

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A Nos. 1041 & 1379/Bang/2011
Assessment Year : 2005-06 & 2005-06

M/S. FIS Solutions (India) Pvt. Ltd., [formerly known as Sungard Solutions(India) Pvt. Ltd.], Upper Ground Floor to 7 th Floor, West End Centre One, Survey No.169/1, Sector II, Aundh, Pune – 411 007. PAN: AABCE 7476K	Vs.	The Assistant Commissioner of Income-tax, Circle – 12(3), Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No. 1106/Bang/2011
Assessment Year : 2005-06 & 2005-06

The Deputy Commissioner of Income-tax, Circle – 12(3), Bangalore.	Vs.	M/S. FIS Solutions (India) Pvt. Ltd., [formerly known as Sungard Solutions(India) Pvt. Ltd.], Pune – 411 007. PAN: AABCE 7476K
APPELLANT		RESPONDENT

Assessee by	:	Shri K.R. Vasudevan, Advocate
Revenue by	:	Shri Priyadarshi Misra, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	25.02.2020
Date of Pronouncement	:	28.02.2020

ORDER

Per N.V. Vasudevan, Vice President

IT(TP)A Nos. 1041 & 1106/Bang/2011 are cross appeals directed against the order dated 13.09.2011 of CIT(A) and an appeal in IT(TP)A No. 1379/B/2011 is by the assessee against the order dated 27.10.2011 of CIT(A) passed u/s. 154 of the IT Act for the assessment year 2005-06. These appeals were originally heard on 20.2.2017 and a common order dated 28.4.2017 was passed by this Tribunal. The Assessee filed M.P.No.279 to 281/Bang/2017 pointing out certain errors in the order of the Tribunal inasmuch as the name of the Assessee had changed from M/S.Sungard Solutions (India)Pvt.Ltd. to M/S.FIS Solutions (India) Private Limited consequent to global acquisition and this aspect was not intimated to the Tribunal. Another mistake that was pointed out was that the Assessee had sought exclusion of two comparable companies chosen by the Transfer Pricing Officer(TPO) viz., M/S.Bodhtree Consulting Ltd., and M/S.Thirdware Solutions Ltd. The Tribunal omitted to adjudicate on the exclusion of the aforesaid two comparable companies. The Tribunal by its order dated 1.1.2019 recalled all the orders with a direction to the parties to file fresh Form No.36 in the name of the new entity and decide the appeals afresh. This is how these three appeals are listed for hearing before us. The parties submitted before us that the arguments advanced would be the same as was submitted when the appeal was originally heard and decided and that only on the exclusion of the two companies M/S.Bodhtree Consulting Ltd., and Thirdware Solutions Ltd., the arguments would be advanced. Accordingly, we proceed to decide these appeals on all aspects of the case as was done by the Tribunal in its order dated 28.4.2017 and further take for consideration and decision the case of the Assessee for exclusion of Bodhtree Consulting Ltd., and Thirdware Solutions Ltd.

Cross appeals - IT(TP)A Nos. 1041 & 1106/Bang/2011

2. The assessee is a subsidiary of Exeter Educational Management Systems Inc. USA and provides software development services for the administration of higher education institutions worldwide. The Assessee is engaged in the business of providing software development (technical support) services to its overseas Associated Enterprises ('AE' for short). It is not in dispute that the transaction of rendering of software development services by the Assessee to its AE was an international transaction and in view of the provisions of sec. 92 of the Income Tax Act, 1961 (Act), income arising from such international transaction has to be determined having regard to Arm's Length Price (ALP). As regards the international transaction of provision of software development (SWD) services to its AEs, the Assessee received consideration of Rs.11,80,97,508/- for rendering Software Development Services from its AE. In support of its claim that the price charged by it in the international transaction is at Arm's Length, the Assessee filed a Transfer Pricing study (TP Study) in which the Assessee adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for determination of ALP. The profit level indicator (PLI) chosen for the purpose of comparison of profit margin of comparable companies was operating profit to operating cost (OP/OC). The price charged in the international transaction by the Assessee from its AE was Rs.11,80,97,508. The Operating cost of the Assessee was Rs.10,32,20,464/-. The operating profit was thus Rs.1,48,77,044/- OP/OC was 14.41%.

Comparables selected by the TPO and their arithmetic mean

Sl. No.	Comparables Selected by TPO	NCP Margins as per TPO Order (%) (WC- Unadj)
1	Bodhtree Consulting Ltd.	24.85
2	Lanco Global Systems Ltd.	13.65
3	Exensys Software Solutions Ltd.	70.68
4	Sankhya Infotech Ltd.	27.39
5	Sasken Network Systems Ltd.	16.64
6	Four Soft Ltd.	22.98
7	Thirdware Solution Ltd.	66.09
8	R S Software (India) Ltd.	8.07
9	Geometric Software Solutions Company Ltd.	20.34
10	Tata Elxsi Ltd.	24.35
11	Visualsoft Technologies Ltd.	23.52
12	Sasken Communication Technologies Ltd.	14.42
13	iGate Global Solutions Ltd.	4.32
14	Flextronics Software Systems Ltd.	32.19
15	L&T Infotech Ltd.	10.33
16	Satyam Computer Services Ltd.	29.44
17	Infosys Technologies Ltd.	42.83
Arithmetical Mean		26.59

3. The working capital adjusted Arithmetic Mean profit margin of the above comparables was arrived at by the TPO at 29.09%. The TPO computed the addition to be made to the total income on account of determination of ALP at Rs. 1,52,11,661/- as follows:

**Computation of arm's length price by TPO
and the adjustment made:**

Arm's Length Mean Margin	26.59%
Less: Working Capital Adjustment	(2.50)%
Adjusted mean margin of the comparables	29.09%
Operating Cost	Rs.10,34,33,155/-
Arm's Length Price (ALP) 124.57% of Operating Cost	Rs.13,35,21,860/-
Price Received	Rs.11,83,10,199/-
Short fall being adjustment u/S. 92CA	Rs.1,52,11,661/-

4. The addition suggested by the TPO was incorporated in the draft order of assessment of the AO. The Assessee did not prefer any objections to the draft assessment order before the Dispute Resolution Panel (DRP) and hence a final order of assessment was passed by the AO. The Assessee preferred appeal before CIT(A) against the final order of assessment. The CIT(A) excluded 12 out of the 17 comparable companies by applying the related party transaction filter (RPT Filter) of) 0 %, i.e., if a comparable company has any transaction with a related party then that company was regarded as not comparable company and was excluded. Thus companies listed at SI.Nos. 5 to 10 and 12 to 17 of the list of 17 comparable companies chosen by the TPO as per the chart given above were excluded.

5. The CIT(A) also excluded Exensys solutions Ltd., and Thirdware solution on the ground that these companies showed extraordinary profit. In this regard it is worthwhile to note that Thirdware Solution Ltd. got excluded by application of RPT filter also. Satyam Computers was also excluded by application was RPT filter and was again excluded by the CIT(A) on the ground that its financial statements were unreliable. Infosys which got excluded by application of RPT filter was again excluded on the ground of its size and turnover being huge. Foreign exchange gain was

directed to be included as part of the operating profit of the Assessee Loss on sale of assets, provision for bad and doubtful debts, diminution in the value of investments were directed to be treated as non-operating income. The OP/OC of the Assessee as well as the comparable companies were directed to be computed accordingly.

6. Even after the order of the CIT(A), the average arithmetic mean profit margin of the 4 comparable companies that remained was 23.03% and therefore the addition made consequent to determination of ALP still remained but at a reduced sum of Rs.27,89,013. Aggrieved by the order of the CIT(A) to the extent of relief allowed the revenue is in appeal and to the extent of the addition being sustained the Assessee is in appeal before the Tribunal in IT(TP)A.No.1379/ and 1041/Bang/2011 respectively.

7. We shall first take for consideration, the revenue's appeal wherein the grievance is against exclusion of companies by application of RPT filter of 0%. It is the plea of the revenue that the threshold limit for application of the RPT filter should be 15% of the total revenue from SWD services should be with related party and only then a company can be regarded as not comparable by application of the RPT filter. So also the revenue is aggrieved by exclusion of companies by application of high turnover and abnormal profits filter. There is one corporate tax issue raised by the revenue in its appeal and the same is in relation to expenditure incurred on travelling and technical fees and other expenses were directed to be excluded both from the export turnover and total turnover by the CIT(A) while computing deduction u/s.10A of the Act. This issue is no longer res integra and has been settled by the Hon'ble Karnataka High Court in the case of Tata Elxsi 349 ITR 98 (Karnataka) wherein it was held that whatever is excluded from the Export turnover should also be excluded

from the total turnover. Hence, there is no merit in this ground of appeal of the revenue.

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

8. By applying this filter the companies which are having the related party transaction upto 15% will be restored to the set of comparable however, subject to our finding on the functional comparability of those companies.

9. The second issue raised by the revenue is regarding high profit margin was taken by the CIT(A) for exclusion of certain companies namely Exensys Solutions Ltd., and Thirdware Solutions Ltd.

10. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. This issue is now settled that high profit or loss cannot be a criteria for inclusion or exclusion of companies in the set of comparables. However, if the high profit or loss is by the reason of some extraordinary circumstances then those extraordinary circumstances which has led to the high profit or loss can be considered as a criteria for inclusion or exclusion of the companies in the list of comparables. Therefore, the mere high profit margin or loss cannot be considered as a parameter or criteria for selection of comparable companies as held by the special bench of this Tribunal in case of *Maersk Global Centres (India) (P.) Ltd. Vs ACIT (147 ITD 83) (Special Bench, Mumbai)*.

11. In Assessee's appeal, the assessee is seeking exclusion of 10 companies out of 17 selected by the TPO. At the time of hearing the Id. AR of the assessee has said at bar that the assessee does not press ground no. 5 wherein the assessee is seeking inclusion of certain companies in the set of comparables. Thus in view of the statement of the Id. AR of the assessee the ground no. 5 of the assessee's appeal is dismissed being not pressed. The other corporate issues raised by the Assessee in this appeal are infructuous because those issues arise out of order passed by CIT(A) u/s.154 of the Act and the Assessee has filed separate appeal against the said order and hence those grounds do not require adjudication in this appeal by the Assessee.

12. As regards the functional comparability of the 10 companies the Id. AR of the assessee has submitted that an identical set of comparable was considered by the coordinate bench of this Tribunal in case of ITO Vs. M/s. Net Devices India Pvt. Ltd. in IT(TP)A No. 1099/Bang/2011 vide order dated 25.05.2016 and further vide order dated 23.11.2016 in MP No. 100/Bang/2016. Thus the Id. AR has submitted that the functional comparability of these 10 companies have been examined by the coordinate bench and found to be not comparable with the software development service segment of captive service provider assessee. On the other hand, the Id. DR has relied upon the orders of the authorities below and submitted that the TPO has duly examined the functional comparability of these companies and therefore when the arms length price has been determined by adopting TNMM as a most appropriate method then minor variations in the functions of the comparable companies are irrelevant.

13. Having considered the rival submissions as well as relevant material on record, we note that out of the 17 comparable companies selected by the TPO the assessee is now seeking exclusion of 10 companies. The details of which are as under:-

1. Bodhtree Consulting Limited
2. Exensys Software Solutions Limited
3. Four Soft Limited
4. Sankhya Infotech Limited
5. Thirdware Solutions Limited
6. Geometric Software Solutions Limited
7. Tata Elxsi Limited (Seg.)
8. Flextronics Software Systems Limited (Seg.)
9. Satyam Computer Services Limited
10. Infosys Technologies Limited

14. At the outset we note that the functional comparability of an identical set of 10 companies have been examined by the coordinate bench of this Tribunal in the case of ITO Vs M/s. Net Devices India Pvt. Ltd. (supra). While deciding the appeal vide order dated 25.05.2016 the Tribunal has dealt with the functional comparability of 8 companies in para 9.1 to 9.3, 11.1 to 18.5.3 as under:-

“Thirdware Solutions Pvt. Ltd.

9.1 There is no dispute that the high profit margin or loss cannot be a ground for exclusion or inclusion of a particular company in the list of comparables. The learned Authorised Representative of the assessee has submitted that this company is in the diversified activities and derive its income from sale of software license, software products apart from software development services. This company is engaged in the diversified activities of rendering application development, customer relationship management and ERP, software products. He has referred to the Annual Report of this company and submitted that this company is also engaged in the distribution of software products and providing trunky project which include a bundle of activities such as providing software product combined with implementation and customer services. In support of his contention, he has relied upon the following decisions :

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

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

IT(T.P)A No.1099/Bang/2011 & C.O. No.19/Bang/2012

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

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

9.2 The learned Departmental Representative has submitted that the TPO has analysed the functions of this company and it was found that this company is engaged in the similar activity of providing software development services. He has relied upon the orders of the authorities below. 9.3 We have heard the rival submissions as well as considered the relevant material on record. The learned Authorised Representative of the assessee has contended that this company is having diversified activities including software product as well as trunky project. We find that as per Schedules 12 as well as 14 of the balance sheet of this company, this company has sale of license, purchase of license and purchase of AMC charges. The details of the sales in Schedule 12 and details of purchase in Schedule 14 are as under :

SCHEDULE 12 :

SALES Sale of Licence 27,202,087

Software Services 80,602,781

Export 147,425,780

Revenue from Subscription 35,939,678

SCHEDULE 14 : DETAILS OF PURCHASE

Purchase of Licence 21,168.657

Clearing and Forwarding 835,754

charges Purchase - AMC Charges 16,893,037

Software Service Charges 17,329,999

Training Expenses 554,296

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

“11.1 Ground No.6 is regarding exclusion of **M/s. Infosys Technologies Ltd.** on the ground of turnover and brand value of the company.

11.2 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the functional comparability of this company was decided by the Delhi Bench of this Tribunal in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856/Del/2010 which has been upheld by the Hon'ble Delhi High Court reported in 219 Taxman 26 in paras 5 to 8 which are as under :

“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 percent 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 iProwe, 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 percent) (Refer page 117 of the paper book) than half of its service, income from onsite services.	The appellant provides only offshore services (i.e., remotely from India)
Expenditure on Advertising/Sales promotion and brand building	Rs.61 Crores	Rs. Nil (as the 100 percent services are provide to AEs)
Expenditure on Research & Development	Rs. 102 crores	Rs. Nil
Other		100 percent offshore (from India)

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.

7. Learned counsel for the appellant Revenue during the course of hearing, drew our attention to the order passed by the TPO and it is pointed out that based upon the figures and data made available, the TPO had treated a third company as comparable when the wage and sale ratio was between 30 percent to 60 percent. By applying this filter, several companies were excluded. This is correct as it is recorded in para 3.1.2 of the order passed by the TPO. TPO, as noted above, however had taken three companies, namely, Satyam Computer Service Ltd.,

L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean.

8. It is a common case that Satyam Computer Services Ltd. should not be taken into consideration. The tribunal for valid and good reasons has pointed out that Infosys Technologies Ltd. cannot be taken as a comparable in the present case. This leaves L&T Infotech Ltd. which gives us the figure of 11.11 percent, which is less than the figure of 17 percent margin as declared by the respondent-assessee. This is the finding recorded by the tribunal. The tribunal in the impugned order has also observed that the assessee had furnished details of workables in respect of 23 companies and the mean of the comparables worked out to 10 percent, as against the margin of 17 percent shown by the assessee. Details of these companies are mentioned in para 5 of the impugned order.”

Following the decision of the Hon'ble Delhi High Court (supra), we do not find any reason to interfere with the impugned order of the CIT (Appeals) on this issue.

C.O. No.19/Bang/2012

12. The assessee has raised the following grounds in the cross objections :

“1. That the order of the learned CIT (Appeals) resulting in income of the Respondent being subject to tax, is bad in law, without application of mind and liable to be quashed.

2. That the learned CIT (Appeals) erred in not entirely deleting the adjustment to the arm's length price made by the Id. Assessing Officer / TPO amounting to INR 12,882,925 in respect of the software development services.

3. That in making an adjustment to the Respondent's transfer price, on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in :

a) Upholding the comparability analysis performed by the Id. TPO in the TP order.

- b) Arbitrarily rejecting the filters applied by the Respondent while undertaking the TP Study.
- c) Modifying some of the filters applied by the Id. TPO in the TP order, without providing an opportunity of being heard to the appellant.
- d) Arbitrary arriving at a set of companies as comparable to the Respondent.
- e) Disregarding application of multiple year / prior year data and holding that current year (i.e. opportunity of being heard to the appellant).
- f) Upholding the Id. TPO's approach of using data as at the time of assessment proceedings.
- g) Upholding the approach adopted by the Id. TPO of collecting selective information of the companies by exercising power granted to him under section 133(6) of the Income Tax Act, 1961 that was not available to the Respondent in the public domain.
- h) Not providing appropriate adjustment towards the risk differential between the Respondent and the entrepreneurial companies selected as comparables, while determining the arms length price.

That the Respondent craves leave to add to and/or alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time hearing of this Appeal.'

13. The assessee has also raised additional grounds as under :

“The grounds mentioned herein are without prejudice to the grounds mentioned in Appeal No. CO 19/Bang/12 filed on July 12,2012.

Transfer Pricing Related

- 1. That the Id. ITO, Ward 12(1), Bangalore and the learned CIT (Appeals) erred in confirming the action of the Id. JDIT (TPO)-II of accepting Bodhtree Consulting Limited as a

comparable that fail the test of comparability on application of related party transaction filter of 15% and thus not comparable to the Appellant in respect of its software development services.

2. The Id. A.O/TPO erred in considering Flextronics Software Systems Ltd. (Seg.) that fails the test of comparability due to functional dissimilarity and thus not comparable to the Appellant in respect of its software development services.

The appellant craves leave to add, alter, amend or withdraw all or any of the grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.”

14. First we take up the additional grounds raised by the assessee in respect of the exclusion of **Bodhtree Consultancy Ltd. & Flextronics Software Systems (Seg.)**.

15.1 The learned Authorised Representative of the assessee has submitted that though the assessee did not raise any objection before the authorities below in respect of the comparability of these two companies however in view of the various decisions of the Tribunal, these two companies are found to be not comparable with the software development services provider. Thus the learned Authorised Representative has submitted that the assessee has raised objection by filing the additional grounds which may be admitted for deciding the comparability of these two companies on merits.

15.2 On the other hand, the learned Departmental Representative has objected to the admission of the additional grounds raised by the assessee when the assessee has not raised any objection before the authorities below and the objections proposed to raise by the assessee now was not available with the authorities below for their consideration.

15.3 We have heard the rival submissions as well as considered the relevant material on record on the admissibility of the additional grounds raised by the assessee. We find that there are

some decisions of this Tribunal wherein the comparability of these two companies have been considered and decided by this Tribunal. Therefore, once the assessee has brought on record some decisions of the Tribunal wherein these two companies were held to be not good comparables then the facts and circumstances and in the interest of justice, we admit the additional grounds raised by the assessee. Accordingly, we will deal with the comparability of these two companies on merits.

16. Bodhtree Consultancy Ltd.

16.1 The learned Authorised Representative of the assessee has submitted that this company is required to be rejected the RPT of 34.68% of the total sale which is in excess of 15% taken as proper threshold limit. In support of his contention, he has relied upon the decision of the Hyderabad Bench of ITAT in the case of NTT Data Enterprises Pvt. Ltd. Vs. ACIT Dt.23.10.2013 in ITA No.1612/Hyd/2010 and submitted that in the said case the Tribunal has noted that the RPT of this company are 34.68%. The learned Authorised Representative has submitted that by following the said decision, the co-ordinate bench of this Tribunal in the case of ACIT Vs. McAfee Software India Pvt. Ltd. Dt.18.3.2016 in ITA Nos.4/Bang/2012 and 1388/Bang/2011 has also taken a similar view. Thus the learned Authorised Representative has submitted that in view of the decisions of the co-ordinate benches of this Tribunal, this company cannot be considered as good comparable and the same shall be excluded from the set of comparables.

16.2 On the other hand, the learned Departmental Representative has submitted that this company was found to be comparable by the authorities below and even otherwise from the Annual Report of this company the RPT are less than 15% and therefore when the company itself has reported the RPT as less than 15% then the same cannot be excluded from the set of comparables merely on assumption of wrong facts.

16.3 We have heard the rival submissions as well as considered the relevant material on record. There is no dispute that as per the Annual Report of this company, the RPT has been reported only to the extent of Rs.10,73,871 in the nature of

manager remuneration to the Managing Director and therefore the said transaction is almost NIL and in any case is less than 15% of the total sales. The learned Authorised Representative of the assessee has placed reliance on the decision of the Hyderabad Bench of ITAT in the case of **NTT Data India Enterprise Application Services Pvt. Ltd.** (supra), we find that the Tribunal has recorded the submissions of the counsel of the assessee in para 7 as under :

“7. Bodhtree Consulting Ltd.

The learned counsel submitted that this company should be rejected under the following TPO's filters :

- Related party transactions filter : As per Schedule 4 of the balance sheet, the company has investments in Perigon, LIC, USA and as per the response under Section 133(6); the company has export sales to Perigon LIC, USA of Rs.133.90 lakhs being 34.68% of the total turnover.
- Functionally different filter : The company in its response to notice under Section 133(6) has stated that it provides e-paper solutions, data cleansing software, website development and other customized software and also state that the e-paper solutions and data cleansing services would come under the category of IT enabled services.”

However, the Tribunal did not propose to give any finding on this issue as the assessee did not press the exclusion of the said company as evident from the finding of the Tribunal in para 9 as under :

“9. Even though detailed submissions were made with reference to the above 7 companies, the learned counsel fairly admitted that even one company i.e. Exensys Software Solutions Ltd. is excluded, inclusion of other companies will become academic in nature as the arm's length margin is within Assessee's margin of 16.74%. With reference to this company, the learned counsel referring to replies given to AP/TPO in response to the notices under Section 133(6) and their annual reports, which are available in its paper book, submitted that this

company is functionally different and the operations are exceptional as there was a merger in the year with another company which had a material/significant impact on the profit margins and further the computations are also wrong as the differed revenue expenditure, which was claimed regularly on the basis of accounting policy of the company, was excluded by the TPO in arriving at a different higher profit margin, which is not correct.”

Thus it is manifest from the order of the Tribunal that only the submissions of the learned Authorised Representative of the assessee were recorded by the Tribunal but there was no occasion for the Tribunal to even examine the facts as pleaded by the learned Authorised Representative and therefore the facts pleaded by the learned Authorised Representative were not examined by the Tribunal then the question of giving any finding on the said issue did not arise. In the case of **M/s. Mc Afee Software (India) Pvt. Ltd.** (supra), the Tribunal has not gone into the fact of the RPT and even no record relating to the said fact has been examined but the Tribunal has just reproduced the submissions of the assessee as pleaded in case of **NTT Data India Enterprise Application Services Pvt. Ltd.** (supra) and therefore it is a clear case of assumption of unexamined facts. Accordingly, we are of the view that when the relevant record showing the RPT at 34.68% as claimed by the learned Authorised Representative of the assessee is not available or produced either before the authorities below or before us, then this objection of the assessee cannot be accepted for want of the supporting evidence. However, in the interest of justice, we set aside this issue to the record of the A.O./TPO to verify the fact as alleged by the assessee and if need arises the information under Section 133(6) of the Act may also be called for and decide the RPT issue.

17. Flextronics Software India Pvt. Ltd.

17.1 The learned Authorised Representative of the assessee has submitted that this company is having hybrid model of supplying both products and services. It offers new product design and development to enhancing and testing their current products. These services are provided for fixed networks, mobile networks, voice over packet and data network. Thus the learned Authorised Representative of the assessee has submitted that this company is

functionally different from the assessee. He has contended that this company is engaged in the R&D activity as it is evident from the Annual Report of this company. In support of his contention, he has relied upon the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Sunquest Information Systems (India) Pvt. Ltd. in IT(TP)A No.1302/Bang/2011 & 92/Bang/2012.
- iii) M/s. Intoto Software India Pvt. Ltd. (ITA No.1196/Hyd/2010)
- iv) M/s. CNO IT Services (India) Pvt. Ltd. (ITA No.1280/Hyd/2010)

17.2 On the other hand, the learned Departmental Representative has submitted that the TPO has examined the functional comparability of this company and it had qualified all the parameters and filters applied by the TPO. The objections raised by the assessee at this stage were not available before the TPO and therefore the same cannot be accepted in the absence of the examination of the fact by the TPO.

17.3 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the comparability of this company has been examined by this Tribunal in various cases as relied upon by the learned Authorised Representative of the assessee. In the case of **McAfee Software (India) Pvt. Ltd.** (supra), the co-ordinate bench of this Tribunal has again considered this issue in para 10.10 as under :

“10.10 This company was objected to on functional dissimilarity. This was considered in ITO Vs. M/s. Sunquest Information Systems (India) Pvt. Ltd. in IT(TP)A No.1302/Bang/2011 dt.11.6.2015 (supra) as under :

“26. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly

demonstrate that there is functional dissimilarity between the assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the assessee company to bring them on par with the assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables.”.

Respectfully following, we exclude the same.”

In view of the facts as recorded and considered by the co-ordinate benches of this Tribunal that this company is in the activity of software development services as well as software products and further also incurred R&D expenditure. Therefore, the same was found to be dis-similar to this pure software development services provider in the capacity of captive service provider. By following the earlier order of the Tribunal, we direct the Assessing Officer/TPO to exclude this company from the list of comparables.

18. The assessee has raised objections against the inclusion of the following companies by the TPO :

- (i) *Sankya Infotech Ltd.*
- (ii) *Foursoft Ltd.*
- (iii) *Geometric Software Solutions Ltd.*
- (iv) *Tata Elxsi Ltd. (Seg.) and*
- (v) *Satyam Computer Services Ltd.*

(i) Sankya Infotech Ltd.

18.1.1 The learned Authorised Representative of the assessee has submitted that this company is functionally dis-similar as this company is product based company and also engaged in R&D activity and development of niche product for the transportation

and aviation fields. This company also owns intangibles. Thus this company cannot be considered as a good comparable when it is engaged in software products for transportation and aviation industry and incurred selling and marketing expenses. In support of his contention, he has relied upon the following decisions :-

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

ii) M/s. Sunquest Information Systems (India) Pvt. Ltd. (IT(TP)A No.1302/Bang/2011 & 92/Bang/2012)

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

18.1.2 On the other hand, the learned Departmental Representative has relied upon the orders of the TPO.

18.1.3 We have considered the rival submissions as well as relevant material on record. At the outset, we note that the functional comparability of this company has been examined by the Tribunal in a series of the cases as relied upon by the learned Authorised Representative of the assessee. In the case of ITO Vs. M/s. Sunquest Information Systems (India) Pvt. Ltd. (IT(TP)A No.1302/Bang/2011 & 92/Bang/2012), the Tribunal has considered and decided an identical issue in paras 19 & 20 as under :

“ Sankhya Infotech Limited (‘Sankhya’)

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

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

SILICON™ LMS (Training Management Information

SILICON™ QT (Online Assessment System)

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

“2. Activities

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

The Delhi Tribunal in ITO v. Colt Technology Services India Pvt. Ltd. (judgment dated 23.10.2012 in ITA No. 609I/Del/2011 for the assessment year 2005-06) has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

20. The submissions made by the learned counsel for the Assessee are considered. The activities set out above and the decision of the Delhi ITAT rendered in the context of a software development company such as the Assessee

makes it amply clear that this company Sankhya cannot be regarded as a comparable. The same is directed to be excluded from the list of comparable companies.”

A similar view has been taken by the Tribunal in the other decisions as relied upon by the Id. A.R. Following the earlier order of the Tribunal where it was found that this company is engaged in the business of development of software products and services as well as training, it cannot be considered as a good comparable of software development services provider. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

Foursoft Ltd.

18.2. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset, we note that the RPT of this company is 19.89%. Therefore in view of our finding on the threshold limit of RPT at 15%, this company cannot be considered as a good comparable having more than 15% RPT. We find that this fact of RPT at 19.89% has not been disputed by the Revenue. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

Geometric Software Solutions Ltd.

18.3.1 The learned Authorised Representative of the assessee has submitted that the RPT of this company is 22% whereas the TPO has wrongly considered the RPT at 10.97%. The learned Authorised Representative has referred the computation of RPT at page 561 of the paper book containing Annual Report and submitted that if all the RPTs are taken into consideration as reported in the Annual Report of this company then it comes to 22.52% of the total sales.

18.3.2 On the other hand, the learned Departmental Representative has submitted that the TPO has considered the RPT as taken from the Annual Report of this company and therefore this objection was not raised by the assessee before the TPO.

18.3.3 Having considered the rival submissions as well as the relevant material on record, We note that the assessee has submitted computation of RPT of this company at page No.561 of the paper book wherein the assessee has calculated this percentage by considering the various transactions with the Related Parties which consists of software development services charges and marketing expenses. Therefore, this issue requires a proper examination and verification of the fact as produced by the assessee. Accordingly, in the facts and circumstances of the case, we set aside this issue of comparability of this company to the record of the A.O./TPO for proper verification of the facts as contended and produced by the assessee before us and then decide the issue after giving an opportunity of hearing to the assessee.

Tata Elxsi Ltd. (Seg.)

18.4.1 The learned Authorised Representative of the assessee has submitted that this company is functionally different from the assessee as this company is engaged in the diversified activity of software development segment as well as in product design, this company also incurred deferred and promotional expenses and engaged in the activity such as hardware design, industrial design and engineering and visual computing. In support of his contention, he has relied upon the following decisions :

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

He has further submitted that for the Assessment Year 2006-07, the Tribunal in the assessee's own case has decided an identical

issue by holding that this company cannot be compared with the assessee.

18.4.2 On the other hand, the learned Departmental Representative has relied upon the order of the TPO and submitted that the predominant activity of this company is software development and therefore it is considered as functionally comparable.

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

“13. Having regard to the rival contentions and the material on record, we find that being the very same assessment year viz., 2006-07 in the case of M/s.Ariba Technologies India Pvt. Ltd. this Tribunal had occasion to go into the comparability of these companies with the said company and the Tribunal has held it to be functionally dissimilar from the similar activity of software development service. We find that the Tribunal, at para.12 & 13 of its order, has held as under:

“12. The following were the relevant observations of the Tribunal on the aforesaid comparable companies in the case of Triology E-Business Software India Pvt.Ltd.(supra):

Xxxxxx
Xxxxxx

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

“14. As far as comparable at Sl.No.6 & 24 are concerned, the comparability of the aforesaid two

companies with that of the software service provider was considered by the Mumbai Bench of the Tribunal in the case of Telcordia Technologies India Private Ltd. (supra) wherein on the aforesaid two companies, the Tribunal held as follows:-

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

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

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

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

We find that there is no change in the business activity of this company in the year under consideration in comparison to the Assessment Year 2006-07. We further note that a similar view has been taken by this Tribunal in the other cases as relied upon by the assessee pertaining to the Assessment Year 2005-06. Accordingly, by following the earlier decisions of this Tribunal,

we are of the view that this company cannot be considered as a good comparable to the assessee. Hence, the Assessing Officer / TPO is directed to exclude this company from the list of comparables.

Satyam Computer Services Ltd.

18.5.1 The learned Authorised Representative of the assessee has submitted that the financial results and information of this company is not reliable due to the financial irregularity and fraudulent activities by the Directors of this company. In support of his contention, he has relied upon the following decisions :

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

ii) M/s. Agnity India Technologies Pvt. Ltd. (ITA No.3856/Del/2010).

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

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

18.5.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

18.5.3 We have considered the submissions of rival parties and the relevant material on record. At the outset, we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in case of Textron Global Technology Pvt. Ltd. (supra) in para 14 as under :

“ 14. Ground No.3 raised by the Revenue is misconceived and the issue does not arise out of the order of the CIT(A). As we have already seen the CIT(A) rejected some of the comparable companies chosen by the TPO by applying related party transaction filter. The filter of companies

dealing in software products and abnormal profits owing to amalgamation of the companies during the relevant period thereby showing abnormal profits was applied to exclude Exensys Software solutions Ltd. Infosys Technologies Ltd., was excluded for reasons of high turnover and high risk profile. Satyam Computer Services Ltd., has to be excluded from the comparable companies for non-reliability of financial data as it was involved in financial scam. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO (ITA 3856/DeI/2010) and SAP India Pvt. Ltd v. ITO [ITA No. 398/8/2008]. Therefore the grievance as projected by the Revenue in ground No.3 is misconceived. On the facts of the present case, we are of the view that the CIT(A) rightly excluded Exensys Software Solutions Ltd., Infosys Technologies Ltd., and Satyam Computers Ltd., from the list of comparable companies.”

It is clear from the record that this issue was also involved in the case of Agnity India Technologies Pvt Ltd Vs. ITO (supra) wherein Delhi Bench of ITAT has excluded this company on the ground of unreliable data and information. The order of the Delhi Bench of Tribunal has been confirmed by the Hon'ble Delhi High Court. In view of the finding of the co-ordinate bench of this Tribunal, we direct the A.O./TPO to exclude this company from the list of comparables.”

14. We further note that the comparability of two companies namely Geometric Software Solutions Limited and Exensys Software Solutions Limited were further dealt with in the Miscellaneous Petition no. 100/Bang/2016 vide order dated 23.11.2016 in para 5 to 8 as under.

“5. Having considered the rival submissions and relevant material on record, we find that the Tribunal has ordered the exclusion of three companies on the ground of having more than 15% RPT at page 15 as under :

Sl. No.	Comparable Company Name	% of RPT Over sales
1.	Aztec Software Limited	17.78
2.	Geometric Software Limited	19.34
3.	Megasoft Limited	17.08

We find that the company Aztec Software Ltd. and Megasoft Ltd. are not part of the TPO set of comparables therefore these two companies are wrongly mentioned in the above said list. Hence the impugned order is modified under para 7.3 last part and may be read as under :

Sl. No.	Comparable Company Name	% of RPT Over sales
1.	Geometric Software Limited	19.34

6. The next mistake has been pointed out by the learned Authorised Representative that in para 8.1, the name of the comparable company has been mentioned as Acentia Software Solution Ltd. whereas correct name of the company is Exensys Software Solutions Ltd. This mistake has been repeated again in para Nos.8.2 & 8.3. he has further submitted that in para 8.3 there is a reproduction of finding by the Tribunal in case of M/s. Textron Global Technology Centre Pvt. Ltd. however wrong part of the said order has been reproduced in the impugned order. The learned Authorised Representative has pointed that the correct part of the finding is given in para 14 whereas the reproduction of paras 19 & 20 have been made. Therefore the learned Authorised Representative has submitted that there is a mistake in para 8.3 of the order as a wrong part of the earlier order in the case of Textron Global Technology Centre Pvt. Ltd. has been reproduced.

7. On the other hand, the learned Departmental Representative has not disputed that certain mistakes have crept in the impugned order regarding wrong comparable companies were mentioned as well as irrelevant portion of the earlier order was reproduced.

8. Having considered the rival submissions and relevant material on record, we find that there is a mistake in paras 8.1 to 8.3 of the impugned order regarding name of the comparable company Exensys Software Solutions Ltd. which is at Sl.No.3 of TPO's set of comparables whereas in the finding of the Tribunal name of the company has wrongly mentioned as Accentia Software Solutions Ltd. Therefore there is an apparent mistake in the paras 8.1 to 8.3 of the order which requires to be rectified. Accordingly, the name mentioned in paras 8.1 to 8.3 as "Accentia Software Solutions Ltd." be read as "Exensys Software Solutions Ltd." We further note that in para 8.3 there is a mistake in reproduction of the earlier order in the case of Textron Global Technology Centre Pvt. Ltd. and instead of the relevant finding in para 14, the wrong part of the order in para 19 & 20 was reproduced. Thus there is a mistake in the order which requires to be rectified. In view of the above facts and circumstances, mistake in paras 8.1 to 8.3 are hereby rectified and the same may be read as under :

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

8.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the CIT (Appeals) has excluded these two companies by considering various facts on functional comparability as well as extra-ordinary events during the year under consideration and not merely on the basis of high profit margins. He has further submitted that the company like **Exensys Software Solutions Ltd.** is functionally different and there is an extra ordinary event of amalgamation during the year under consideration with

M/s. Honlool India Ltd. He has referred the Annual Report of this company in support of his contention. The learned Authorised Representative has further submitted that even otherwise this company is engaged in diversified operation including software products as well as intangible assets, brands which comprise a substantial part of growth of assets. Therefore, this company cannot be considered as comparable to the assessee which is a captive service provider. In support of his contention, the learned Authorised Representative has relied upon a number of decisions of this Tribunal including the following decisions :

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

8.3 We have considered the rival submissions as well as relevant material on record. We note that though the CIT (Appeals) has finally concluded that this company has abnormal profit and accordingly directed the TPO/A.O to exclude the same from the set of comparables, however, as it is manifest from the Annual Report of the company that during the year under consideration this company entered into a scheme of amalgamation with **M/s. Holool India Ltd.** The scheme of amalgamation has been sanctioned by the Hon'ble High Court of Andhra Pradesh w.e.f. 1.4.2004 vide order dt.5.9.2005. Therefore, undisputedly there was an extra-ordinary event during the year under consideration in respect of this company. Further we find that the co-ordinate bench of this Tribunal in case of **M/s. Textron Global Technology Centre Pvt. Ltd.** in IT(TP)A No.29/Bang/2012 has considered the comparability of this company in paras 14 as under :

“14. Ground No.3 raised by the Revenue is misconceived and the issue does not arise out of the order of the CIT(A). As we have already seen the CIT(A) rejected some of the comparable companies

chosen by the TPO by applying related party transaction filter. The filter of companies dealing in software products and abnormal profits owing to amalgamation of the companies during the relevant period thereby showing abnormal profits was applied to exclude Exensys Software solutions Ltd. Infosys Technologies Ltd., was excluded for reasons of high turnover and high risk profile. Satyam Computer Services Ltd., has to be excluded from the comparable companies for non-reliability of financial data as it was involved in financial scam. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO (ITA 3856/Del/2010) and SAP India Pvt. Ltd v. ITO [ITA No. 398/8/2008]. Therefore the grievance as projected by the Revenue in ground No.3 is misconceived. On the facts of the present case, we are of the view that the CIT(A) rightly excluded Exensys Software Solutions Ltd., Infosys Technologies Ltd., and Satyam Computers Ltd., from the list of comparable companies."

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

15. Following the orders of the coordinate bench (supra) we direct the AO / TPO to exclude 8 companies from the set of comparables and reconsider the functional comparability in case of Geometric Software Solutions Ltd., and in the case of M/S.Bodhtree Consulting Ltd., by verifying the R.P.T.

16. Since we have directed the AO / TPO to exclude certain companies from the set of comparables and also remanded certain companies for verification of facts, therefore, the TPO/AO is directed to recompute the

arms length price on the basis of the remaining set of comparables. Needless to say the benefit of proviso to section 92C(2) of the Act shall also be considered.

17. In the appeal in IT(TP)A No. 1379/Bang/2011 against the order passed u/s. 154, the assessee has raised the following grounds:-

I. Write back of Provision for management charges

1. During the financial year 2004-05, the appellant had reversed a provision for management charges payable to its parent company amounting to Rs 801,775 and claimed 10A deduction on the same treating it as business income. The learned AO erred in holding that such reversal of management charge provision is not derived from export of computer software and hence, 10A deduction cannot be claimed on the same.

The learned CIT(A), in his order passed under Section 250 (dated 13.09.2011) had missed adjudicating on this ground. We had filed a rectification application under Section 154 against the CIT(A)'s order. Later, the CIT(A) passed a rectification order on the same.

2. The learned CIT(A) erred in dismissing the appeal on the ground that the reversal of the provision is merely an accounting entry and does not result in business income.
3. The learned CIT(A) erred in stating that there is no separate addition in the computation of income on the above account in the AO's order. However, it may be noted that the said reversal has been added back to the 10A profits by the AO for the purpose of computing 10A deduction.
4. The learned CIT(A) erred in not appreciating the fact that being a captive service provider, the provision made for management charges payable to its holding company is towards the conduct of its business and hence, should not be treated as not derived from export.
5. The learned CIT(A) ought to have appreciated that as the provision was allowed in the financial year 2003-04 (when the same was created) as a business expenditure pertaining to 10A unit, the reversal of the same ought to be considered as an income from business of the 10A unit only.

The Appellant craves leave to add, to alter or amend all or any of the aforesaid grounds of appeal. For the above and any other grounds which may be revised at the time of hearing, it is prayed that the order of the learned CIT (A) be set aside.

18. The only issue that arises in this appeal of the assessee is regarding the eligibility of deduction u/s. 10A in respect of the amount of provision for management charges payable to its AE has been reversed during the year under consideration. The Id. AR of the assessee has submitted that the assessee made provision for management charges payable to its parent company in the earlier years however during the year under consideration the assessee has reversed the said provision amounting to Rs. 8,01,775/- and therefore the assessee claimed the deduction u/s. 10A in respect of the said amount. The AO disallowed the claim of the assessee on the ground that reversal of management charges provision is not an income derived from export of computer software hence, 10A deduction cannot be allowed on the same. The CIT(A) did not adjudicate this issue while passing the main order therefore, the assessee filed a petition u/s. 154 but CIT(A) has rejected the claim of the assessee on the reason that the reversal of provision is merely an accounting entry which does not result in business income and therefore the AO was justified in excluding the said income from the business profits for computing deduction u/s. 10A.

19. Before us, the Id. AR of the assessee has submitted that this provision made in the earlier year was allowed by the AO as business expenditure and therefore it has reduced the claim of deduction u/s. 10A in the earlier years. In the year under consideration when the assessee has reversed this provision the income from business of the assessee has been enhanced and which is eligible for deduction u/s. 10A. On the other hand, the Id. DR has submitted that since this is only an accounting entry and does not result in business income during the year under consideration therefore it is not eligible for deduction u/s. 10A.

20. We have considered the rival submissions as well as relevant material on record. We note that the AO as well as CIT(A) has denied the claim of deduction u/s. 10A in respect of this amount of Rs. 8,01,755/- pertains to the reversal of provision for management charges payable to its parent company. The assessee has stated that this amount was allowed as business expenditure in the earlier year and therefore the business profit of the assessee for the purpose of deduction u/s. 10A was reduced by this amount in the earlier year. During the year under consideration the assessee has reversed the provision which has resulted increase in the business income of the assessee and therefore it is eligible for deduction u/s. 10A. Since this fact of provision being allowed as business expenditure in the earlier year has not been verified by the authorities below and therefore in the absence of any finding on this issue by the authorities below it is not possible to give a concluding finding at this stage. Thus in the facts and circumstances of the case we set aside this issue to the record of the AO for verification of the relevant facts and then decide the claim of the assessee as per law.

21. In the result, cross appeals are partly allowed. The assessee's appeal in IT(TP)A No.1379/B/2011 against the order passed u/s. 154 is allowed for statistical purposes.

Pronounced in the open court on this 28th day of February, 2020.

Sd/-

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 28th February, 2020.

/Desai S Murthy/

Copy to:

1. Assessee
2. Revenue
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.