules and expert opinion is not substantial enough to justify</p>	<p>1. Persistent Systems is a well established leader in outsourced product development (Refer page 4 of the Annual report)</p> <p>2. Persistent Systems has made new investments in four thrust areas: Cloud computing, analytics, enterprise mobility and enterprise collaboration, whereas Appellant into pure software development</p>

	<p>cogent reasons for considering the same as super profits (Refer page 12 of the TP order)</p>	<p>exclusion of the software product company (Refer page 25 of the CIT(A) order),</p> <p>3. Super profit should be justified with extraordinary events or circumstances or else no company can be excluded basis this ground (Refer page 25 of the CIT(A) order)</p> <p>4. On site revenue is not one of the criteria to decide comparability (Refer page 26 of the CIT(A) order)</p> <p>5. Number of units and huge employee number will not constitute material difference to justify exclusion of company from the final list of comparable companies (Refer page 26 of the CIT(A) order)</p> <p>6. Appellant is not a start - up and cannot be considered to be loss making company (Refer page 26 of the CIT(A) order)</p> <p>7. Acquisition of US company would affect the growth of the US company and would affect consolidated financials and not standalone financials (Refer page 26 of the CIT(A) order)</p>	<p>(Refer page 4 of the Annual report)</p> <p>3. Annual report of the company clearly differentiates between OPD and IT services. The skill set and the expertise required in OPD is much higher than the skill set required in providing IT services. Accordingly, Persistent Systems cannot be compared With the Appellant which IS purely a software development company performing routine low and activities (Refer page 16 and 17 of the Annual report)</p> <p>4. Persistent Systems develops a product end to end. It provides a comprehensive range of services for its customers across all phases of product life cycle. It creates customised applications. enhance the functionality of existing software products and participate in release of new product versions (Refer page 65 of the Annual report)</p> <p>5. From the management discussion and analysis section, it is pretty evident that Persistent Systems is a leading provider of end-to-end software product development services - from research to testing to professional services and customer support (Refer page 74 of the Annual report)</p> <p>6 Persistent Systems has been regularly investing in the creation of new intellectual property. It will continue to focus on three main areas of innovation, Platform innovation, PE process Innovation and domain specific innovation (Refer page 74 of the Annual report)</p> <p>7 On a review of the annual report of Persistent Systems, it can be seen that the revenue earned is from 'Sale of software services and products' whereas the Appellant is involved only in software services and not software products (Refer page 99 and 106 of the Annual report)</p> <p>8 No segmental data is available to distinguish between the revenue earned purely from software services and purely from products (Refer page 108 of the Annual report)</p> <p>9. Exceptionally high turnover as compared to Appellant.</p>
<p>Sasken</p>	<p>1. Appellant has failed to demonstrate as to how turnover affects the profitability and more specifically that with the increase In turnover profitability Increases (Refer page 12 and 16 of the TP order)</p>	<p>1. Turnover of Sasken is just 13 times more than the value of the International transaction of the Appellant and according it cannot be excluded on huge turnover basis (Refer page 23 of the CIT(A) order)</p> <p>2. Sasken's annual report states that the company neither launched the phone nor booked any revenue from the said activity. Hence it has no impact on profitability (Refer page 24 of the CIT(A) order)</p> <p>3. Company need not derive revenue from all streams mentioned in revenue</p>	<p>1. In the Directors report section of the annual report of Sasken, it is stated that the company has developed a handheld satellite phone IsatPhonePro for Inmarsat (leader in global satellite communication services). It is clearly stated that Sasken is responsible for end-to-end development of the Isatphone Pro satellite phone, which has been made 'possible through its multi-site capabilities and centres of excellence in India - Even though no revenue has been booked by the sale of Isatphone Pro, the functions of carrying out the development (end-to-end) is being done by Sasken which is not carried out by the Appellant (Refer page 33 of the</p>

		<p>recognition policy. Company has reported different segments in consolidated accounts and not in standalone (Refer page 24 of the CIT(A) order)</p> <p>4. Relevant extracts from prospectus filed before SEBI states that Sasken is into embedded R&D outsourcing services etc., - CIT(A) stated that they are different types of software which are being referred to in the prospectus filed. Merely because particular software is used for specific needs of the business or industry, it does not cease to be software (Refer page 25 of the CIT(A) order)</p>	<p>Annual report)</p> <p>2. Sasken is involved in R&O activities. The Company has applied for 21 patents and has been granted 8 patents out of them (Refer page 33 of the Annual report)</p> <p>3. Employing various technologies Sasken has developed Vyapaar SEVA - a business services platform. Company has also acquired the product portfolio of Ingenient Technologies Inc., which offers best-in-class multimedia codecs in Audio, Video, Image and Speech space. (Refer page 14 of the Annual report)</p> <p>4. Hon'ble Bengaluru Tribunal in the case of Electronics for Imaging India Pvt Ltd IT(TP) No 212/8ang/2015 and Hon'ble Hyderabad Tribunal in the case of Ivy Comptech Pvt Limited vs DC IT Hyderabad (ITA No. 222 and 334/Hyd/2015) for the AY 2010-11, has excluded Sasken stating the company is engaged in 3 segments and has no segmental break-up of the same.</p> <p>5. CIT(A) has opined that Sasken provides different services such as embedded R&D Outsourcing services etc., (as per the prospectus furnished before SEBI (Refer page 25 of the CIT(A) order)</p> <p>6. Sasken has been rejected by the Hon'ble Delhi Tribunal in the case of ION Trading India Private Limited vs ITO Ward Delhi (ITA No 1035/0e1/2015) and by Pune Tribunal In the case of Tibco Software India Private Limited ITA No 94/PUN/2014 for the AY 2010-11, stating that a business restructuring was undertaken during the year.</p> <p>7. Exceptionally high turnover as compared to Appellant.</p>
<p>Kals</p>	<p>1. DRP has considered Kals as comparable for AY 2008-09 (Refer page 17 of the TP order)</p>	<p>1. Company has worked not as a software product company and but also a software service company ('Notes 1 to accounts of the annual report') (Refer page 28 of the CIT(A) order)</p> <p>2. In the segmental reporting, Kals itself has reported both software services and software products under the same segment. Accordingly, it can be concluded that both the activities are not very different from each other (Refer page 30 of the CIT(A) order)</p> <p>3. Case laws excluding Kals were dated prior to introduction of Safe harbour rules. Safe harbour rules do not differentiate IT services on the lines of software service provider or software product provider. Broad differentiation is only on the basis of software services, SPO and KPO (Refer page 30 of the CIT(A) order)</p> <p>4. Software products are also software developed by company and in no way is different from nature of work</p>	<p>1. In the background of the Company, it is stated that "Kals is engaged in the development of software and software products since its inception" (Refer page 21 of the annual report)</p> <p>2. No clear bifurcation between income from sale of software products and from software development services is available in the annual report of Kals. (Refer page 23 of the Annual report of Kals)</p> <p>3. Rejected as a comparable by the Hon'ble Pune Tribunal in the Assessee's own case for AY 2008-09 for being functionally dissimilar.</p> <p>4. Rejected in the case of Approva Systems Pvt Ltd vs DCIT (ITA No. 1921/PUN(2014) and in the case of TIBCO Software India Pvt Ltd (ITA 276/PUN(2015) for the AY 2010-11, stating that Kals was functionally different to a software development company as the same is engaged in the development of software products.</p>

		<p>carried on by a software service provider company (Refer page 31 of the CIT(A) order)</p> <p>5. Safe harbour rules applies both to software product and software development company. IT product companies are also a part of the IT software services providers though there may be certain minor differences (Refer page 33 of the CIT(A) order)</p> <p>6. No Patent or any other intellectual property rights present in the balance sheet of the company (Refer page 34 of the CIT(A) order)</p> <p>7. Income from translation and training comprises of 6% of the total revenue (Refer page 35 of the CIT(A) order)</p>	
Thirdware	<p>1. Companies operations consists of software development, implementation and support services (Refer page 18 of the TP order)</p> <p>2. Sale of license revenue is only 3% of the total revenue (Refer page 18 of the TP order)</p>	<p>1. Income from sale of license is negligible (2.23% of total revenue) (Refer page 35 of the CIT(A) order)</p> <p>2. Management discussion and analysis state that the company is into software business (Refer page 36 of the CIT(A) order)</p> <p>3. Thirdware itself treats products as a part of software services. Accordingly, Appellants arguments that the company cannot be compared because its into software development is not tenable. Difference between software service and software product is not substantial enough to justify company's exclusion (Refer page 36 and 37 of the CIT(A) order)</p> <p>4. PAPA is available from AY 2011-12. therefore during FY 2009-10 it has not affected the profitability of Thirdware (Ref page 37 of the CIT(A) order)</p> <p>5. Services outsourced is less than 20% of total services exported. Outsourcing does not change the function of a company (Refer page 37 of the CIT(A) order)</p>	<p>1. Thirdware is engaged in the implementation and consulting services of software based on ERP and business intelligence whereas Appellant provides routine, low end software development services to its AE (Refer page 34 of the Annual report)</p> <p>2. As per the segment reporting of the company, the company's operation comprises of software development, implementation and support services. However, there is no segmental break-up amongst the same (Refer page 54 of the Annual report)</p> <p>3. Thirdware has developed its own product PAPA (Refer page 55 and 56 of the Annual report). Even though the product has not been launched during the FY 2009-10 and has not resulted in any revenue generation. it will take years for developing a product and then the final product would be available for sale. Comparing Appellant with Thirdware is inappropriate as the skill set and overall functional capability of both the companies are at different level.</p> <p>4. Thirdware has been rejected by the Hon'ble Pune Tribunal in the case of Approva Systems Pvt Ltd vs DCIT (ITA No. 19211PUN12014) and in the case of TIBCO Software India Pvt Ltd (ITA 2761PUN12015) for the AY 2010-11. stating that the same is engaged in the business of sale-cum-license of software and accordingly is dissimilar to the functions carried out by a software development company.</p> <p>5. Thirdware has been rejected as a comparable company to the taxpayer engaged in the provision of software development services by the Hon'ble Delhi Tribunal in the case of ION Trading India Private Limited vs ITO Ward Delhi (ITA No 10351Del12015), stating that it has incurred expenses towards import of software services, evidencing outsource of software services</p> <p>6. Thirdware has been rejected as a comparable company by the</p>

			Hon'ble Delhi Tribunal in the case of Open Solutions Software Services vs DCIT ITA No. 7078/Dell2014 for the AY 2010-11, stating that the same does not contain proper segmental revenue between software development and software products.
Goldstone	<p>1. It is engaged in software development services (Refer page 15 of the TP order)</p> <p>2. Goldstone was considered as comparable for both AY 2008-09 and 2009-10 (Refer page 15 of the TP order)</p>	<p>1. Income from media division is only 7% of its total revenue. Non availability of segmental accounts of media division will not make any difference as the revenue earned from the same is pretty less (Refer page 39 of the CIT(A) order)</p>	<p>1. Goldstone is presently engaged in the business of IT enabled services. Goldstone offers highly complex and mission critical solutions whereas Appellant performs basic level of software support and development functions (Refer page 8 of the annual report)</p> <p>2. Goldstone is offering a wide variety of services such as Remote IT infrastructure management. Portal development and maintenance using Microsoft sharepoint, Quality assurance and testing and Cloud Service offerings (Refer page 9 of the annual report)</p> <p>3. No segmental information - While the annual report of the company provides the break up of the segmental revenue, the same do not provide the break up of the segmental results amongst the different segments. Accordingly, it is not possible to analyse the profitability of the segments for comparison purposes (Refer page 36 of the annual report)</p> <p>4. Goldstone is considered not to be comparable to Emptoris India in its own case by the Hon'ble Pune Tribunal for the AY 2008-09 stating that the same is engaged in activities related to Media and IP TV which are functionally dissimilar to that of Emptoris India.</p> <p>5. Hon'ble High Court of Delhi in the case of Principal CIT vs Pitney Browess Software India Limited (ITA No. 68112015) has rejected Goldstone stating that tile basis of allocation of costs and the working of profits between the segments were not clear.</p>
Acropetal	<p>1.Acropetal is an India based software service provider primarily delivering software validation and verification services to the banking and financial services industry worldwide (Refer page 17 of the TP order)</p>	<p>1. Note 1 of the Notes to accounts of the annual report state that the company is into software development. Similar reference are present on page 5 and in column V on page 25 of the annual report (Refer page 40 and 41 of (CIT(A) order)</p> <p>2. EMRS is a software and the company is into software development only (Refer page 41 of the CIT(A) order)</p> <p>3. Inventory is only used for carrying out the work and income is not derived from trading in inventory item (Refer page 41 of the CIT(A) order)</p> <p>4. Company has not yet declared income from the new segment. Further, neither there is a segment pertaining to this income nor there is any mention of combining income from these activities with income from other segment (Refer 42 of the CIT(A) order)</p> <p>5. Company cannot be</p>	<p>1. Acropetal has an inventory of INR 3.37 crores and the increase or decrease in the same is credited to the profit and loss account of the company (refer page 13 and 14 of the annual report)</p> <p>2. The TPO has not allocated the unallocable expenses of 17.43 crores between the segments to arrive at the proper margins (refer page 23 of the Annual report)</p> <p>3. Company has on site business expenses which depicts that it works on a different business model (Refer page 19 of the annual report.</p>

		<p>excluded for abnormal profits unless concrete data is available to prove the same. Data of subsequent years cannot be considered for analysis (Refer page 42 of the CIT(A) order)</p> <p>6. Company cannot be excluded basis the argument of inorganic growth (Refer page 44 of the CIT(A) order)</p>	
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12. We shall now take up each of the above six comparables, if they are required to be excluded from the list of comparables by the TPO/CIT(A).

I. Kals Information Technology

13. In this regard, Id. AR for the assessee submitted that with regard to **Kals Information Technology (in short 'Kals')**, the same was considered by this Bench of the Tribunal in **assessee's own case** reported in [2016] 67 taxmann.com 279 (Pune-Trib), wherein the **Kals** was found to be not a good comparable *qua* the functions of the assessee. In this regard, he brought our attention to contents in para 11. The Id. AR further submitted that Kals is engaged in product development and not the software development as in case of the assessee. The contents of para 11 are perused and the relevant findings of the Tribunal at para 11 are extracted as below :-

"11. We find that Pune Bench of Tribunal in Barclays Technology Centre India (P.) Ltd.'s case (supra) i.e. a concern which was engaged in the activity of providing software development services to its associate enterprises in UK had also vide para 18 held that the concern M/s. KALS Information Systems Ltd. was to be excluded from the final set of comparables as it was functionally dissimilar. The relevant para 18 reads as under:—

'18. Thirdly, assessee has contended that the concern M/s. Kals Information Systems Ltd. be excluded from the final set of comparables. On this aspect also, the case set up by the assessee is that the decision of the Pune Bench of the Tribunal in the case of Symphony Services Pune Pvt. Ltd.(supra) fully covers the controversy. In the case of Symphony Services (supra), M/s. Kals Information Systems Ltd. was excluded from the list of comparables on the ground that the said concern was involved not only in the activity of providing of software development services but also in selling of software products. Symphony Services Pune Pvt. Ltd. was only engaged in providing software services. In the case of Symphony Services Pune Pvt. Ltd. (supra) as well as in the present case also, the TPO did not accept the plea for exclusion of KALS Information System Ltd. primarily on the ground that the financial statements of the said concern did not reflect any sale of

software products. Quite clearly the stand of the Revenue in the present case as well in the case of Symphony Services Pune Pvt. Ltd. (*supra*) is similar. It is also quite clear that the nature of service being rendered by the assessee and Symphony Services Pune Pvt. Ltd. (*supra*) are similar, namely rendering of software development services to its affiliates. The following discussion in the order of the Tribunal in case of Symphony Services dated 30-04-2014 (*supra*) brings out the salient features of the controversy :

"13. The second point raised by the assessee is with regard to the adoption of Kals Information Systems Limited as a comparable concern while benchmarking the international transactions of the assessee. Before the TPO, assessee submitted that the said concern be excluded from the list of comparables on account of functional dissimilarities. The relevant discussion in this regard is contained in para 6.1 of the order of the TPO. The plea of the assessee was that the said concern was engaged in selling of software products, namely, Virtual Insure, La. Vision, CMSS, e-DMS and ERP "SHINE", etc., which are all specialised software products developed for the respective sectors. For the instance, Virtual Insure was said to be a web based solution that was useful in the insurance sector; La Vision was an e-commerce based application in the field of intra-organizational communications, etc.; and, CMSS was a software for consultants/agents to manage their customers pre and post sales. On this basis, it was sought to be made out that the assessee was functionally different inasmuch it was engaged in the provision of software development and other related services to its associated enterprises as well as to the non-associated enterprises and, was not involved in development and sale of software products. The TPO did not accept the plea of the assessee for the reason that the Annual Report of the said concern did not reflect about sale of software products after development and therefore, according to him, it was not functionally different.

14. Before us, the learned counsel for the assessee has vehemently pointed out that the plea of the assessee has been rejected by the income-tax authorities without any justifiable reasons, as even on the basis of the information available in the public domain it is quite evident that Kals Information System Limited was a concern which was developing and selling software products, which was an activity quite distinct from the activity of software development undertaken by the assessee. In the course of hearing, the learned counsel has furnished the prints out from the Annual Report of Kals Information Systems Ltd. wherein various software products sold by the said concern have been detailed, which according to him, supports the plea of the assessee that the said concern was functionally different. Apart therefrom, the learned counsel has referred to the decision of the Pune Bench of the Tribunal in the case of Bindview India Pvt. Ltd. v. Dy. CIT vide ITA No.1 386/PN/2010 dated 30.11.2011, which was also a concern engaged in rendering software development services for its parent company. The action of the TPO of selecting Kals Information Systems Limited as a comparable concern while applying the TNM method was rejected by the Tribunal on the basis that the said concern was engaged in development of software products and sale, which was functionally dissimilar to the software development services undertaken by the Bindview India Pvt. Ltd. (*supra*). The learned counsel pointed out that the said decision is fully applicable to the facts of the present case inasmuch as similar functions were undertaken by Bindview India Pvt. Ltd. and therefore

Kals Information Systems Limited is liable to be excluded from the lists of comparables.

15. A reference has also been made to the decision of the Bangalore Bench of the Tribunal in the case of M/s 3DPLM Software Solutions Ltd. v. DCIT vide IT(TP)A No.1303/Bang/2012 dated 28.11.2013 wherein also the said concern, namely, Kals Information Systems Limited was not considered as a comparable on account of functional dissimilarities. The learned counsel pointed out that M/s 3DPLM Software Solutions Ltd.(supra) was also a concern engaged in the provision of software development and other related services, which is similar to the functions undertaken by the assessee. It was pointed out that the functions of Kals Information Systems Limited considered by the Bangalore Bench of the Tribunal is for the same assessment year as is in the present case and therefore the said decision also squarely applies to the facts of the present case.

16. The learned CIT-DR has defended the position of the TPO by relying on the discussion in the order of the TPO, which we have already adverted to in the earlier part of this order, and is not being repeated for the sake of brevity.

17. We have carefully considered the rival submissions. We find that the precedents by way of the decision of the Pune Bench of the Tribunal in the case of Bindview India (P.) Ltd. (supra) and the decision of the Bangalore Bench of the Tribunal in the case of M/s 3DPLM Software Solutions Ltd.(supra) relied upon by the assessee squarely cover the controversy relating to Kals Information Systems Limited. In the aforesaid two precedents, the said concern has been sought to be excluded from the list of comparables on account of functional dissimilarities. The Bangalore Bench of the Tribunal in the case of M/s 3DPLM Software Solutions Ltd. (supra) has considered the functions undertaken by the said concern during the previous year relevant to the assessment year under consideration before us, and it has been found that the said concern was engaged in the business of developing and selling software products and was not purely or mainly a software service provider. There is no dispute to the fact position that the appellant before us has undertaken mainly software development services for its associated enterprises and the non-associated enterprises and that such activity is quite distinct from the developing and selling of software products. The Pune Bench of the Tribunal in the case of Bindview India (P.) Ltd. (supra) has also found the said concern to be functionally dissimilar from a concern which was engaged in the business of software development services, which is the case before us. Though, the decision of the Tribunal in the case of Bindview India Pvt. Ltd. (supra) relates to the assessment year 2006-07 whereas the present case of the assessee for assessment year 2008-09 yet there is no material on record suggest that the activities carried out by Kals Information Systems Limited in the current assessment year are different from those noted by the Tribunal in the case of Bindview India (P.) Ltd. (supra) for assessment year 2006-07.

18. Considering the aforesaid discussion, in our view, the concern i.e. Kals Information Systems Limited is liable to be excluded from the list of comparables for the purposes of benchmarking international transactions of provision of software development services. We hold so. Thus, on this aspect assessee succeeds.'

14. On hearing the counsels on this issue, we find that the Tribunal, in assessee's own case held that Kals is not a comparable *qua* the functions of the assessee. The Pune Bench of the Tribunal relied heavily on the decisions of same bench in the case of Barclays Technology Centre India (P) Ltd. [2015] 56 Taxmann.com 386 which deciding the above. Considering the same, we are of the opinion that it is a covered issue by the above decision of the Tribunal. Therefore, Kals needs to be **excluded** as argued by Id. Counsel for the assessee.

II. Goldstone Technologies Limited

15. With regard to the second comparable company, namely, **Goldstone Technologies Limited (in short 'Goldstone')**, we find that there is no reason for the inclusion of this comparable too. In this regard, Id. AR brought to our attention to the order of the Tribunal in assessee's own case reported in [2016] 67 taxmann.com 279 (Pune-Trib) and submitted that the issue stands covered considering the contents at para 17 of the said order of the Tribunal.

16. We perused the para 17 of the order of the Tribunal in the above case and the relevant findings of the Tribunal in this regard are extracted below :-

*“17. The learned Authorized Representative for the assessee pointed out that before the DRP, it was pointed out that the said concern Goldstone Technologies Ltd. was engaged in the activities related to Media & IP TV and further, the company had carried inventory of set top boxes and movie rights in its Balance Sheet for the previous year. In addition, the said company had some income from sale of industrial material. Looking at the services provided by the said concern, it is clear that the same are functionally dissimilar to the services provided by the assessee and there is no merit in comparing the results of the said concern while benchmarking the international transaction of the assessee. Accordingly, we direct the Assessing Officer to **exclude Goldstone Technologies Ltd.**”*

17. Considering the above decision of the Tribunal, we are of the opinion that it is a covered issue by the aforesaid decision of the Tribunal and therefore, this

comparable namely, Goldstone Technologies Limited needs to be excluded. Therefore, the Assessing Officer is directed to exclude the same.

18. For the rest of the **four comparables** and the request for exclusion of the same from the list of comparables, Id. Counsel relied on the summary extracted above by us in this order.

III. Thirdware Solutions Limited

19. Further Id. AR drew our attention to the decision of the Tribunal at para 55 & 56 of the order in the case of M/s ION Trading India Private Limited Vs. ITO, ITA No.1035/Del/2015 and submitted that **Thirdware Solutions Limited** is said to be engaged in implementation and consulting services of software based on ERP and business intelligence; whereas the said function is entirely different and dissimilar to the function of the assessee, which provides the routine, low end software development services to the AE. For the sake of completeness, we would like to extract the findings of the Tribunal at para 55 & 56 which read as below :-

"55. The assessee has objected to the inclusion of the said comparable on the following ground that the aforesaid company is focused on solutions and services in the Enterprise Allocation Space (EAS) in the Transaction, Analytics, and Collaborative Solution Layers. This includes ERP, customer relationship management (CRM), SCM, BI/DW, BPM etc. Thirdware offers Application Implementation Services (AIS), Application Development Services (ADS) and Application Management-support Services (AMS). It was further submitted that it is engaged in development of own software-PAPA and has incurred expenses towards import of software service, evidencing outsourcing of software services unlike the Applicant company. The TPO has not provided any reason for holding Thirdware as a company comparable to the Appellant whereas, The DRP while upholding Thirdware as comparable to the Appellant company observed as under:

"The audited report of the company reveals that company is mainly engaged in software development. The majority of income is from software development.

Having considered the material placed on record we find that the company is mainly involved in software services. Therefore, we hold that TPO is right in including the same for the purpose of comparability analysis."

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 contrast 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.”

20. Considering the above decision of the Tribunal, we are of the opinion that it is a covered issue by the aforesaid decision of the Tribunal, therefore, this comparable company namely, Goldstone Technologies Limited needs to be excluded. Therefore, the Assessing Officer is directed to **exclude the same**.

IV. Persistent Systems Limited

21. With regard to the exclusion of **Persistent Systems Limited**, Id. AR of the assessee drew our attention to para 43 to 48 of the order of the Tribunal in case of M/s. ION Trading India Private Limited Vs. ITO, ITA No.1035/Del/2015 and submitted that, in the aforesaid case, the Tribunal excluded this company from the list of comparables.

22. We perused the order of the Tribunal in case of M/s. ION Trading India Pvt. Ltd. (supra) and found that the Tribunal omitted M/s Persistent Systems Limited from the set of comparables after observing the following observations :-

*“43. The assessee has sought exclusion of the aforesaid company on the ground that this company is a technology company into **software product** development services and is focused mainly on three industries i.e. Infrastructure & Systems, Telecom & Wireless, Life Science and Healthcare, whereas the assessee is operating in finance domain which is totally different. It was further submitted that on economy of scales, the company Persistent Systems Limited is very large in comparison with that of the assessee. It was also submitted that the company has revenue from sale of products as well with the software services. It has been submitted that segmental break of sales on sale of products and services has not been given by the company as the pricing consequently the margin would differ that on sale of products and sale of services. Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the list of comparables.*

.....

*48. Therefore, following the above judgments we hold that this company i.e. **Persistent Systems Ltd.** ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly."*

23. Considering the above decision of the Tribunal, we direct the AO/TPO to **exclude the Persistent Systems Limited** too from the list of comparables company.

V. Sasken Communications Technologies Limited

24. With regard to other comparable, namely **M/s. Sasken Communications Technologies Limited**, Id.AR submitted that this company has already been excluded from the list of comparables by the Tribunal in the case of ION Trading India Private Limited Vs. ITO, ITA No.1035/Del/2015 (supra) after discussing at para 50 to 53, as under :-

*"50. The assessee has sought exclusion of the aforesaid company on the ground that this company has different business model and there is presence of intangibles. It has also submitted that, as per Annual Report, the company derives revenue from software products, which suggests that the company is a product company unlike the assessee. It was further submitted that the company has inventories amounting to Rs.166.55 lakhs and being a software service company, it was also provided that should not be holding any inventory in the books of accounts. The assessee also contended that company is also actively engaged in **product development** and earns revenue also from sale of software products, there were also peculiar economic circumstances as it underwent restructuring during the year which inflated its profit by Rs.1,519,70 lakhs in addition to other factors affecting its sales and margins. Further, the turnover of the company is more than 19 times of the appellant. The TPO has held as under:*

"It is seen that this cost (contract staff cost) is insignificant in comparison to employee cost of Rs. 213.46 cr."

"All software companies have software in their fixed assets. It is only when it is significant and developed by them and is being amortized on sale of software products exceeding 25% of total income, it can be said to be resulting in different income which changes the profile from pure software developer to a company also selling products. It is further seen that this company has been chosen as it is engaged in providing software development, which is broadly similar to the service being provided by the assessee. Since, the assessee is also

providing similar services, so this company can be used as a comparable."

.....

*53. Having regard to the above judgment and since it is evident from record that **Sasken Communication Technologies Limited is functionally not similar to the appellant** and also having gone through restricting in the instant year, it **cannot be treated as comparable to assessee**. We order accordingly."*

25. Respectfully following the above decision of the Tribunal, we direct the AO/TPO to exclude this company, namely, Sasken Communication Technologies Limited from the list of comparables.

VI. Acropetal Technologies Limited

26. Lastly, the other comparable, namely, **Acropetal Technologies Limited**, Id. AR before us submitted that there exists a decision of the Tribunal in the case of TIBCO Software India Pvt. Ltd. Vs. DCIT, in ITA No.276/PUN/2015, order dated 31.01.2017. In this order, the Tribunal excluded the Acropetal Technologies Limited from the list of comparables.

27. We perused the order of the Tribunal in the aforesaid case and the relevant observations of the Tribunal at para 47 to 48 in case of TIBCO Software India Pvt. Ltd.(supra) are extracted as under :-

*"47. Now, coming to the next concern i.e. Acropetal Technologies Ltd. Similar issue of exclusion of Acropetal Technologies Ltd. being engaged in **design engineering activities**, the learned Authorized Representative for the assessee pointed out that it was engaged in design engineering activities and various ITA No. 276/PUN/2015 ITA No.334/P UN/2015 CO No.04/PUN/2016 TIBCO Software India Pvt. Ltd.*

Benches of Tribunal including the Pune Bench of Tribunal in Vistcon Engineering Centre (India) (P.) Ltd. Vs. ACIT (2016) 70 taxmann.com 248 (Pune-Trib.), had held that the said concern is not comparable to BPO services provided by the assessee. The Tribunal vide para 26 had held as under:-

"26. So far as Acropetal Technologies Ltd. is concerned it is the submission of the Ld. Counsel for the assessee that the TPO has considered overall entity level operating margin in respect of

comparable segmental margin. He submitted that Acropetal Technologies Ltd. generates revenue from Engineering Design Services and Information Technology Consultancy. Therefore, only segmental profitability of Engineering Design Services needs to be considered for the comparison. The DRP held that the IT based services segment is also similar to the segment of the Engineering Design Services and accordingly rejected the ground raised by the assessee. He submitted that the operating profit/operating cost of the relevant segment of the said comparable company for the year under consideration is 32.92% before considering the working capital adjustment. He submitted that the Engineering Design Services cannot be equated with IT services, therefore, Acropetal Technologies Ltd. should not be considered as comparable company."

*48. Following the same parity of reasoning, we hold that Acropetal Technologies Ltd. **is also being engaged in outsourcing, is to be excluded.**"*

28. Following the above observations of the Tribunal, we direct the AO/TPO to exclude the Acropetal Technologies Limited from the set of comparables. We order accordingly.

29. Thus, all the said six comparables are required to be excluded on the ground of functional dissimilarities. Accordingly, we order the Assessing Officer. Accordingly, we allow the ground Nos.1 to 6 & 8 raised by the assessee.

30. Ground No.7 relates to **working capital adjustment**.

31. At the outset, Id. AR for the assessee has drew our attention to para 11 of the order of the Tribunal in **assessee's own case** in ITA No.1500&1550/PUN/2012, order dated 08.07.2015, wherein the Tribunal restored the issue to the file of Assessing Officer for fresh adjudication. We perused the said order of the Tribunal and found that the Tribunal in para 11 of the order is relevant and the same read as under :-

"11. On perusal of the record and in the totality of the facts and circumstances of the case, on account of peculiar circumstances under which the assessee is carrying on its business i.e. providing services to its associate enterprises only with mark-up of 10% on the cost and where there is no adversity on account of working capital, then such working capital adjustment is to be made in the hands of the companies, which are

*picked up as comparables to bring the same to the level of the assessee, while benchmarking the international transactions entered into by the assessee. Thus, an endeavour is to be made to bring the results of comparables at par with the results of the tested party as if the same are working in the same environment. In the case of the assessee, where it is benefited on account of its transactions entirely with its associate enterprises on the basis of an Agreement, under which it is entitled to a mark-up of 10% on cost, working capital adjustment on such account merits to be allowed to the assessee. The OECD has provided guidelines for such working capital adjustment and the said guidelines are one of the accepted modes of computing working capital adjustment. **In view thereof, we hold that the assessee is entitled to the working capital adjustment, which in turn is to be computed as per the OECD guidelines. The assessee has filed the computation of working capital adjustment to the results of the comparables before us and the same were also filed before the Assessing Officer and some adjustment has been allowed on account of working capital adjustment by the Assessing Officer, while giving effect to the order of CIT(A). However, the errors pointed out by the assessee vide different communications to the Assessing Officer / TPO and the concerned Commissioner, have not been carried out till date. Accordingly, we direct the Assessing Officer to complete the exercise of working capital adjustment to be allowed to the assessee within a period of 45 days from the date of this order, after affording reasonable opportunity of hearing to the assessee. Upholding the order of CIT(A) with regard to the allowability of working capital adjustment, we dismiss the grounds of appeal raised by the Revenue. In view of the concession of the learned Authorized Representative for the assessee that in case the working capital adjustment is allowed to it, then the margins shown by the assessee in respect of international transactions with its associate enterprises was within +/- 5% of the margins shown by the list of comparables, we do not adjudicate the issues raised in the appeal filed by the assessee.***

32. Respectfully following the above observations of the Tribunal in assessee's own case, we restore the issue of working capital adjustment to the file of Assessing Officer/TPO for fresh adjudication after affording sufficient opportunity of hearing to the assessee. Accordingly, ground no.7 is allowed for statistical purposes.

33. Ground No.9 relates to **risk profile adjustment**.

34. Before us, Id. AR brought our attention to the decision of the Pune Bench of the Tribunal in the case of Haworth (India) Pvt. Ltd. Vs. DCIT, in ITA No.520/PUN/2015 for the assessment year 2010-2011 order dated 12.12.2018 and submitted that the matter needs to revisit the file of Assessing Officer for

fresh consideration. In this regard, he brought our attention to para 22 & 23 of the said order of the Tribunal. For the sake of completeness, we proceed to extract para 22 & 23 of the order of Tribunal as under :-

“22. Ground no.5 relates to rejection of the claim relating to the grant of risk adjustment. The DRP/Assessing Officer rejected the assessee’s request for economic adjustments pertaining to risk borne by the assessee vis-à-vis comparables. Ld. Counsel mentioned that the claim of risk adjustment arises for the first time in this assessment year. This claim was not made in the earlier assessment years before the revenue authorities. In this regard, Id. AR vehemently argued that the assessee is a ‘risk-free entity’ whereas the comparables are not. Hence, there is requirement for grant of risk adjustment to the comparables for them to become good comparables. In this regard, Id. Counsel relied on the contents of Rule 10B of the Income Tax Rules, 1962 one side and various decisions such as Hellosoft India Pvt. Ltd. (ITA No.645/Hyd/2009 and 1411 of 2010) and Sony India Private Limited vs. Addl. CIT (ITA No.4008, 4994/Del/2010) on the other. Ld. Counsel submitted that the risk adjustments are required to be given when the comparables are risk bearing entities unlike the assessee. Bringing our attention to the contents of page 32 of the order of the DRP where the DRP discussed this issue before denying the risk adjustments, Id. Counsel finds fault with the order of the DRP/TPO and submitted that the order of the DRP/TPO/Assessing Officer on this issue needs reversed.

*23. On hearing both the sides, on the need for granting risk adjustment, we are of the opinion that the **said Rule 10B of the Rules provides the law for grant of risk adjustment**. This issue was decided by the Tribunal and the decision in the case of Sony India Private Limited (supra) is relevant and provide needful guidance in such matters. We also considered the assessee’s request for granting some adjustment on ad-hoc basis. Considering the above, in principle, we are of the opinion that the assessee is entitled to risk adjustments. A quantum of such adjustments has to be decided by the Assessing Officer/TPO/DRP after considering the facts of the present case and also in the light of judgemental law in existence. The assessee is directed to provide the requisite data before the Assessing Officer/TPO for adjusting the reasonable inference to the extent of risk adjustment. Accordingly, this part of ground is allowed for statistical purposes.*

35. From the above, it is clear that, in principle, the TP Rule provides for grant of Risk Adjustment. The Tribunal’s order (supra) also advocates for the same. Therefore, following the identical direction given by the Tribunal in the aforesaid decision, we remit this issue raised in ground No.9 to the file of Assessing Officer for fresh consideration. This ground no.9 of appeal of assessee is allowed for statistical purposes.

36. Ground No.10 is consequential, therefore, the same does not need any separate adjudication.

37. Thus, appeal of the assessee is partly allowed for statistical purposes.

ITA No.1346/PUN/2015 (By Revenue)

38. Now, we shall take up appeal of Revenue in ITA No.1346/PUN/2015. The grounds raised by the Revenue are extracted as under :-

1. *Whether Ld. CIT(A) erred by directing to include companies having onsite revenue when their FAR analysis is different from offsite companies and therefore cannot be considered as comparable.*
2. *Whether Ld. CIT(A) in the facts and circumstances erred by directing AO to **exclude Infosys Technologies Ltd.**, Mindtree Ltd. and L & T Infotech Ltd as comparable company on the basis of turnover and without analyzing the FAR of the companies.*
3. *For these and such other grounds as may be urged at the time of hearing, the order of the Ld. Commissioner of Income Tax (Appeals) may be vacated and that of the Assessing Officer be restored.*
4. *The appellant craves to add, amend, alter or delete any of the grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal.*

39. From the above grounds of appeal raised by the Revenue, it is evident that the Revenue urges for vacating the order of CIT(A) on the reasoning that the CIT(A) erred in directing for **exclusion** of certain companies and in directing the AO/TPO to exclude the high turnover comparables while they otherwise satisfy the functional test.

40. The TPO considered Infosys Technologies Ltd, Mindtree Ltd. and L&T Infotech Ltd. as comparables while recommending the adjustments of Rs.4.82 crores. The CIT(A) directed for deleting the said comparables after discussing the huge turnovers of the said comparables. The CIT(A) held that the assessee with

turnover of Rs.30 crores cannot be compared with the said three high turnover comparables. Their turnovers vary from Rs.1,204 crores to Rs.21,140 crores.

41. After hearing both the parties before us, we find it relevant to extract the discussion given by the CIT(A) in para 2.3.1.1 to 2.3.1.3 as under :-

“2.3.1.1 The Appellant has raised the argument that the turnover of the above mentioned companies is much higher than that of the Appellant Company. It was stated that the against the Appellant's company's turnover of Rs.30 cr, turnover of Infosys Technologies is of Rs 21,140 cr, Mindtree Ltd has turnover of Rs 1,204 cr whereas L & T Infotech has turnover of Rs 1,776 cr. Accordingly these companies cannot be compared with the Appellant company.

2.3.1.2 I find that the learned TPO has not applied the upper turnover filter presumably following the decisions of the honourable Tribunal, which have held that turnover filter is of no relevance in the software industry and there is no relationship of turnover with the profit of the company as company with lower turnover has also earned higher profit than the company with higher turnover. I agree with the view that turnover may not be a factor in a service industry, however, according to me, size of the company makes difference in undertaking risks. Bigger sized company is in the position to undertake more risks in the business as compared to the smaller size companies. The size of the company can be categorized either on the basis of the capital or asset or on the basis of turnover. Para 3.43 of the OECD Guidelines mention size in terms of 'sales' as one of the comparability criteria. In this connection, it may not be out of place to mention that the Rule 10TD of the Income Tax Rules provide higher profitability for the companies having turnover of more than Rs 500 cr. Further, turnover is an important criterion in the industrial policies and other commercial policies. The honourable Delhi High Court in the case of CIT vs Agnity India Technologies Private Limited has discussed several aspects of the 'giant' companies such as Infosys Limited and Wipro Limited and held that such companies cannot be compared with the smaller sized companies.

*2.3.1.3 In this connection, it is seen that turnover of Infosys Technologies is 705 times more, Mindtree's turnover is 40 times more and L & T Infotech's turnover is 59 times more than that of the Appellant's international transaction. I do not consider these companies as comparable with the Appellant. In view of this discussion, I direct the learned AO to exclude **Infosys Technologies Limited, Mindtree Ltd and Larsen and Toubro Infotech Ltd** from the list of the comparable companies.”*

42. Considering the above, we are of the opinion that these comparables with high turnover cannot be considered as good comparables. Accordingly, we confirm the views of the CIT(A) on these comparables. Hence, we find no reason

to interfere with the order of the CIT(A) on this issue. Thus, the grounds raised by the Revenue stand dismissed.

43. In the result, the appeal of the Revenue is dismissed.

C.O. No.11/PUN/2018 (By Assessee)

44. Now, we shall take up the cross objection filed by the assessee in CO No.11/PUN/2018, which is arising out of the appeal of the Revenue in ITA No.1346/PUN/2015.

45. Since we have dismissed the appeal of the Revenue and granted the relief to the assessee, therefore, the cross objection filed by the assessee has become infructuous and the same is hereby dismissed.

46. In the result, appeal of the assessee in ITA No.1301/PUN/2015 is partly allowed for statistical purposes, whereas appeal of the Revenue in ITA No.1346/PUN/2015 along with cross objection of the assessee in CO No.11/PUN/2018, both are dismissed.

Order pronounced in the open court on 09/04/2019.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(D. KARUNAKARA RAO)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे /Pune; दिनांक Dated 09/04/2019

प्र.कु.मि/Prakash Kumar Mishra, Sr.PS./*Sujeet*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. The CIT(A)-13, Pune
4. The Pr. CCIT, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे / DR, ITAT, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

//True Copy//

(Senior Private Secretary)
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune