



2. The solitary grievance of the assessee reads as under:

“The Ld. Dispute Resolution Panel ('DRP') and the Ld AO (following direction of the DRP) erred the on facts and in law in confirming the addition of Rs. 31,345,467 to the income of the appellant as proposed by the Ld TPO by holding that the international transactions undertaken by the appellant do not satisfy the arm's length principle envisaged under the Income-tax Act 1961 Act'.”

3. Briefly stated the facts of the case are that the appellant is a joint venture between Sumitomo Wiring Systems Limited, Japan and the Samvardhana Motherson Group, India. The appellant provides customised software. The areas of expertise of the appellant span across business process automation, cross functional and cross enterprise integration, optimization of processes. The appellant caters both to the domestic and export markets for which different segments are maintained. The export sales are mainly from software development services.

4. During the year under consideration, the appellant undertook the following international transactions with its Associated Enterprises [AEs] which were duly reported in the Accountant's report in form 3CEB filed alongwith return of income:

- i) Provision for software development services;
- ii) Services received;
- iii) Reimbursement of expenses, and
- iv) Payment of interest on loan.

5. The quarrel in the present appeal is only in respect of provision of software development services. The bench marking approach of the appellant is TNMM, used as the most appropriate method, PLI being OP/ OC [Total Cost] for which the assessee used 16 comparables whose mean margin is 9.66% and since the appellant's mark up was 7.33%, the international transaction in respect of provision of software development services was reported at Arm's Length Price.

6. In the TP assessment proceedings, the TPO rejected the economic analysis submitted by the appellant and undertook a fresh search using arbitrary, quantitative and qualitative filters. The TP

assessment order was passed on 29.10.2010 using 26 comparables with a mean OP/TC mark-up of 25.16% and since the appellant's mark up was 7.33%, TP adjustment of 3.13 crores was made. Though the appellant has used multiple year data for bench marking its transaction, the TPO used current year's data only.

7. The proposed draft assessment order was challenged before the DRP. The DRP issued its directions dated 12.09.2011 to the TPO confirming the proposed additions. The final set of comparables taken are as under:

S. No.	TPO's Comparables	Mark-up (OP/TC)%
1	Accel Transmatic Limited (Se;	20.90%
2	Avani Cimcon Technologies Limited	50.29%
3	Celestial Labs Limited	58.35%
4	Datamatics Limited	1.38%
5	E-Zest Solutions Limited	35-63%
6	Flextronics Software System [Seg]	25.31%
7	Geometric Limited (Seg.)	10.71%
8	Helios & Matheson Information Techlogy Limited	35-63%

9	IGate Global Solutions Limited	7-49%
10	Infosys Technologies Limited	40.30%
11	Ishir Infotech Limited	30.12%
12	KALS Information Systems Limited	30-55%
13	LGS Global Limited (Lanco Global Solutions Limited)	15-75%
14	Lucid Software Limited	19.37%
15	Mediasoft Solutions	3.66%
16	Megasoft Limited	60.23%
17	Mindtree Limited	16.90%
18	Persistent Systt	24.18%
19	Quintegra Solutitas	12.56%
20	R S Software (India) Limited	13.47%
21	R Systems Intermnational Limited [Seg]	15.07%
22	Sasken Communication Technologies Ltd	22.16%
23	SIP Technologies & Exports Limited	13.90%
24	Tata Elxsi Limited	26.51%
25	Thirdware Solutions	25.12%
26	Wipro Limited (Seg)	33.48%
	Airthmetic mean	25%
	Less: Working capital adjustment	0.84%
	Adj. Airthmetic mean OP/TC	24.16%

8. The assessee challenged the inclusion of 17 comparables. The ld. counsel for the assessee further challenged the two comparables for which information was received from the companies u/s 133(6) of the

Act and no opportunity was given to the assessee to put forth its arguments against the exclusion of these two comparables.

9. Before proceeding any further, let us first understand the following relevant filters adopted by the TPO:

- i) Single year data i.e. F.Y. 2006-07
- ii) Though the assessee has taken companies with ratio of other operating income to sales greater than 50%, the TPO selected 75% limit. Accordingly, all the companies whose income from software development services constituted at least 75% of the total operating income were selected.
- iii) Though the assessee has taken companies with ratio of R & D expenses to sales greater than 3%, the TPO was of the opinion that there are no studies to show that the R & D activity changes the functionality of a software developer.
- iv) Companies with operating sales less than Rs. 1 crore were eliminated.

- v) Related party transactions more than 25% of the operating revenues were excluded.

10. Since the appellant is mainly an export oriented software development provider, the TPO applied minimum threshold limit of 25% export earning from Software Development Services wherein companies whose export revenues from Software Development Services are less than 25% of the operating revenues were excluded. The companies with diminishing revenue for last years upto including F.Y. 2006-07 were rejected as comparables.

11. Keeping in mind the afore-stated relevant filters adopted by the TPO, we will now consider the comparables objected by the ld. counsel for the assessee before us.

12. At the very outset, the ld. counsel for the assessee stated that the set of comparables used by the TPO were used in the case of Motorola Solutions India Pvt Limited and the Tribunal in ITA No. 5637/DEL/2011 has excluded all the comparables used by the TPO. We are of the considered view that each comparable has to be considered on the facts of the case in hand, and, therefore, the decision of the

co-ordinate bench will be considered only when we find parity in the facts.

I. ACCEL TRANSMATIC LIMITED (SEG)

13. The Annual Report of this company is placed at pages 1 to 79 of the Compendium - I. As per its Profit and loss account, the net income from operations is 35,03,95.543/- which includes manufacturing, sales, trading sales, manufacture and repair services, training and educational services, software services, domestic plus exports, etc. As per the segmental reporting at page 48, it can be seen that the segment result for external sales of the current year is Rs. 967.67 lakhs when compared with the total income from operations of Rs. 35,98,82,360/-.

14. The assessee has objected because the RPT is 19.29% and since the TPO has adopted RPT of more than 25%, the same has been included. The assessee has relied upon the decision in the case of Sony India Pvt Ltd in ITA Nos. 1189/DEL/2005, 819/DEL/2007 and 820/DEL/2007 and Motorola Solutions [supra]. But in those cases, on the facts the RPT filter was adopted at 15%. In our considered opinion,

the Act does not provide directions as to what percentage RPT transaction have material effect on the overall margins. In the definition of the “Associated Enterprises” in section 92A(2)(a), it is provided that one enterprise holding 26% shares in other enterprise can be considered as an AE. Similarly, u/s 40A(2b) of the Act, it is provided that persons having substantial interest is a person carrying not less than 20% of voting power in that company. Keeping these provisions in mind, we are of the view that the filter of 25% applied by the TPO is apt.

15. Another argument placed by the ld. counsel for the assessee is that this company owns software products and is also engaged in the sale of software products. But, as mentioned elsewhere, segmental reporting is in detail in the Annual Report of this company. We do not find any reason for exclusion of this company. This company will remain in the final set of comparables.

## II. AVANI CIMCON TECHNOLOGIES LIMITED

16. The Annual Report of this company is placed at pages 80 to 96 of the paper book. The total income is shown at Rs. 3,64,27,306/- and

which includes earning software export in foreign currency amounting to Rs. 3,54,77,523/- which is 97.39% of the total income and hence passes the filter of 75% adopted by the TPO. The Id. counsel for the assessee strongly contended that this company is involved in the provision of IT and related services and owns software products and segmental details are not available.

17. In so far as the segmental details are concerned, we have already pointed out that 97% of the Revenue is coming from earning from software exports. Therefore, a miniscule % of other related income would do no difference. However, we find that this company owns software products like Dxchange, Travel Solutions, Insurance Solution, Customer Appreciation and Relationship Management Application, Content management Systems etc. In our considered view, owning such software products does make a difference in the functionality of this comparable company vis-a-vis the appellant company. On the basis of dissimilarity, this company is directed to be excluded from the final set of comparables.

### III. CELESTIAL LABS LIMITED

18. The Annual Report of this company is placed at pages 97 to 124 of the paper book. As per the Annual Report, this company, is primarily into development of software tools as products for application in the field of bio technology, pharmaceuticals and health care. The total income as per the Profit and Loss Account is Rs. 14,12,75,776/- and out of which sales from services is Rs. 13,62,00,676/- which is 96.40% of the total income. The contention of the Id. counsel for the assessee that this company is primarily into development of software tools as products does not hold any water as the sales from products is only 3.60%.

19. Having said all that, the R & D facilities of this company have been used by it in relation to development of software for discovery of new drugs. This company is engaged in the bio-technology pharmaceuticals and health care and contract research activities. This means that extensive research activity was carried out by this company in order to develop software for specific purposes which are discovery of new drugs. In our considered opinion, this kind of software developed services should not be equated with normal service provider

like the appellant for various business solutions. We, accordingly, do not find any merit in the inclusion of such a company. Accordingly, this company is directed to be excluded from the final set of comparables.

#### IV. E-ZEST SOLUTIONS LIMITED

20. The Annual Report of this company is placed at pages 125 - 146 of the paper book. This company undertakes diversified activity providing services such as custom software development, CRM, ERP, open source ERP, knowledge management consulting healthcare manufacturing, manufacturing solutions, etc. The total income as per the Profit and Loss Account is Rs. 6,30,22,252/- which includes export turnover and domestic turnover. But no segmental information is available. The TPO has also mentioned that from the Annual Report available in the public domain, functionality is not clear and also the RPT information was not available.

21. Though the TPO refers to the reply received by him pursuant to the notice issued u/s 133(6) of the Act, but no details have been furnished by the TPO in respect of the reply demonstrating that this

company passes all the filters applied by him. As the Annual report exhibited in the paper book does not contain full details, therefore, for want of adequate details, this company cannot be taken as a comparable and the same is directed to be excluded from the final set of comparables.

V. FLEXTRONICS SOFTWARE SYSTEM [SEG]

22. The Annual Report of this company is placed at pages 147 to 209 of the paper book. The total sale of this company is shown at Rs. 7,28,60,38,887/- out of which software services sales is Rs. 6,45,66,52,651/- which comes to 88.60%. But the alarming factor is that the previous year period has been taken ended on 30.06.2006 whereas the figure compared is when the period ended on 31.03.2007 which means that the annual accounts are not for a period of 12 months. Since the financials of this company is not on the same platform of that of the appellant company, we restore this company for comparability to the file of the TPO. The TPO is directed to call for financial data to demonstrate that this is a good comparable company.

## VI. HELIOS & MATHESON INFORMATION TECHNOLOGY LIMITED

23. The Annual Report of this company is placed at pages 210 to 345 of the paper book. The income from software sales and services is at Rs. 3,96,29,92,738/-. The employee cost income from software sales and services is at 5.82% and on total sales is around 1%. The filter adopted by the TPO is more than 25%. Therefore, this comparable falls on its face merely on the employee cost to sales filter. On this very ground, this company is directed to be excluded from the final set of comparables.

## VII. INFOSYS TECHNOLOGIES LIMITED

24. The Annual Report of this company is placed at pages 346 to 615 of the paper book. Infosys Technologies Limited has substantial intangible assets and is a giant company with a substantial brand value. Infosys owns products/IPR. The turnover of this company is approximately 700 times than the turnover of the appellant company and has substantial investment in intangibles. Being a giant company, this company has been excluded in the case of Agnity India

Technologies Pvt Limited by the Hon'ble High Court of Delhi in ITA No. 1204/2011.

25. Considering the functionality and brand value of this company, it cannot be considered as a good comparable and is directed to be excluded from the final set of comparables.

#### VIII. ISHIR INFOTECH LIMITED

26. The Annual Report of this company is placed at pages 616 to 634 of the paper book. Its Profit and Loss account shows professional receipts from export and domestic services at Rs. 7,42,09,887/- whereas its salary and staff welfare expenses are at Rs. 29,35,065/- which makes its employees cost ratio 3.95% which is well below than the employee cost filter of 25% adopted by the TPO. For this very reason, this company fails to be a good comparable and is directed to be excluded from the final set of comparables.

IX. KALS INFORMATION SYSTEMS LIMITED

27. The Annual Report of this company is placed at pages 635 to 659 of the paper book. The income from sales services and training is at Rs. 2,09,05,322/- which includes income from software development export sales of Rs. 2,00,09,937/-. Though the ld. counsel for the assessee has contended that this company is functionally dissimilar and segmental information is not available, but from the schedule forming part of the balance sheet, income from software development export sales is separately mentioned alongwith other segments, namely, translation and interpretation - export, indigenous and training receipts. The ld. counsel for the assessee further contended that this company fails the filter of accepting companies with software service revenue in excess of 75%.

28. The ld. counsel for the assessee further contended that this company has revenue by way of sale of products and training but the break up is not available. As per the information gathered by the TPO u/s 133(6) of the Act, this company has categorically stated that the core business is that of pure software development service provider and revenue from domestic training activities is very small. The

revenue from software development services constitutes more than 88% of the total operating revenue. All these facts were confronted to the assessee. As no plausible reply has been furnished, we do not find any reason to exclude this company and it will remain in the final set of comparables.

X. LUCID SOFTWARE LIMITED

29. The Annual Report of this company is placed at pages 660 to 685 of the paper book. The Profit and Loss account of this company shows sales revenue from international market at Rs. 1,69,13,625/- and from domestic at Rs. 78,453/-. The Schedule of Fixed Assets shows product software with substantial additions during the year under consideration. This shows that this company is engaged in the development of products. As no segmental information is available, this company is directed to be excluded from the final set of comparables.

XI MEGASOFT SOLUTIONS

30. The Annual Report of this company is placed at pages 687 to 761 of the paper book. Its Annual Report shows that pursuant to the

Scheme of Amalgamation Indus E Solutions limited with Megasoft Solutions Limited, as approved by the Hon'ble High Court of Judicature at Madras, one share of Rs. 10/- each of Megasoft were allotted to share holders of Indus E Solutions Limited in the ratio 1:1. This shows that there was an extra ordinary even during the year under consideration.

31. Further, its fixed assets schedule shows Intellectual Property Rights as an asset. Moreover, this company's Annual account is for the calendar year whereas that of the appellant company is for financial year. Therefore, there being different accounting years, the financials are incomparable. We, therefore, do not find this company as good comparable and direct for exclusion of it from the final set of comparables. Accordingly, we do not find this company as a good comparable and direct the TPO to exclude this company from the final set of comparables.

## XII. PERSISTENT SYSTEMS PRIVATE LIMITED

32. The Annual Report of this company is placed at pages 762 to 895 of the paper book. In its Profit and Loss account, sale of software

services and products is at Rs. 31,231/- and in Schedule 11, bifurcation is given for sale of software services and products - export and domestic. Though segmental information is provided in the Annual Report, from which sale of software services can be separately known from the sale of products, but the information received by the TPO u/s 133(6) of the Act, the company has informed that its software products sales constituted 0.73% of the Revenue which means that more than 99% of the Revenue is from software services.

33. The ld. counsel for the assessee vehemently stated that this company is functionally dissimilar as it is engaged in outsourced software product development services as investment in Intellectual property led sales. The ld. counsel for the assessee further stated that this company has undertaken significant restructuring and has very high turnover, but failed in convincing us the impact of these things on the over all margin of the company. Therefore, we are of the considered view that this company passes all the filters and has been rightly taken in the final set of comparables. No interference is called for.

### XIII. R SYSTEMS INTERNATIONAL LIMITED

34. The Annual Report of this company is placed at pages 896 to 1058 of the paper book. The Financial Accounts of this company shows that its accounting year is calendar year whereas that of the assessee is financial year. We, accordingly, restore this comparable company to the file of the TPO. The TPO is directed to use financial year data to demonstrate that this is a good comparable.

### XIV. SASKEN COMMUNICATION TECHNOLOGIES LTD

35. The Annual Report of this company is placed at pages 1059 - 1228 of the paper book which shows that this company has undertaken restructuring during the year under consideration by way of merger with Sasken Network Systems Limited Integrated Softech Solutions Private Limited and Botnia Hitech, Oy, Finland. There being an extraordinary event during the year, therefore, this company cannot be used as a comparable. For this reason only, the company is directed to be excluded from the final set of comparables.

XV. TATA ELXSI LIMITED

36. The Annual Report of this company is placed at pages 1229 to 1281 of the paper book. The company owns software products and is engaged into various diversified business operations as compared to the appellant company which is pure a service provider engaged in only routine software development services. Moreover, the segmental accounts are also not available which makes it difficult for comparability. Accordingly, we do not find this company as a good comparable and direct the TPO to exclude this company from the final set of comparables.

XVI. THIRDWARE SOLUTIONS LIMITED

37. The Annual Report of this company is placed at pages 1282 to 1319 of the paper book. This company derives revenue from various sources such as sale of license, software services, export from SEZ unit, revenue from subscription, etc. The Profit and Loss Account of this company shows sales at Rs. 38,21,39,652/- but there is no segmental account though the TPO has mentioned that the information

gathered u/s 133(6) of the Act shows that this company's software development segment qualifies all the filters but has not given any financial data to support his claim due to non availability of data for comparison. We direct the TPO to exclude this company from the final set of comparables.

XVII. WIPRO LIMITED

38. The Annual Report of this company is placed at pages 1320 to 1535 of the paper book. This company is engaged in diversified activities and is a giant global IT services and product provider. This company has huge brand value and owns IP. The turnover of this company is Rs. 9,654 crores as against Rs. 19.99 crores of the appellant company. Because of its global status, high brand value, ownership of IP and engaged in diversified activities, in our considered opinion, this company should not have been selected in the final set of comparables. We, therefore, direct the TPO to exclude this company from the final set of comparables.

XVIII COMPUTED INTERNATIONAL LIMITED

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XIX. MELSTAR INFORMATION TECHNOLOGIES LIMITED

39. The Annual Reports of these companies were not available in the public domain and hence, the TPO gathered information by serving notice u/s 133(6) of the Act. However, we find that the information gathered u/s 133(6) of the Act was not confronted to the assessee. We, accordingly, restore the issue of comparability of these two companies to the file of the TPO. The TPO is directed to confront the information gathered u/s 133(6) of the Act and after giving reasonable opportunity of being heard to the assessee, decide the issue afresh.

40. Before parting, as mentioned elsewhere, we have adjudicated only that ground which had been argued by the ld. counsel for the assessee.

41. In the result, the appeal of the assessee in ITA No. 5801/DEL/2011 is partly allowed.

The order is pronounced in the open court on 30.10.2019.

Sd/-

**[KULDIP SINGH]  
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 30<sup>th</sup> October, 2019  
VL/

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(A)
5. DR

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ITAT, New Delhi

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Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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