

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1084/Del./2016
(Assessment Year : 2007-08)**

M/s. Agilent Technologies (International) vs. ACIT, Circle 1 (1),
Private Limited, Gurgaon.
Plot No.CP-11, Sector 8, IMT Manesar,
Gurgaon – 122 051 (Haryana).

(PAN : AADCA4115C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Kamal Sawhney, Advocate
Shri Anshul Sharma, CA

REVENUE BY : Shri Sanjay I. Bara, CIT DR

Date of Hearing : 30.09.2019

Date of Order : 18.11.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER

This is second round of litigation because during the first round of assessment proceedings, the matter was restored to the file of Id. Transfer Pricing Officer (TPO) by the coordinate Bench of the Tribunal vide order dated 15.06.2012 to decide afresh after providing copies of reply to notices issued under section 133 (6) of the Income-tax Act, 1961 (for short 'the Act') to the taxpayer.

2. The Appellant, M/s. Agilent Technologies (International) Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 28.01.2016 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C of the Act qua the assessment year 2007-08 on the grounds inter alia that :-

“On the facts and circumstances of the case and in law, the learned Assessing Officer CAO') has erred in passing the assessment order under section 254/143(3) read with section 144C of the Income-tax Act, 1961 ('file Act') after considering the adjustments made by the learned Transfer Pricing Officer ('learned TPO') in his order passed under section 254 read with 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ('DRP')

Each of the ground is referred to separately, which may kindly be considered independent of each other

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

1. The learned TPO / AO / DRP have erred in making an addition of INR 180,674,599 to the total income of the Appellant in respect of International transactions pertaining to provision of software development services and provision of IT-enabled services by the Appellant to its associated enterprises ('AEs') (hereinafter referred to as 'impugned transactions').

2. The learned TPO / A.O / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ('the Rules'), and modifying the same for the determination of the Arm's Length Price ('ALP') of the impugned transactions to hold that the International transactions are not at arm's length.

3. The learned TPO I AO f DRP have erred In

a. Not accepting the use of multiple year data, as adopted by the Appellant In its Transfer Pricing ('TP') documentation and

b. Determining the arm's length margins / prices using data pertaining only to financial Year ('FY') 2006-07 which was not available to the appellant at the time of complying with the Indian TP documentation requirements

4 The learned TPO / AO / DRP have erred III rejecting certain comparable companies selected by tile Appellant by applying inappropriate comparability criteria such as

- a turnover less than INR < crore,*
- b Diminishing revenue,*
- c Different accounting year.*
- d. Employee cost greater than 25 percent; and*
- e. Onsite revenues greater than 75 percent.*

5 The learned TPO / AO / DRP have erred in law by exercising powers under section 133(6) of the Act to obtain information which was not available in public domain and relying on the same for comparability purposes.

6. The learned TPO / AO / DRP have erred in selecting certain companies (which arc earning super normal profits) as comparable to the Appellant.

7 The learned TPO / AO / DRP have erred in erroneously rejecting the comparable companies selected by the Appellant and adding certain companies to the final set of comparable companies on an ad-hoc basis, thereby resorting to cherry picking of comparables to determine ALP.

8. The learned TPO / AO / DRP have erred in treatment of operating and non-operating items while computing the margins of the Appellant and comparable companies, and passed an order which also suffers from several computational errors in computation of margins.

9. The learned TPO / AO / DRP have erred in not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies

10. The learned TPO / AO have erred in not passing an assessment order in conformity with the directions of the Hon'ble DRP in respect of certain items (viz. treatment of fringe benefit tax and computational errors while computing operating margins of the Appellant and comparable companies), thus acting in contravention of provisions of section 144C(10) of the Act.

11 The learned AO has grossly erred In initiating penalty proceedings under section 271 (1)(c) of the Act

12. The learned AO has erred in levying interest under section 2348 and 234C of the Act while completely disregarding the provisions of the Act and the judicial precedence.”

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Agilent Technologies (International) Pvt. Ltd., the taxpayer is a wholly owned subsidiary of Agilent Technologies International Europe, BV and is into the business of providing Software Development (IT) Services and Information Technologies Enabled Services (ITES) to its overseas company. As per report in Form 3CEB, the taxpayer provided Software Development (IT) services and ITES to its Associated Enterprises (AE) and thereby entered into international transactions as under:-

<i>Name of transaction</i>	<i>Value of international transaction</i>
<i>Purchase of fixed assets</i>	<i>4,222,962</i>
<i>Purchases for repairs and maintenance</i>	<i>1,885,599</i>
<i>Provision of IT Enabled services</i>	<i>1,452,567,224</i>
<i>Provision of software R & D services</i>	<i>321,600,317</i>
<i>Reimbursement of expat salaries paid</i>	<i>32,542,090</i>

4. The taxpayer in its Transfer Pricing (TP) analysis applied Transactional Net Margin Method (TNMM) as Most Appropriate Method (MAM) with OP/OC as Profit Level Indicator (PLI) and computed its own margin at 13.03% and 15.98% in the ITES and IT segment respectively. TPO after applying various filters under Rule, which have not been challenged by the taxpayer, rejected 15 comparables selected by the taxpayer qua software segment and

rejected 3 comparables qua ITES segment selected by the taxpayer. Ld. TPO finally selected 26 comparables for software segment with average margin after working capital adjustment of 32.68% with OP/OC and 25 comparables qua ITES segment to benchmark the international transactions with average margin after working capital adjustment of 32.02% with OP/OC and computed the Arm's Length Price (ALP) of international transactions entered into by the taxpayer with its AE as under :-

**“9.1 Software Development services :-
Arm's Length Price :**

Operating Cost	279,485,304
Arms Length Margin	32.68% of the Operating Cost
Arms Length Price (ALP) @ 132.68% of operating cost	370,821,101

Price received vis-à-vis the Arms Length Price

The price charged by the taxpayer to its Associated Enterprises is compared to the Arms Length Price as under :-

Arms Length Price (ALP) @ 132.68% of operating cost	370,821,101
Price charged in the international transactions	321,644,804
Shortfall being adjustment u/s 92CA	49,176,297

9.2 IT Enabled services segment :

Operating Cost	1,293,732,265
Arms Length Margin	30.05% of the Operating Cost
Arms Length Price (ALP)	1,682,498,810

Price received vis-à-vis the Arms Length Price :

The price charged by the taxpayer to its Associated Enterprises is compared to the Arm's Length Price as under :-

<i>Arms Length Price as computed above</i>	<i>1,682,498,810</i>
<i>Price shown in the international transactions</i>	<i>1,453,039,699</i>
<i>Shortfall being adjustment u/s 92CA</i>	<i>229,459,111</i>

10. *In view of the same, following adjustments can be made :-*

<i>A. Software Development Segment</i>	<i>Rs. 49,176,297</i>
<i>B. ITES</i>	<i><u>Rs.229,459,111</u></i>
<i>Total :</i>	<i><u>Rs.278,635,408”</u></i>

5. The taxpayer carried the matter before the Id. DRP by way of filing objections, who has given partial relief to the taxpayer in both ITES as well as IT segment. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, TNMM as the MAM applied by the taxpayer to benchmark its international transactions qua IT and ITES segment has been accepted by the Id. TPO/DRP. After giving effect to the Id. DRP directions, Id. TPO computed the average of Software Development services segment at 31.56% and in case of ITES segment at 22.72% and proposed ALP adjustment of

Rs.13,46,28,537/- and Rs.4,60,46,062/- in ITES and IT segment respectively.

8. Ld. AR for the taxpayer in order to compress the issue raised in the present appeal contended that at this stage, the taxpayer is seeking exclusion of *Wipro Limited (BPO segment), Maple Esolutions Ltd., Triton Corp. Ltd., Infosys BPO Ltd., HCL Comnet Systems & Services Ltd. and Accentia Technologies Ltd.* in ITES segment and sought exclusion of *Infosys Technologies Ltd., Wipro Limited, Kals Info Systems Ltd., Persistent Systems Ltd., Tata Elxsi Ltd., Megasoft Ltd., Ishir Infotech Ltd., Helios & Matheson Information Technologies Ltd., Thirdware Solutions Ltd., Avani Cimcon Technologies Ltd., Sasken Communication Technologies Ltd. and Flextronic Software Systems Ltd.* in Software Development (IT) segment.

ITES SEGMENT

9. After giving effect to the directions issued by the ld. DRP, ld. TPO in order to benchmark the international transactions qua ITES segment taken final set of comparables as under :-

<i>No.</i>	<i>Company Name</i>	<i>Adjusted OP to Total Cost %</i>
<i>1</i>	<i>Accentia Technologies Ltd (Seg)</i>	<i>27.87%</i>
<i>2</i>	<i>Aditya Birla Mincas Worldwide Ltd (Earlier Transworks Information Services Ltd</i>	<i>12.75%</i>

3	<i>Allsec Technologies Ltd</i>	27.44%
4	<i>Appollo Healthstreet Ltd</i>	(-)9.99%
5	<i>Cosmic Global Ltd</i>	13.1%
6	<i>Datamatics Financial Services Ltd</i>	10.34%
7	<i>Flextroncs Software Systems Ltd. (Seg)</i>	7.8%
8	<i>Genesys International Corporation Ltd</i>	10.28%
9	<i>HCL Com net Systems & Services Ltd (Seg.)</i>	45.83%
10	<i>I C R A Techno Analytics Ltd (Seg.)</i>	13.15%
11	<i>Informed Technologies India Ltd</i>	35.33%
12	<i>Infosys B P O Ltd</i>	30.38%
13	<i>Iservices India Pvt Ltd</i>	50.35%
14	<i>Maple Esolutions Ltd</i>	31.99%
15	<i>R Systems International Ltd (Seg.)</i>	20.04%
16	<i>Spanco Ltd (seg.)</i>	21.39%
17	<i>Triton Corp Ltd</i>	29.37%
18	<i>Wipro Ltd (Seg.)</i>	31.51%
	<i>Arithmetical Mean</i>	22.72%

10. The Id. TPO computed the ALP qua ITES segment as under:-

<i>Operating Cost</i>	1,29,37,32,265/-
<i>Arms Length Price</i>	22.72% of the <i>Operating Cost</i>
<i>Arms Length Price (ALP) @ 122.72% of operating cost</i>	1,58,76,68,236/-
<i>Price received vis-à-vis the Arms Length Price :</i>	
<i>Arms Length Price (ALP) @ 122.72% of operating cost</i>	1,58,76,68,236/-
<i>Price charged in the international transactions</i>	1,45,30,39,699/-
<i>Shortfall being adjustment u/s 92CA</i>	13,46,28,537/-

11. Now, we would examine the suitability of comparable companies finally selected by the TPO/DRP now sought to be excluded by the taxpayer one by one.

WIPRO LIMITED (BPO SEGMENT)
(WIPRO)

12. Ld. AR for the taxpayer sought exclusion of Wipro from the final set of comparables on the grounds inter alia that it is a product company; that it has significant intangibles; that Wipro has acquired substantial business and brand of North West Switchgear Ltd.; that Wipro is a giant company with huge turnover and relied upon the decisions in cases of *Avaya India Pvt. Ltd. ITA 532/2019*, *American Express (India) Pvt. Ltd. ITA No.1868/Del/2015*, *Oracle (OFSS) BPO Services Pvt. Ltd. ITA 124/2018*, *H&S Software Development and Knowledge Management Centre Pvt. Ltd., New River Software Services Pvt. Ltd. ITA 924/2016*, *Pentair Water India Pvt. Ltd. vs. CIT ITA 18/2015 & Everest Business Advisory India (P) Ltd. ITA No.41/Del/2013 & 1191/Del/2013*.

14. When we examine the letter issued by the Wipro to ld. TPO pursuant to the notice issued u/s 133 (6) of the Act, available at page 989 of the paper book, it is categorically mentioned in para 4 that BPO segment of Wipro covers various activities i.e. IT Services and product. Furthermore, when we examine summary of segmental profit & loss for FY 2006-07, available at page 991 of the paper book, Wipro has sold goods worth Rs.63,13,70,75,351/-.

Furthermore, when we examine TPO's order at page 92, external page 139 of the appeal set, it has come on record that Wipro has acquired 9 companies detailed as under :-

(i) mPower Software Services Inc. and subsidiaries (100% stake acquired in December 2005) - Customer Related Intangibles – Rs.513.13 million

(ii) BVPENTE Beteiligungsverwaltung GmbH and subsidiaries (100% stake acquired in December, 2005) - Customer Related intangibles - Rs. 117.40 million

(iii) cMango Inc. and Subsidiaries (100% stake acquired in April, 2006) - Customer Related Intangibles - Rs, 117.40 million

(iv) RetailBox BV and Subsidiaries (100% stake acquired in June, 2006) – Customer Related Intangibles - Rs. 297.72 million

(v) North-west Switchgear Ltd (100% stake acquired in May, 2006) - Marketing Related Intangibles - Rs. 1097.91 million

(vi) Saraware Oy (100% stake acquired in June; 2006) - Customer Related Intangibles - Rs, 254.72 million

(vii) Quantech Global Services (100% stake acquired in July, 2006) - Customer Related Intangibles - Rs, 45,92 million

(viii) Hydrauto Group (100% stake acquired in November, 2006) - Customer Related Intangibles - Rs. 73.57 million

(ix) 3D Networks (100% stake acquired in November, 2006) - Customer Related Intangibles - Rs. 136.24 million

15. When we examine financials of the Wipro, available at page 1468 of the paper book, it has come on record that on account of acquisition, Wipro has acquired customer related, market related and technology related intangibles without having any verification of intangibles between standalone and consolidated financials.

Furthermore, financial statement, available at page 1475 of the paper book, shows that Wipro has goodwill of Rs.8.6 crores. It is also proved from page 991 of the paper book that Wipro has huge turnover of Rs.940 crores as against Rs.142 crores of the taxpayer, thus a giant company with huge brand value.

16. The Id. DR for the Revenue contended that when company is into BPO, it is possible to have products and that intangibles do not contribute to profits and that the taxpayer has failed to bring on record as to how product sale of Wipro and its intangibles have affected the profit margins. Ld. DR also contented on brand value of Wipro that the taxpayer is also a big brand and moreover, brand is always built with lot of corresponding expenses and relied upon the orders of the Id. TPO/DRP.

17. The contentions raised by the Id. DR for the Revenue are not sustainable when we examine the profile of Wipro in totality which is a giant company having huge turnover of Rs.940 crores vis-à-vis turnover of the taxpayer of Rs.142 crores, which is admittedly a captive service provider compensative on a cost plus mark-up basis, having significant customer related, market related and technology related intangibles and also into acquisitions during the year under assessment.

18. Coordinate Bench of the Tribunal in case of [PAGE 61 OF case laws PAPER BOOK] examined the suitability of Wipro vis-à-vis American Express (India) Pvt. Ltd., a routine ITES provider, and ordered to exclude the same from the final set of comparables.

19. The ratio laid down by Hon'ble Delhi High Court in the case of *Avaya India Pvt. Ltd. in ITA 532/2019 order dated 24.07.2019* is also applicable to the facts and circumstances of the case to the extent that scale of operation of a company vis-à-vis tested party is required to be kept in view and a giant company cannot be compared with a captive contract service provider working on a small scale by returning following findings :-

“27. There is merit in the contention of the Assessee that the scale of operations of the comparables with the tested entity is a factor that requires to be kept in view. TCS E-Serve has a turnover of Rs.1359 crores and has no segmental revenue whereas the Assessee’s entire segmental revenue is a mere 24 crores. As observed by this Court in its decision dated 5th August 2016 in ITA 417/2016 (PCIT v. Actis Global Services Private Limited) “Size and Scale of TCS’s operation makes it an inapposite comparable vis-à-vis the Petitioner.” As already pointed out earlier there is a closer comparison of TCS E-Serve Limited with Infosys BPO Limited with each of them employing 13,342 and 17,934 employees respectively and making Rs.37 crores and Rs.19 crores as contribution towards brand equity. When Rule 10(B)(2) is applied i.e. the FAR analysis, namely, functions performed, assets owned and risks assumed is deployed then brand and high economic upscale would fall within the domain of “assets” and this also would make both these companies as unsuitable comparables.”

20. Moreover, Wipro has acquired customer related, market related and technology related intangibles which are part of the

subsidiaries acquired by Wipro. Perusal of financial statement, available at page 1475 of paper book, shows that Wipro is having goodwill of Rs.8.6 crores whereas the taxpayer is having no such goodwill as it is working as a captive contract service provider.

21. Hon'ble Delhi High Court in the case of *Pr. CIT vs. Oracle (OFSS) BPO Services Pvt. Ltd. in ITA 124/2018 order dated 05.02.2018* confirmed the exclusion of Wipro by the Tribunal on ground of brand value which have significant role in its ability to garner profits and to negotiate contracts by returning following findings :-

“There is no error of law per se in this approach. As to the exclusion of M/s Wipro Limited, here too, the Court is of the opinion that the brand value of an entity has a significant role in its ability to garner profits and negotiate contracts. Thus, while considering the comparables, the likelihood of profits derived or attributable to the brand having regard to the consistency of the quality of services that an entity is able to offer would be relevant; although functionally, the two entities may be similar in terms of the services or products they offer, brand does play its own role in price or cost determination. If this singular aspect is kept in mind, the ITAT's approach cannot be faulted with.”

22. Similarly, Hon'ble Delhi High Court in *H & S Software Development and Knowledge Manager Centre Pvt. Ltd.* (supra) has confirmed the exclusion of Wipro by the Tribunal on ground of significant brand presence for profits at large corporate size. So, in view of the facts and circumstances of the case and following the law laid down by Hon'ble Delhi High Court in the cases supra, we

are of the considered view that Wipro is not a suitable comparable vis-à-vis taxpayer, hence ordered to be excluded.

MAPLE ESOLUTIONS LTD. (MAPLE)

23. The taxpayer sought exclusion of Maple from the final set of comparables for benchmarking the international transactions on ground of merger and acquisitions which has affected its profit leading to abnormal results with growth of 64% in sales over the previous year. The taxpayer has made analysis of revenue and profit of Maple for AY 2006-07, 2007-08 & 2008-09 in tabulated form as under :-

<u>Maple Esolutions Ltd.</u>	<i>FY 2005-06</i>	<i>FY 2006-07</i>	<i>FY 2007-08</i>	<i>FY 2008-09</i>
<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
	<i>Refer Page 1308 of PB</i>		<i>Refer internal page 63 of FY 07-08 annual report</i>	<i>Refer internal page 63 of FY 08-09 annual report</i>
<i>Revenue</i>	<i>74,312,955.54</i>	<i>122,132,832.77</i>	<i>336,459,841.54</i>	<i>38,599,505.82</i>
		<i>64.35%</i>	<i>175.49%</i>	<i>-88.53%</i>
	<i>Refer Page 1308 of PB</i>		<i>Refer internal page 63 of FY 07-08 annual report</i>	<i>Refer internal page 63 of FY 08-09 annual report</i>
<i>Profit / Loss as per financials</i>	<i>17,510,010.00</i>	<i>30,145,087.00</i>	<i>51,1566,745.00</i>	<i>(20,176,862.00)</i>
		<i>72.16%</i>	<i>69.70%</i>	<i>-139.44%</i>

Ld. AR for the taxpayer relied upon the decisions in the cases of ***Caliberated Healthcare Systems India Pvt. Ltd. in ITA***

No.5271/Del/2012, M/s. Everest Business Advisory India (P) Ltd. in ITA No.41/Del/2013, CRM Services India (P) Ltd. in ITA No.4796/Del/2010, Oracle (OFSS) BPO Service Pvt. Ltd. in ITA No.1111/Kol/2011, Capital IQ Information Systems India Pvt. Ltd. in ITA No.1961/Hyd./2011 & AOL Online India Pvt. Ltd. in ITA No.1036/Bang./2011.

24. On the other hand, ld. DR for the Revenue contended that simple acquisition is not enough to exclude any company from the list of comparables.

25. The contention raised by the ld. DR for the Revenue is not sustainable because in case of Maple, acquisition has certainly affected the profit margin as its growth during the year under assessment is abnormal to the tune of 64% in sales over the previous year. Maple has been ordered to be excluded by the coordinate Bench of the Tribunal in the case of *Cabliterated Healthcare Systems India Pvt. Ltd.* (supra) as a comparable in similar set of facts and circumstances on grounds of acquisition by returning following findings :-

“9. We have heard both the sides and perused the relevant material on record. Both these companies are inter-related entities. During the year under consideration, there was acquisition of 100% shares of Maple Esolutions Ltd. by Triton Corp. Ltd. and thus, Maple Esolutions Ltd. became a wholly owned subsidiary of Triton Corp. Ltd. w.e.f 01.01.2007. It can be seen that this merger/acquisition has taken place during the year under consideration, thereby shattering their comparability.

.....

11. We find that there is a direct order by the Delhi Benches of the Tribunal in which these two companies have been excluded because of financial irregularities committed by their directors. In the absence of any contrary order brought on record by the ld. DR permitting the inclusion of companies under cloud, in the list of comparables, respectfully following the precedent we direct the exclusion of these two companies from the list of comparables.”

26. Maple has been ordered to be excluded in many other cases decided by the Tribunal on the ground that its financial results are not credible as its Directors have been indicted in frauds. So, in view of the matter, we find that Maple is not a suitable comparable vis-à-vis taxpayer, hence ordered to be excluded.

TRITON CORP. LTD. (TRITON)

27. The taxpayer sought to exclude Triton again on ground of acquisition and on the ground that its financials are not credible as its Directors were indicted for fraud; that it is a product company and segmental financials are not available and relied upon the decision of *Cabliterated Healthcare Systems India Pvt. Ltd.* (supra). Ld. AR for the taxpayer in support of his arguments brought on record that financial results of Triton for FYs 2006-07, 2007-08 & 2008-09 in tabulated form which are extracted as under:-

<i>Triton Corp Ltd.</i>	<i>FY 2005-06</i>	<i>FY 2006-07</i>	<i>FY 2007-08</i>	<i>FY 2008-09</i>
<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
	<i>Refer Page 1344 of PB</i>		<i>Refer page 22 of annual report</i>	
<i>Revenue</i>	<i>317,529,518.00</i>	<i>533,671,726.00</i>	<i>1,431,655,866.00</i>	<i>327,661,569.00</i>
		<i>68.07%</i>	<i>168.27%</i>	<i>-77.11%</i>
	<i>Refer Page 1344 of PB</i>		<i>Refer page 22 of annual report</i>	
<i>Profit / Loss as per financials</i>	<i>46,361,173.00</i>	<i>122,204,738.00</i>	<i>236,804,944.00</i>	<i>(328,318,273.00)</i>
		<i>163.59%</i>	<i>93.78%</i>	<i>-238.65%</i>

28. Ld. DR for the Revenue, on the other hand, contested the exclusion of Triton on the basis of same argument in case of Maple and relied upon the orders passed by the Id. TPO/DRP.

29. Bare perusal of financial results, extracted in preceding para, shows that due to acquisition, profit of Triton has increased by 163.59% and 93.78% in FY 2006-07 and 2007-08 respectively which is sufficient to exclude as a comparable vis-à-vis the taxpayer as no such extra ordinary event has pushed taxpayer further to achieve such profit results.

29.1 Moreover, in *Cabliberated Healthcare Systems India Pvt. Ltd.* (supra), Triton has been ordered to be excluded as a comparable because of financial irregularities committed by their Directors as its financials were not credible. So, in view of the matter, we are of the considered view that Triton is also not a suitable comparable, hence ordered to be excluded from the final set of comparables.

INFOSYS BPO LTD. (INFOSYS BPO)

30. The taxpayer sought to exclude Infosys BPO on the grounds inter alia that it is a giant company with huge turnover and significant intangibles; that Infosys BPO has a brand expenditure of Rs.56 lakhs vis-à-vis nil in case of the taxpayer; that Infosys BPO has a brand value of Rs.31,617 crores and relied upon the decision rendered by the coordinate Bench of the Tribunal in case of *Flextronics Technologies (India) Pvt. Ltd. in ITA No.1559/Bang/2012*, *Avaya India Pvt. Ltd. in ITA No.1904/Del/2015*, *Evalueserve SEZ (Gurgaon) Pvt. Ltd. in ITA 241/2018* and *Oracle (OFSS) BPO Services Pvt. Ltd.* It has also been ordered to be excluded in *taxpayer's own case in ITA No.4191/Del/2018 for AY 2014-15 order dated 06.05.2019.*

31. Ld. DR for the Revenue, on the other hand, relied upon the orders passed by the ld. TPO/DRP.

32. Coordinate Bench of the Tribunal in *taxpayer's own case for AY 2014-15* (supra) ordered to excluded Infosys BPO as a comparable for benchmarking the international transaction for ITES segment by returning following findings :-

“17. We have carefully considered the rival contention and perused the orders of the lower authorities wherein the reasons given for inclusion of the above comparable company for the

purpose of benchmarking of the arm's-length price of the international transaction of the ITeS segment of the assessee. The assessee has also placed before us the annual report of Infosys BPO Ltd for 2013 – 14. On looking at the annual report itself it is clear that the company has an imprint of Infosys brand all over it. In the companies overview at page number 4 of the annual accounts as mentioned that this company is the business process outsourcing subsidiary of Infosys and is engaged as outsourcing service provider. In the management discussion and analysis placed at page number 14 of the annual report, it is stated that Infosys BPO provides business process management services to organizations that outsource their business processes and Infosys BPO is majority owned and controlled subsidiary of Infosys Ltd. Rich industry experience held the company to understand the evolving needs of the clients better and provided them with the ability to offer appropriate solution across different industry verticals and horizontals , quickly. Further in paragraph number 1 it is stated that the company is committed to providing best- in - class services to both horizontal and vertical focus areas. The horizontal solutions comprises of sourcing and procurement, customer services, finance and accounting, legal process outsourcing, sales and fulfillment, analytics, business platform, business transformation services, human resources outsourcing, technology solution optimization. While vertical solution included financial services and insurance, manufacturing, energy utilities, communication and services, retail, consumer packaged goods, logistics and life sciences. On looking at the horizontal services, which comparable company provides it is apparent that on this ground itself the same is not comparable with the assessee company. On looking at page number 64 of the annual accounts, it is apparent that comparable company has contributed INR 50,000,000 towards brand building and advertisement expenditure. Admittedly the company does not have any goodwill which can impact the profitability of the price of the business of it services because the goodwill is recorded on amalgamation in the nature of purchase only. This is mentioned at page number 51 in para number 1.5 of the annual report and corroborated by page number 58 of the fixed assets schedule in paragraph number 2.6 of the report. Based on the above analysis, it is apparent that Infosys BPO Ltd has a huge brand backing of the Infosys group behind it which can definitely impact the revenue as well as the profitability of the comparable company, therefore in absence of any such assets available to the assessee company, Infosys BPO Ltd is required to be excluded from the comparability analysis of ITeS segment. Accordingly we direct the learned TPO/AO to exclude the above comparable and then compute the arm's-length price of the ITeS segment of the assessee.”

33. Undisputedly, there is no change in the business model of the taxpayer. Moreover, when we examine scale of business of Infosys BPO vis-à-vis the taxpayer, it is a giant company with huge turnover and having significant intangibles because as per annual report, relevant page 1239 of the paper book, Infosys BPO is having a turnover of Rs.649 crores whereas turnover of the taxpayer is Rs.142 crores. Moreover, Infosys BPO has brand expenditure of Rs.56 lakhs as against nil expenditure of the taxpayer.

24. Moreover, ratio laid down by Hon'ble Delhi High Court in case of *Avaya India Pvt. Ltd.* (supra) is applicable to the facts and circumstances of the case that scale of operation of comparable vis-à-vis tested party is a factor requires to be kept in mind. So, keeping in view the size and scale of Infosys BPO vis-à-vis the taxpayer, it is not a suitable comparable.

25. Hon'ble Delhi High Court has also confirmed the exclusion of Infosys BPO vis-à-vis routine ITES provider in case of *H & S Software Development and Knowledge Management Centre Pvt. Ltd.* (supra) by returning following findings :-

“.....In the other two cases of M/s. Infosys BPO and Wipro BPO Ltd., the ITAT again in the opinion of this Court, quite correctly held that the corporate entities had a significant brand presence for profits and

large corporate size, which could not be compared to the assessee's transactions."

26. In view of the facts and circumstances of the case discussed above and following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2014-15 (supra) and decisions supra rendered by Hon'ble Delhi High Court, we are of the considered view that Infosys BPO is not a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

HCL COMNET SYSTEMS & SERVICES LTD.
(HCL COMNET)

27. The taxpayer sought exclusion of HCL Comnet on the grounds inter alia that the information qua HCL Comnet is not available in the public domain and the Id. TPO has relied upon the data collected u/s 133 (6) of the Act; that HCL Comnet fails RPT/Sales filter. When the relevant data/information is not available in the public domain and apparently Id. TPO relied upon information obtained u/s 133(6) of the Act which otherwise relates to succeeding assessment year i.e. AY 2008-09 as is apparent from pages 977 to 983 of the paper book, both the Representatives of the parties to the appeal conceded that this comparable be set aside to the Id TPO to examine its suitability afresh. In view of the matter,

we set aside the issue as to examining suitability of HCL Comnet as a comparable vis-à-vis the taxpayer to the Id TPO by providing adequate opportunity of being heard to the taxpayer.

ACCENTIA TECHNOLOGIES LTD. (ACCENTIA)

28. Ld. AR for the taxpayer sought exclusion of Accentia on ground of extra ordinary events and that the company is having goodwill on amalgamation of Rs.2.8 crores during the year under assessment and that Accentia is earning revenue from software services with no segmental data available.

29. Ld. DR for the Revenue, on the other hand, relied upon the orders passed by the Id. TPO/DRP.

30. Perusal of the reply given by Accentia u/s 133 (6) of the Act to the TPO shows that Geosoft Technologies (Trivandrum) Ltd. and Iridium Technologies (India) Pvt. Ltd. has become subsidiaries of Accentia w.e.f. April 1, 2006 and thereby increased the revenue and profit of Accentia to the extent of 528% and 57% respectively. The revised revenue and profit increase post removing sale of investment are 100683% and 5148%.

31. Coordinate Bench of the Tribunal in *AOL Online India Pvt. Ltd. in ITA No.1036/Bang/2011* has also examined the suitability of Accentia as a comparable vis-à-vis routine ITES provider and

ordered to be excluded on ground for extra ordinary events i.e. amalgamation of subsidiary resulting in growth of revenue of 100683% and on functional non-comparability as Accentia is into the activity of medical transcription, billing & coding and software development and implementation and on the ground that business promotion expenses constitute 28.34% of the total operating revenue earned by the company.

32. Suitability of Accentia has also been examined by the coordinate Bench of the Tribunal in ICC India Pvt. Ltd. in ITA No.25/Del/2012 and ordered to exclude the same by returning following findings :-

“(i) Accentia Technologies Ltd. (Seg) : The assessee is objecting to the aforesaid company being treated as a comparable on the ground that during the year Geosoft Technologies (Trivandrum) Ltd. and Indian Technologies (India) Pvt. Ltd. amalgamated with Accentia during the year resulting in abnormal rise in profits. The Delhi Bench of the Tribunal in Cienna India (P) Ltd. vs DCIT 57 taxmann.com 329 (Delhi-Trib) as well as the Mumbai Bench in Petro Araldite (P) Ltd Vs. DCIT 144 ITD 625 (Mumbai-Trib) have held that a company cannot be considered as comparable because of financial results become distorted due to mergers, demergers etc. Similar view has also been taken by the Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd vs ACIT in ITA No. 5654/Del/2011. As there were amalgamations in Accentia Technologies Ltd. during the financial year in question, this fact makes it incomparable with the assessee company. In view of the aforesaid, we direct to exclude Accentia Technologies Ltd. (Seg) from the list of comparables.”

33. So, in view of the facts and circumstances of the case and following the decision (supra) rendered by the coordinate Bench of

the Tribunal, we are of the considered view that Accentia is not a suitable comparable on ground of amalgamation of subsidiaries resulting into growth of revenue by 100683% and on ground of functional dis-similarity, hence ordered to be excluded.

SOFTWARE DEVELOPMENT SERVCIES (SDS)
(IT SEGMENT)

34. Post DRP directions, ld. TPO computed the adjustment on account of ALP qua SDS Segment to the tune of Rs.4,60,46,062/- by finally selecting 24 comparables which are as under :-

<i>No.</i>	<i>Company Name</i>	<i>OP to total Cost%</i>
<i>1</i>	<i>Avani Cimcon Technologies Ltd.</i>	<i>50.29%</i>
<i>2</i>	<i>Datamatics Ltd.</i>	<i>1.38%</i>
<i>3</i>	<i>E-Zest Solutions Ltd.</i>	<i>35.63%</i>
<i>4</i>	<i>Flextroncs Software Systems Ltd. (Seg)</i>	<i>25.31%</i>
<i>5</i>	<i>Geometric Ltd (Seg)</i>	<i>10.71%</i>
<i>6</i>	<i>Helios & Matheson Information Technology Ltd</i>	<i>36.63%</i>
<i>7</i>	<i>Igate Global Solutions Ltd</i>	<i>7.49%</i>
<i>8</i>	<i>Infosys Technologies Ltd</i>	<i>40.30%</i>
<i>9</i>	<i>Ishir Infotech Ltd</i>	<i>30.12%</i>
<i>10</i>	<i>KALS Informations Systems Ltd</i>	<i>30.55%</i>
<i>11</i>	<i>LGS Global Ltd (Lanco Global Solutions Ltd)</i>	<i>15.75%</i>
<i>12</i>	<i>Lucid Software Ltd</i>	<i>19.37%</i>
<i>13</i>	<i>Mediasoft Solutions Ltd</i>	<i>3.66%</i>
<i>14</i>	<i>Megasoft Ltd</i>	<i>60.23%</i>
<i>15</i>	<i>Mindtree Ltd.</i>	<i>16.90%</i>
<i>16</i>	<i>Persistent Systems Ltd.</i>	<i>24.18%</i>
<i>17</i>	<i>Quintegra Solutions Ltd.</i>	<i>12.56%</i>
<i>18</i>	<i>R S Software (India) Ltd.</i>	<i>13.47%</i>
<i>19</i>	<i>R Systems International Ltd. (Seg.)</i>	<i>15.07%</i>
<i>20</i>	<i>Sasken Communication Techno Ltd. (Seg.)</i>	<i>22.16%</i>

21	<i>SIP Technologies & Exports Ltd.</i>	<i>13.90%</i>
22	<i>Tata Elxsi ltd (Seg.)</i>	<i>26.51%</i>
23	<i>Thirdware Solutions Ltd.</i>	<i>25.12%</i>
24	<i>Wipro Ltd. (Seg.)</i>	<i>33.48%</i>
	<i>Average</i>	<i>23.78%</i>
	<i>After working capital adjustment OP/OC%</i>	<i>31.56%</i>

35. Consequently, ld. TPO proposed the adjustment of ALP qua provision of SDS segment as under :-

<i>Operating Cost</i>	<i>27,94,85,304/-</i>
<i>Arms Length Price</i>	<i>31.56% of the Operating Cost</i>
<i>Arms Length Price (ALP) @ 131.56% of operating cost</i>	<i>36,76,90,866/-</i>
<i>Price received vis-à-vis the Arms Length Price :</i>	
<i>Arms Length Price (ALP) @ 131.56% of operating cost</i>	<i>36,76,90,866/-</i>
<i>Price charged in the international transactions</i>	<i>32,16,44,804</i>
<i>Shortfall being adjustment u/s 92CA</i>	<i>4,60,46,062/-</i>

36. Ld. AR for the taxpayer in order to compress the controversy raised by way of grounds no.6 & 7 qua adjustment in SDS segment contended that the ld. TPO/DRP have erred in selecting 12 out of 24 comparables and as such sought their exclusion viz. (i) **Infosys Technologies Ltd.**, (ii) **Wipro Ltd. (IT Seg.)**, (iii) **KALS Informations Systems Ltd**, (iv) **Persistent Systems Ltd.**, (v) **Tata Elxsi Ltd (Seg.)**, (vi) **Megasoft Ltd.**, (vii) **Hellos & Matheson Information Technology Ltd.**, (viii) **Thirdware Solutions Ltd.**, (ix) **Avani Cincom Technologies Ltd.**, (x)

Sasken Communication Technologies Ltd. (Seg.), (xi) Flextronics Software Systems Ltd. (Seg), and (xii)Ishir Infotech Ltd.. We would decide the suitability of each of the aforesaid comparables one by one.

INFOSYS TECHNOLOGIES LTD.
(INFOSYS TECHNOLOGIES)

37. The taxpayer challenged the inclusion of Infosys Technologies as a comparable vis-à-vis the taxpayer to benchmark the international transactions on the grounds inter alia that it is functionally dissimilar being a product company; that it is a giant company with huge turnover and brand expenditure and further contended that this comparable was excluded by the Tribunal in *taxpayer's own case in ITA No.477/Del/2016 for AY 2011-12 order dated 13.02.2018.*

37.1 Perusal of the annual report, relevant pages 1815 and 1862 of paper book-III, shows that Infosys Technologies has its banking product, namely, Finacle Suite and its overview also claims that the company has software products. Furthermore, its expenditure on R&D are Rs.48 crores during the year under assessment as against no expenditure on R&D by the taxpayer.

37.2 Furthermore, when we examine the scale of business with brand expenses of Infosys Technologies vis-à-vis the taxpayer, both are incomparable as is evident from the table extracted below :-

<i>Particulars</i>	<i>Agilent International</i>	<i>Infosys Ltd.</i>
	<i>FY 2006-07/AY 2007-08</i>	<i>FY 2006-07/AY 2007-08</i>
<i>Turnover</i>	<i>INR 32 crores @ pg 51 of PB I</i>	<i>INR 13,149 crores @ pg 1854 of PB III</i>
<i>Brand expenditure</i>	<i>INR 0 lakhs @ pg 302 of PB I</i>	<i>INR 69 lakhs @ pg 1859 of PB III</i>
<i>Asset base</i>	<i>INR 29 crores @ pg 298 of PB I</i>	<i>INR 2,150 crores @ pg 1856 of PB III</i>

38. Furthermore, Infosys Technologies has been excluded by the coordinate Bench of the Tribunal in *taxpayer's own case for AY 2011-12* (supra), when undisputedly there is no change in the business model of the taxpayer during the year under assessment and in the year 2011-12 by following the ratio laid down by Hon'ble Delhi High Court in the case of *CIT vs. Agnity India Technologies Pvt. Ltd. in ITA 1204/2011* and by following the decision of the coordinate Bench of the Tribunal in *Cadence Design System (India) Pvt. Ltd. vs. DCIT in ITA No.2074/Del/2014*.

39. Hon'ble Delhi High Court in case of *Agnity India Technologies Pvt. Ltd.* (supra) confirmed the exclusion of Infosys Technologies vis-à-vis SDS provider, a captive service provider by the Tribunal by returning following findings :-

“5. The tribunal has observed that the assessee was not comparable with Infosys Technologies Ltd., as Infosys Technologies Ltd. was a large and bigger company in the area of development of software and, therefore, the profits earned cannot be a bench marked or equated with the respondent, to determine the results declared by the respondent-assessee. In paragraph 3.3 the tribunal has referred to the difference between the respondent-assessee and Infosys Technologies Ltd. For the sake of convenience, we are reproducing the same:-

Basic Particular	Infosys Technologies Ltd.	Agnity India
Risk Profile	Operate as full-fledged risk taking entrepreneurs	Operate at minimal risks as the 100% services are provided to AEs
Nature of Services	Diversified-consulting, application design, development, re-engineering and maintenance system integration, package evaluation and implementation and business process management, etc. (refer page 117 of the paper book)	Contract Software Development Services.
Revenue	Rs.9, 028 Crores	Rs.16.09 Crores
Ownership of branded/ proprietary products	Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProve, Infosys mConnect, Also, the company derives substantial portion of its proprietary products (including its flagship banking product suite “Finacle”)	
Onsite Vs. Offshore	As much as half of the software development services rendered by Infosys are onsite (i.e., services performed at the customer’s location overseas). And offshore (50.20%) (Refer page 117	The appellant provides only offshore services (i.e., remotely from India)

	<i>of the paper book) than half of its service, income from onsite services.</i>	
<i>Expenditure on Advertising/Sales promotion and brand building</i>	<i>Rs.61 Crores</i>	<i>Rs. Nil (as the 100% services are provide to AEs)</i>
<i>Expenditure on Research & Development</i>	<i>Rs. 102 crores</i>	<i>Rs. Nil</i>
<i>Other</i>		<i>100% offshore (from India)</i>

6. *Learned counsel for the Revenue has submitted that the tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent-assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.”*

40. So, by following the ratio laid down by the Hon’ble High Court in *Agnity India Technologies Pvt. Ltd.* (supra) and order passed by the coordinate Bench of the Tribunal in *taxpayer’s own case for AY 2011-12* (supra), we are of the considered view that Infosys Technologies having turnover of Rs.13,149 crores with asset base of Rs.2150 crores having brand expenditure of Rs.69 lakhs as against turnover of Rs.32 crores of taxpayer with nil brand expenditure and asset base of Rs.29 crores; and that Infosys

Technologies has also incurred Rs.49 crores on the R&D expenditure and its revenue from the software product has increased to 67.6% whereas segmental financials are not available, so Infosys is not a suitable comparable. So, in these circumstances, we are of the considered view that Infosys Technologies is not a suitable comparable vis-à-vis taxpayer, hence ordered to be excluded.

WIPRO LIMITED (WIPRO)

41. The taxpayer sought exclusion of Wipro for benchmarking its international transactions qua SDS segment on the grounds inter alia that Wipro is a product company; that its segmental accounts are not prepared on consolidated basis; that Wipro has an inventory amounting to Rs.2,404 millions which shows that it is engaged in trading function apart from rendering services; that Wipro is a giant company as its size and scale vis-à-vis the taxpayer make all the difference and relied upon the decision of *Toluna India Pvt. Ltd. in ITA No.6407/Del/2012*, *H&S Software Development, Knowledge Management Centre Pvt. Ltd. in ITA 912/2017* and *Alcatel Lucent India Ltd. in ITA 515/2017*.

42. When we examine annual report of Wipro, relevant page 1465 of the paper book, it shows that in the standalone financial statement, Wipro is earning its income from sales and service but

when we examine its further bifurcation of revenue at page 1474 of the paper book, it shows that it has revenue from software services, sale of computers, toilet soaps, lighting products, etc.. Moreover, cost of goods sold under IT segment as per information supplied to the TPO u/s 133 (6) of the Act is Rs.6313 crores whereas segmental accounts are prepared only on standalone basis. Furthermore, when we examine size and scale of Wipro vis-à-vis the taxpayer it has come on record that Wipro is having turnover of Rs.9,616 crores as against Rs.32 crores of the taxpayer. Similarly, Wipro has asset base of Rs.2,626 crores as against Rs.29 crores of the taxpayer. Hon'ble Delhi High Court vide *order dated 29.07.2016 in ITA 393/2016 in Toluna India Pvt. Ltd.* confirmed the findings returned by the coordinate Bench of the Tribunal that the giant company in terms of size and scale cannot be a good comparable vis-à-vis routine SDS provider.

43. Similarly, Hon'ble Delhi High Court in case of *H&S Software Development and Knowledge Management Centre Pvt. Ltd.* (supra) also confirmed the findings returned by the coordinate Bench of the Tribunal excluding Wipro, by returning following findings :-

“.....In the other two cases of M/s. Infosys BPO and Wipro BPO Ltd., the ITAT again, in the opinion of this Court, quite correctly held that the corporate entities had a significant brand

presence for profits and large corporate size, which could not be compared to the assessee's transactions."

44. So, keeping in view the fact that Wipro is a product company having sold goods under IT segment of Rs.6,313 crores and being a giant company cannot be a suitable comparable vis-à-vis the taxpayer who is a captive SDS provider, hence ordered to be excluded.

KALS INFO SYSTEMS LTD. (KALS)

45. The taxpayer sought exclusion of Kals for benchmarking its international transactions qua SDS segment on the grounds inter alia that Kals is functionally dissimilar; that it has shown inventory of Rs.1.01 crores in its books of accounts and relied upon the decisions of *Toluna India Pvt. Ltd. in ITA No.6407/Del/2012*, *AVL India Software (P) Ltd. vs. DCIT in ITA No.6454/Del/2012 & 279/Del/2013* and *Aircom International (India) Pvt. Ltd. in ITA No.6402/Del/2012*.

46. However, on the other hand, ld. DR for the Revenue drew our attention towards letter dated 13.01.2009 issued by the Kals to the TPO in response to notice issued u/s 133 (6) of the Act wherein in para 5, it is categorically mentioned that income from export/

sales/software products and export of sales/software training is shown as nil.

47. No doubt, in the Notes to the Financial Statement, available at page 1913 of the paper book, categorically claims that Kals is engaged in development of software and software products since its inception. The company consisting of STP unit engaged in development of software and software products and a training centre engaged in training of software professionals on online projects.

48. At the same time, when we examine page 1911 of the paper book, Kals has shown inventory of Rs.1.01 crores since entire data is available in the public domain, it is difficult to rely upon the information obtained u/s 133 (6), so it would be in the interest of justice to set aside this issue to the TPO to decide afresh after providing adequate opportunity of being heard to the taxpayer.

PERSISTENT SYSTEMS LTD. (PERSISTENT)

49. The taxpayer sought to exclude Persistent from the final set of comparables for benchmarking its international transactions qua SDS segment on the grounds inter alia that Persistent is functionally dissimilar being engaged in software products with non-availability of segmental financials; that the asset base of Persistent is 5 times more than the taxpayer i.e. asset base of

Rs.161 crores as against Rs.29 crores of the taxpayer and relied upon the decisions of *Lime Labs (I) Pvt. Ltd. in ITA No.1703/Del/2015*, *AVL India Software (P.) Ltd. (supra)*, *Saxo India Pvt. Ltd. in ITA No.6148/Del/2015* and affirmed by *Hon'ble Delhi High Court in ITA 682/2016*.

50. However, on the other hand, ld. DR for the Revenue by relying upon the information supplied by Persistent in response to the notice issued u/s 133 (6) of the Act contended that revenue of Persistent from product licenses is Rs.21.57 millions which is 0.76% and it does not impact the profit margin. It is further contended that Persistent is a pure software development company.

51. However, when we examine profit & loss account at page 2155 of the paper book it shows that Persistent has income from sale of software services and product to the tune of Rs.29374.63 lakhs; Persistent has R&D expenditure of Rs.2.71 crores as is evident from page 2177 of the paper book as against nil of the taxpayer. Persistent is also earning royalty from the sale of products as is evident from Note to Accounts at page 2165 of the paper book. It has also come on record that Persistent is also earning commission on sales as is evident form page 2162 of the paper book.

52. Hon'ble High Court of Delhi confirmed the findings returned by the Tribunal in *Saxo India Pvt. Ltd.* (supra) that the mere availability of the turnover allocable for software product sales per se cannot lead to an assumption that segmental accounts are available. From page 2177 of the paper book, it further shows that during the year under assessment, Control Net (India) Pvt. Ltd. was amalgamated with Persistent w.e.f. 01.04.2006. It is also proved from page 2142 of the paper book that expenses incurred by Persistent also includes 12 month expenses of Control Net (India) Pvt. Ltd. which shows that during the year under assessment, Persistent also performed additional functions for rendering services to the customers having different functional profile.

53. Persistent has been ordered to be excluded as comparable vis-à-vis the routine software development service provider in case of *AVL India Software (P.) Ltd.* (supra) by returning following findings :-

"37. We find that in the case of Toluna India Pvt. Ltd (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

"33. After considering the rival submissions and perusing the relevant material on record, we hold that this company also cannot be considered as comparable because of merger of another company into it, which fact is evident from page 196, of @ the paper book. It can be seen that a subsidiary company was merged into this company pursuant to judgment of Hon'ble Bombay High Court w.e.f. 1.4.06. Because of the merger of subsidiary into this company, we hold that the financial position of

this company cannot be construed as normal capable of a good comparison. Following the Mumbai Bench decision in Petro Araldite (P) Ltd. (supra), we direct the exclusion of this company from the list of comparables. The assessee succeeds.”

54. So, in view of the matter, we are of the considered view that Persistent being a product company with no separate segmental accounts, has undergone merger during the year under assessment and having revenue from the outsources product development; having R&D expenditure of Rs.2.71 crores as against nil of the taxpayer, having revenue from licence of products and is also earning royalty from the sale of products, is not a suitable comparable vis-à-vis taxpayer which is a routine SDS provider, hence ordered to be excluded.

TATA ELXSI LIMITED (SDS SEGMENT)
(TATA ELXSI)

55. The taxpayer sought exclusion of Tata Elxsi as comparable for benchmarking the international transaction qua SDS segment on the grounds inter alia that Tata Elxsi is engaged in embedded product design services which include design of hardware and software; that company is engaged in product R&D, development of hardware and software embedded products; that segmental results show only two segments i.e. software development services and systems integration & support; that Tata Elxsi also provides

Digital TV enabled products like set top box, advanced displays, multimedia products, etc.; that it has inventory of Rs.37.42 lakhs and has incurred R&D expenses amounting to Rs.10.91 crores i.e. 3.54% of the total revenue as against nil expenditure of taxpayer and relied upon the decisions of *Mentor Graphics (India) Pvt. Ltd. in ITA No.2587/Del/2014 and Toluna India Pvt. Ltd.* (supra).

56. When we examine annual report of Tata Elxsi at page 2499 of the paper book, it has come on record that its SDS business constitutes from Embedded Product Design Services (Design & Development to Hardware and Software), Industrial Design and Engineering (Mechanical Design with a focus on Industrial Design) and Animation and Visual Effects (Animation and Special Effect). Annual report at page 2512 of the paper book under the head 'Management Discussion & Analysis for the year ended 31st March, 2007' shows that Tata Elxsi provides global customers with service towards technology product development and outsourced R&D, including Digital TV enabled products such as advanced displays and set top boxes, multimedia and portable entertainment products such as audio and media players, consumer electronics such as digital video cameras, mobile phones etc. and enables value to its customers through the cost-effective and timely service delivery of its technology and domain expertise.

57. Furthermore, perusal of page 2501 of the paper book under the head 'Annexure A to Director's Report' proves that Tata Elxsi incurred Rs.10.91 crores i.e. 3.54% of the total revenue as R&D expenditure and all these functions are not being performed by the taxpayer which makes it incomparable to the taxpayer.

58. Coordinate Bench of the Tribunal in case of *Mentor Graphics (India) Pvt. Ltd.* (supra) ordered to exclude Tata Elxsi as a comparable vis-à-vis SDS provider by returning following findings :-

"5.5ITAT while excluding Tata Elxsi Ltd. are in Para 5.04 and 5.04.1. The same are being reproduced as under for a ready reference:-

"5.04 Tata Elxsi Limited ('Tata Elxsi') - The Ld. AR has submitted that this company has been included by the TPO on the ground that it is functionally similar to the assessee company. The Ld. AR has also submitted that this company has software segment and that this segment does not contain any revenue by way of sale of products and, therefore, the company was not functionally comparable. The Ld. AR has submitted that Tata Elxsi Ltd. has two segments viz. Systems Integration & Support and Software Development & Services.

5.04.1 It is seen that this company was excluded as a comparable on the ground that it was engaged in the development of specialized/niche products in the following rulings: JDA Software India (P) Ltd. Vs. ITO ([2016J 66 taxmann.com 327) (AY 2006-07), Yodlee Infotech P. Ltd. Vs. ITO [TS-63-ITAT-2013 (Bang)-TPJ (AY 2006-07), HCL EAI Services Ltd. Vs. DCIT [TS-133-ITAT-2013(Bang)- TP], Goldman Sachs Services Private Limited [TS-435-ITAT- 2015(BangJ-TPJ (AY 2006-07), Novell Software Development (India) P. Ltd. [TS-257-ITAT-2016 (Bang) (AY 2007-08), Telecordia Technologies India P. Ltd. [TS-325-ITAT- 2012(Mum)J (AY 2007-08), Virtusa (India) Pvt. Ltd. Vs. DCIT [TS-253-ITAT-2013(HYD)-TPJ (AY 2007-08). In Virtusa

(India) Pvt. Ltd. Vs. DCIT [TS-253- ITAT-20J3(HYD)-TPJ the Hyderabad Bench of the ITAT in ITA No.1962/Hyd/2011 followed the decision of the Mumbai Bench rendered in the case of Telcordia Technologies India P. Ltd. in ITA No. 7821/Mum/2011, wherein the Mumbai Bench had held that, "From the facts and material on record and submissions made by the Ld. AR, it is seen that 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 Ld. AR that the nature of the product developed and services provided by this company are different from the assessee as have been narrated above. Even the segmental details for Revenue sales have not been provided by the TPO so as to consider it as comparable party for comparing the profit ratio from product and services. Thus, on these fact, we are unable to treat this company fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable parties." Following the aforesaid decisions, this company cannot be considered as comparable with the assessee and we direct exclusion of the aforesaid company from the final list of comparable while determining ALP."

59. Similarly, coordinate Bench of the Tribunal in *Toluna India Pvt. Ltd.* (supra), upheld by Hon'ble Delhi High Court, ordered to exclude Tata Elxsi as a comparable vis-à-vis routine SDS provider by returning following findings :-

"39.2. After considering the rival submissions and perusing the material on record, we find from page No. 206 of the paper book, which is Annexure to the Director's report of this company, that the nature of its activity is quite distinct from that of the assessee. It can be seen that this company is into development of hardware and software for embedded products such as multi-media and some other electronics, etc. Apart from that, this company is also engaged in making some programmes developing technology intellectual property. As the nature of activity carried out by the assessee in question is nowhere close to that of Tala Elxsi Ltd., we hold that this company cannot be included in the list of comparables. Accordingly, this company is directed to be excluded. The assessee succeeds."

60. In view of the matter, we are of the considered view that Tata Elxsi is not a suitable comparable vis-à-vis the taxpayer to benchmark its international transactions qua SDS segment.

MEGASOFT LIMITED (MEGASOFT)

61. The taxpayer sought exclusion of Megasoft from the final set of comparables to benchmark international transactions qua SDS segment on the grounds inter alia that Megasoft is a software product service company and its segmental financials are not available; that asset base of Megasoft is 5.3 times larger than the taxpayer; that there was an amalgamation from August 2006 onwards with Visual Soft Technologies Ltd. taking over assets, liabilities, rights and obligations of Visual Soft Technologies Ltd. and relied upon the decisions in *Avaya India Pvt. Ltd. in ITA 532/2019*, *Toluna India Pvt. Ltd. in ITA No.5645/Del/2011* and *AOL Online India Pvt. Ltd. in ITA No.1036/Bang/2011*.

62. When we examine page 1972 of the paper book under the head 'Management Discussion and Analysis', it has come on record that Megasoft has doubled its product revenue from Rs.694 million to Rs.1448 million with a record profit of Rs.560 million. It is also come on record that Megasoft delivers value to customers and stakeholders through innovative technologies used for its own

product development and for co-creating value for other product companies through its two divisions.

63. When we examine Id. DRP order at page 15, Megasoft has been retained as comparable by relying upon *ChrysCapital Investment advisors (India) Pvt. Ltd. vs. DCIT in ITA 417/2014* but has not met with the detailed objections raised by the taxpayer. Furthermore, when we examine page 1975 of the paper book, it is proved on record that revenue of Megasoft from software product was 49% during the year under assessment and it also earns revenue from the sale of software licence, as is evident from page 1988 of the paper book. Moreover, segmental financials showing break-up between software product and software business at standalone level is not available.

64. Coordinate Bench of the Tribunal in case of *Toluna India Pvt. Ltd.* (supra) ordered to exclude Megasoft on ground of amalgamation by returning following findings :-

"31.2. Having heard the rival submissions and perused the relevant material on record, we find from the Director's report of this company, a copy of which is available on page 193 of the paper book, that the financial results for the year include the business performance of Visual Soft Technologies Ltd. w.e.f 1st October, 2006 consequent to the amalgamation. The Mumbai Bench of the Tribunal in Petro Araldite (P) Ltd. vs. DCIT [(2013) 154 TTJ (Mum) 176] has held that a company cannot be considered as comparable because of exceptional financial results due to mergers/demergers etc. Since the financial results of Megasoft Ltd. have the impact of the merger of Visual Software Technologies Ltd., w.e.f. 1st October, 2006, obviously,

this company cannot be considered as comparable. Accordingly, this company is directed to be excluded. The assessee succeeds."

65. Similarly, coordinate Bench of the Tribunal in *AOL Online India Pvt. Ltd.* (supra) also ordered to exclude Megasoft as comparable vis-à-vis routine SDS provider by returning following findings :-

"4.2. Assessee is objecting to the balance of the comparables and objections on each of the comparables are as under:

"Megasoft Ltd.

..... 1. Functionally Not Comparable - company has two segments - BLUEALLY and XIUS-BCGI Under the XIUS-BCGI company carried out product development. Software development is carried out under BLUEAPPLY division.

2. The product segment has employee cost of 27.65% whereas software services segment has employee cost of 50%. Similarly profit margin on cost in product segment is 117.95% and in case of software services segment is 23.11 %. Hence both the segments are substantially different.

.....It was admitted that these objections were considered in the Co-ordinate Bench decision in the case of Broadcom India Research Private Limited in IT(IP)A No.1180/Bang/2011. Further, in the case of NXP Semiconductors India P. Ltd. Vs. ACIT in IT(IP)A No.1174/Bang/2011 also examined the above comparables. Similarly in the case of Capgemini India P. Ltd., Vs. ACIT [46 SOT 195] (Mum) has also examined these comparables. In all these decision of the Co-ordinate Benches, the objections as stated in the above column were examined in detail and the above said companies were held to be not comparable to the functionality of the said assessee's company. Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables."

66. In view of what has been discussed above, we are of the considered view that Megasoft is not a suitable comparable

vis-à-vis the taxpayer on ground of functional dissimilarity and on account of amalgamation, hence ordered to be excluded.

ISHIR INFOTECH LTD. (ISHIR)

67. The taxpayer sought to exclude Ishir as comparable to benchmark the international transactions qua SDS segment on the ground that Ishir fails to qualify 25% employees cost filter applied by the TPO and relied upon the decision in *M/s. Softbrands India Pvt. Ltd. in ITA No.1094/Bang/2011 and AOL Online India Pvt. Ltd. in ITA No.1036/Bang/2011*.

68. When we examine para 9.5 at page 25 of the order of the TPO it is evident that the TPO has himself applied employee cost filter of 25% over sales but when we examine the objections filed by the taxpayer before Id. DRP, relevant page 927, employee cost/ operating revenue is calculated at 3.96% of operating revenue. However, it is brought to our notice that Id. TPO while computing employee cost included professional fee as employee cost, which is not includible as contended by the Id. AR for the taxpayer.

69. Ishir has been excluded on ground of failing employee cost filter by the coordinate Bench of the Tribunal in *M/s. Softbrands India Pvt. Ltd.* (supra) by returning following findings :-

“21. As for as comparable companies listed at Sl.No.11 & 14 of the final list of comparable companies chosen by the TPO viz., M/s. Ishir Infotech Ltd. and Lucid Software Ltd., is concerned,

this Tribunal in the case of First Advantage Offshore Services Pvt. Ltd. Vs. DCIT IT (IP) No.10861Bang12011 for AY 07-08 held that the companies should be excluded for the reasons as held in the following paras:

"22. The learned counsel for the assessee submitted that these two companies are also to be excluded from the list of comparables on the basis of the finding of this Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. dt 22.2.2013, wherein at pages 17 and 22 of its order the distinctions as to why these companies should be excluded are brought out. He submitted that the facts of the case before us are similar and, therefore, the said decision is applicable to the assessee 's case also.

23. The learned DR however objected to the exclusion of these two companies from the list of comparables. On a careful perusal of the material on record, we find that the Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. (cited supra) has taken a note of dissimilarities between the assessee therein and Lucid Software Ltd. As observed therein Lucid Software Ltd. company is also involved in the development of software as compared to the assessee, which is only into software services. Similarly, as regards Ishir Infotech Ltd., the Tribunal has considered the decision of the Tribunal in the case of 24/7 Co. Pvt. Ltd to hold that Isltir Infotech is also outsourcing its work and, therefore, has not satisfied the 25% employee cost filter and thus has to be excluded from the list of comparables. As the facts of the case before us are similar, respectfully following the decision of the co-ordinate bench, we hold that these two companies are also to be excluded."

70. Ishir is ordered to be excluded by the coordinate Bench of the Tribunal in *AOL Online India Pvt. Ltd.* (supra) on account of failing employee cost filter as comparable vis-à-vis SDS provider by returning following findings :-

"Ishir Infotech Ltd .

..... Fails employee cost filter - only 3.96% of the operating revenue of the company (schedule 15 on page 13 of the Annual Report and page 7 of the Annual Report for operating revenue) - Ishir is engaged in trading of services

..... It was admitted that these objections were considered in the Co-ordinate Bench decision in the case of Broadcom India Research Private Limited in IT(TP)A

No.1180/Bang/2011. Further, in the case of NXP Semiconductors India P. Ltd., Vs. ACIT in IT(TP)A No.1174/Bang/2011 also examined the above comparables. Similarly in the case of Capgemini India P. Ltd., Vs. ACIT [46 SOT 195J (Mum) has also examined these comparables. In all these decision of the Co-ordinate Benches, the objections as stated in the above column were examined in detail and the above said companies were held to be not comparable to the functionality of the said assessee's company. Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables."

71. So, we are of the considered view that when Ishir fails to qualify employee cost filter applied by Id. TPO himself, it cannot be a suitable comparable vis-à-vis taxpayer because professional fee otherwise included by the TPO for employee cost cannot be part and parcel of employee cost by any stretch of imagination because it falls in the category of outsourced function by the company. So, we order to exclude Ishir from the final set of comparables.

**HELIOS & MATHESON INFORMATION
TECHNOLOGIES LTD. (HELIOS & MATHESON)**

72. The taxpayer sought to exclude Helios & Matheson on the grounds inter alia that it is functionally dissimilar being engaged in software sales and services and it earns also revenue from training development and from sale of software of which segmental

financials are not available and relied upon the decisions of ***Toluna India Pvt. Ltd. and AOL Online India Pvt. Ltd.*** (supra).

73. When we examine the financials of Helios & Matheson in the annual report, available at page 1663 of the paper book, it shows that Helios & Matheson is having income from software sale and services to the tune of Rs.178,63,80,304/- with no segmental financials so as to explain the income from software services and to specify income from software sales and income from software services. When we examine page 1666 of the paper book it is also proved that there is no quantitative details available with Helios & Matheson. Relevant portion is extracted as under :-

“The company is engaged in training development and maintenance of computer software, the production of sale of such software cannot be expressed in any generic unit, hence, it is not possible to give the quantitative details of sales and certain information as required under part ii of schedule vi to the companies act, 1956.”

74. Suitability of Helios & Matheson as comparable has been examined by the coordinate Bench of the Tribunal in ***Toluna India Pvt. Ltd.*** (supra) and ordered to exclude the same by returning following findings :-

“23.2further be noticed that the TPO has taken the figures of this company which represent 'Income from software sales and services'. Obviously, the assessee is not engaged in software sales. In view of our above discussion while dealing with the comparability of Flextronics Software Systems Limited, we are satisfied that this company cannot be considered as comparable and is, hence, directed to be excluded from the list of comparables. The assessee succeeds.”

75. Similarly, Helios & Matheson has been ordered to be excluded as comparable vis-à-vis SDS segment in *AOL Online India Pvt. Ltd.* (supra) by returning following findings :-

“4.2. Assessee is objecting to the balance of the comparables and objections on each of the comparables are as under:

"Helios & Matheson Information Technology Ltd.

..... 1. Functionally Not Comparable - is earning revenue from software sales and services.

2. Rejected as a comparable by the assessee in its TP study for AY 2006-07 on functional comparability.

.....It was admitted that these objections were considered in the Co-ordinate Bench decision in the case of Broadcom India Research Private Limited in IT(TP)A No.1180/Bang/2011. Further, in the case of NXP Semiconductors India P. Ltd., Vs. ACIT in IT(TP)A No.1174/Bang/2011 also examined the above comparables. Similarly in the case of Capgemini India P. Ltd., Vs. ACIT (46 SOT 195) (Mum) has also examined these comparables. In all these decision of the Co-ordinate Benches, the objections as stated in the above column were examined in detail and the above said companies were held to be not comparable to the functionality of the said assessee's company. Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables."

76. In view of the matter, we are of the considered view that Helios and Matheson cannot be a suitable comparable vis-à-vis the taxpayer being functionally dissimilar as it has income from software sales and services with no segmental financials available, hence we order to exclude the same from the final set of comparables.

THIRDWARE SOLUTIONS LTD. (THIRDWARE)

77. Though the taxpayer has challenged the Thirdware as comparable, but during the course of arguments, the ld. AR for the taxpayer submitted that he does not press exclusion of Thirdware from the final set of comparables, hence it is ordered to be retained.

AVANI CIMCON TECHNOLOGIES LTD. (AVANI)

78. The taxpayer sought exclusion of Avani from the SDS segment on the grounds of functional dissimilarity being engaged into software products and the segmental results are not available in the public domain. The taxpayer relied upon the information qua Avani from website wherein it is stated that Avani has developed its very first version of product called 'DXchange' in the year 2006 and relied upon the decisions in *ST Microelectronics Pvt. Ltd. in ITA No.949/Bang/2011*, *Aircom International (India) Pvt. Ltd. in ITA No.6402/Del/2012* and *Saxo India (P.) Ltd.* (supra).

79. Ld. DR for the Revenue, on the other hand, contended that Avani is a pure software development service provider and relied upon the information given at pages 993, 994 and 996. At pages 993, 994 & 996 of the paper book, it is categorically mentioned that Avani is a pure software development service provider.

80. When there is an inherent contradiction between the data relied upon by the taxpayer from the website of the company and the data available in the annual report, we are of the considered view that the issue is required to be set aside to TPO to decide afresh after scanning the data available in the public domain by providing adequate opportunity of being heard to the taxpayer.

SASKEN COMMUNICATION TECHNOLOGIES LTD.
(SOFTWARE SERVICE SEGMENT) (SASKEN)

81. The taxpayer sought exclusion of Sasken as a comparable to benchmark the international transactions qua SDS segment on the grounds inter alia that Sasken has acquired Botnia Hightech and its subsidiaries based in Finland in March, 2007; that during the year under assessment, Sasken has completed three other mergers, viz., Sasken Network System Ltd. and Integrated Softech Solutions Ltd. along with Botnia Hightech; that there has been increase of revenue of 55% by organic and inorganic growth led by acquisition; that Sasken has intangibles of Rs.5.72 crores during the year under assessment and it is also engaged in creation of intellectual property; that Sasken has incurred huge R&D expenditure to the tune of Rs.22.23 crores as against nil of taxpayer and that asset base of Sasken is Rs.95 crores as against Rs.29 crores of the taxpayer and relied upon the decisions in *Toluna*

India Pvt. Ltd. (supra), Tata McGraw Hill Education Pvt. Ltd. in ITA No.5857/Del/2011 an Saxo India Pvt. Ltd. (supra).

82. Ld. DR for the Revenue, on the other hand, contended that assessee has failed to show the impact of mergers on margin of profit and relied upon the orders of the lower authorities below.

83. Perusal of annual report of Sasken, available at pages 2388 & 2445 of the paper book, shows that Sasken has acquired Botnia Hightech and its subsidiaries situated in Finland in March 2007, completed mergers of Sasken Network Systems Ltd. and Integrated Softech Solutions Ltd. leading to robust growth as its revenue have increased by 55% from Rs.308.1 crores in 2005-06 to Rs.477.1 crores in 2006-07 with software services including Network Engineering Services contributing 95% to the revenue. Its own profit grew from Rs.22.9 crores in FY 2006-07 to Rs.45.3 crores during the year under assessment, registering a growth of 93% as is evident from annual report available at page 2357 of the paper book.

83.1 Furthermore, perusal of Schedule 3 forming part of the balance sheet qua fixed assets, available at page 2425 of the paper book, shows that Sasken has intangible assets amounting to Rs.5.72 crores as against nil of the taxpayer. Sasken has also incurred R&D expenditure to the tune of Rs.22.23 crores as per

profit & loss account, available at page 2423 of the paper book, as against nil R&D expenditure of the taxpayer.

83.2 Furthermore, as per Schedule 3 forming part of the balance sheet, available at page 2425 of the paper book, it is proved on record that Sasken is having asset base of Rs.95 crores which is 3.2 times as against Rs.29 crores of the taxpayer. All these facts make Sasken not a suitable comparable vis-à-vis the taxpayer for benchmarking the international transactions qua SDS segment.

84. Coordinate Bench of the Tribunal in *Toluna India Pvt. Ltd.* (supra) directed exclusion of Sasken on grounds of acquisition as a comparable vis-à-vis SDS segment. Similarly, coordinate Bench of the Tribunal in *Tata McGraw Hill Education Pvt. Ltd.* (supra) also excluded Sasken on ground of merger of Sasken Network Systems Ltd. and Integrated Softech Solutions Ltd. on the ground that its financial results makes incomparable vis-à-vis routine SDS segment.

85. In view of what has been discussed above and following the aforesaid decisions rendered by the coordinate Bench of the Tribunal, we are of the considered view that keeping in view the acquisition, merger, asset base, R&D expenditure and inorganic growth of Sasken, it is not a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

FLEXTRONIC SOFTWARE SYSTEMS LTD.
(FLEXTRONIC)

86. The taxpayer sought exclusion of Flextronic from the final set of comparables to benchmark international transactions qua SDS segment on the grounds inter alia that it is a product company; that it has asset base of Rs.125.84 crores which is 43 times of the taxpayer; that it has incurred R&D expenditure to the tune of 4.6% of the total turnover and relied upon the decisions of *Avaya India Pvt. Ltd. in ITA No.5528/Del/2011 and Toluna India Pvt. Ltd.* (supra).

87. Perusal of annual report, available at page 1558 of the paper book, shows that Flextronic is end to end provider of communication products, services and solutions to network equipment providers, handset manufacturers, service providers and business process outsourcing sectors and that it has hybrid business model of supplying both products and services to its customers. Perusal of the profit & loss account, available at page 1568 of the paper book, shows that Flextronic has amortized product development cost of Rs.5.15 crores during the year under assessment.

87.1 Furthermore, perusal of Scheduled D forming part of the balance sheet shows that it has asset base of Rs.125.84 crores as against Rs.29 crores of the taxpayer. Flextronic has also incurred R&D expenditure as per Annexure to the Director's Report, available at page 1561 of the paper book, to the tune of 4.6% of the total turnover as against nil R&D expenditure of the taxpayer. So, all these facts make Flextronic not a suitable comparable vis-à-vis the taxpayer which is a routine SDS provider as a risk bearing entity. Moreover, a product company cannot be compared for benchmarking the international transactions vis-à-vis routine SDS provider.

88. Coordinate Bench of the Tribunal in *Toluna India Pvt. Ltd.* (supra) excluded Flextronic as a comparable vis-à-vis routine SDS provider on the ground that this company is having a product revenue of Rs.92.1 crores whereas the taxpayer is not selling any product by returning following findings :-

"21.2. After considering the rival submissions and perusing the relevant material on record, we find this company to be not comparable to that of the assessee. The reason for our this decision is that the TPO has taken segmental data of 'Product and service segment' of this company which has Product revenue of Rs.92.1 crore. In contrast to it, the instant assessee is not selling any software products, but, is doing the job assigned to it on cost plus basis. The contention of the ld. DR that since the majority of the revenue from 'Product and services segment' was from the services segment and, hence, this company should be considered as comparable, is bereft of any force. When figures of Products and services are combined, it cannot be ascertained as to how much contribution was made by the product division or

the service division to the overall revenue of the Product and services segment. As the assessee is admittedly not engaged in selling its software products, such a company cannot be considered as comparable. It can be seen from the annual report of this company, a copy of which is available on page 88 of the paper book, that it consolidated its existing product portfolio and took steps to expand into further technologies by increasing the momentum in key initiatives in WIMAX, IMS, SIP & ISSIESS domains. This company has its own products such as ASN, WIMAX, Gateway Product with ASN Light. It is further relevant to note that the year ending of this company is not coinciding with that of the assessee and it is not known as to how the TPO has adopted the relevant figures for comparison. In view of the foregoing discussion, we hold this company to be not comparable and direct its exclusion from the list of comparables. The assessee succeeds. "

89. Similarly coordinate Bench of the Tribunal in case of *Avaya India Pvt. Ltd.* (supra) excluded Flextronic as a comparable vis-à-vis routine SDS provider being functionally dissimilar and engaged into significant R&D activities resulting into creating of intellectual property rights.

90. Keeping in view the aforesaid facts and circumstances of the case and following the aforesaid orders passed by the Tribunal, we are of the considered view that Flextronic being a product company having substantial revenue from sale of products, being into extensive R&D activities having expenditure of 4.6% of the turnover which is in return creating intellectual property rights and there is no break up of product and services available and moreover its asset base is 43 times of taxpayer which certainly makes it

incomparable vis-à-vis the taxpayer. So, we order to exclude Flextronic from the final set of comparables.

91. Keeping in view the findings returned in the preceding paras, the appeal filed by the taxpayer is allowed for statistical purposes and AO/TPO to computer the TP adjustment, if any, accordingly.

Order pronounced in open court on this 18th day of November, 2019.

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

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

**Dated the 18th day of November, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**