

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE  
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>IT(TP)A No.612/Bang/2013</b>
<b>Assessment Year : 2005 - 06</b>

The Dy. Commissioner of Income Tax, Circle-2(1)(1), Bengaluru.	<b>Vs.</b>	M/s CGI Information Systems and Management Consultants Pvt. Ltd., (Successor in the interest of M/s Logica Pvt. Ltd.), E City, Tower-2, 95/1 & 95/2, Electronic City Phase 1 (West), Bengaluru-560 100.  PAN – AAACL 3330M
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	:	Shri Muzaffar Hussain, CIT (DR)
Respondent by	:	Ms. Tanmayee Rajkumar, Advocate

Date of Hearing	:	03-03-2020
Date of Pronouncement	:	-04-2020

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by revenue against order dated 22/02/2013 passed by Ld.CIT(A)-4, Bangalore for assessment year 2005-06 on following grounds of appeal:

1. *The order of the Learned CIT (Appeals). in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.*
2. *The learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in*

*excluding iGate Global Solutions Ltd., M/s. L&T Infotech Ltd., Satyam Computers Ltd., M/s. Infosys Technology Ltd. M/s Flextronics Software Systems Ltd. as a comparable in the segment.*

3. *The CIT(A), on the facts and in the circumstances of the case, erred in holding that M/s. Bodhtree Consulting Ltd, Geometric Software Solutions Co. Ltd. can not be taken as comparables, without appreciating the fact that the companies qualify all the qualitative and quantitative filters applied by the TPO in selection of these companies as comparables. -*
4. *The learned CIT (A) erred in directing inclusion of M/s VJIL Consulting Ltd. as a comparable without calling for a remand report from the TPO to ascertain the reasons for rejection of the comparable by the TPO.*
5. *The learned CIT (A) erred in directing inclusion of M/s VJIL Consulting Ltd., without appreciating the conclusion of the TPO that the company does not satisfy the qualitative filters applied for the purposes of comparability analysis and therefore was an inappropriate comparable for the purpose of determining the arm's length price.*
6. *The CIT(A), on the facts and in the circumstances of the case. erred in holding that M/s. Tata Elxsi Ltd.. call not be taken as comparable being functionally different without appreciating the fact that it satisfies all the qualitative and quantitative filters applied by the TPO.*
7. *The Ld. CIT (A) erred in excluding Exensys Software Solutions Ltd. and Thirdware Solutions Ltd from the list of comparables by rejecting the companies on the basis of Abnormal Profit without defining what constitutes abnormal profit filter and how tie same is determined*
8. *The learned CIT (A) erred in rejecting the diminishing revenue filter used by the TPO to exclude companies that do not reflect the normal industry trend.*
9. *The Ld.CIT(A) has erred in rejecting the employee cost filter applied by the TPO to select companies which are predominantly into software development services.*
10. *The CIT (A) was not justified in directing the AO to recompute the deduction allowable u/s 10A of the I.T.Act after reducing the communication charges of Rs. 3,62,43,727/- from the total turnover also.*
11. *The Ld. CIT (A) erred in not appreciating the fact that there is no provision in section 10A which requires the concerned expenses: which are required to be reduced from the export turnover as per clause (iv) of the Explanation to Section 10A, to be reduced from the total turnover also.*
12. *The Ld. CIT (A) erred in not appreciating the fact that the jurisdictional High Court's decision relied upon by him has not been accepted by the department and an appeal has been filed before Hon'ble Supreme Court which is still pending.*
13. *For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.*
14. *The appellants crave leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.*

**Brief facts of the case are as under:**

**2.** Assessee is a company and filed its return of income for year under consideration on 26/10/2005 declaring total income of Rs.81,34,602/-. Return was processed under section 143 (1) of the Act. Ld.AO observed that assessee is engaged in the business

of development of computer software for exports and software consultancy. As the case was selected for scrutiny, notice under section 143(2) was issued to assessee in response to which, representative of assessee appeared before Ld.AO and filed requisite details as called for.

**3.** Ld.AO observed that, assessee claimed deduction of Rs.14,09,10,912/- under section 10 A of the Act. Subsequently, Ld.AO reworked deduction under section 10A by reducing telecommunication charges incurred by.

**4.** Ld.AO observed that assessee entered into international transaction with associated enterprise and accordingly the case was transferred to Transfer Pricing officer in accordance to section 92CA of the Act.

**5.** Upon receipt of reference, Ld.TPO observed that assessee had following international transaction with its associated enterprise:

<b>Particulars</b>	<b>Amount(in rupees)</b>
Provision of software design and development services	Rs.131,15,23,660/-

**6.** Ld.TPO observed that, assessee used TNMM as most appropriate method and OP/TC as PLI, computing margin of assessee at 12.11%. Assessee selected 87 comparables. Ld.TPO applied various filters and accepted 6 comparables from assessee's list. Final list of comparables selected by Ld.TPO, comprised of total following 17 comparables, having mean margin of 26.59%.

<b>S.No.</b>	<b>Comparables</b>	<b>Margin</b>
1.	Bodhtree Consulting Ltd.	24.85%
2.	Lanco Slobal 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 Solutions Ltd	66.09%
8.	RS 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 Communications 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%
	<b>Average margin</b>	<b>26.59%</b>

**7.** Ld.TPO observed that assessee was a contract service provider and earned a steady income on the cost it incurred in rendering services. He also observed that assessee is not a risk bearing entrepreneurial company. It has also been accepted by

authorities below that assessee do not undertake any R&D activities on its own.

**8.** Ld.AO computed shortfall being, Rs.17,23,25,636/- and proposed it to be an adjustment under section 92C of the Act.

Aggrieved by order passed by Ld.AO, assessee preferred appeal before Ld.CIT(A).

**9.** Upon considering submissions made by assessee, Ld.CIT (A) rejected Flextronics Ltd, L&T Infotech Ltd, Infosys Technologies Ltd, Satyam Computer Services Ltd., and iGate Global Solutions Ltd., by applying turnover filter of 1 crore to 200 crore. Ld.CIT (A) also excluded Exensys Software Solutions Ltd and Thirdware Solutions Ltd., for having abnormally high profits in excess of 50% during financial year 2004-05.

**10.** Further, Ld.CIT(A) accepted assessee's contention of Bodhtree Consulting Ltd., Geometric Software Solutions Ltd and Tata Elxsi Ltd to be functionally not comparable with assessee. Ld.CIT(A) also excluded VIJIL Consulting Ltd. Upon passing of order by Ld.CIT (A) following comparables remains for purposes of computing arm's length margin of the transaction:

S.No.	Comparables
1.	Lanco Global Systems Ltd.
2.	Sankhya Infotech Ltd.
3.	Sasken Network Systems Ltd.
4.	Four Soft Ltd.
5.	RS Software (India) Ltd.
6.	Visualsoft Technologies Ltd

7.	Sasken Communications Technologies Ltd.
8.	VIJIL Ltd.

**11.** Ld.CIT(A) observed that assessee's margin was within +/-5% range of arithmetical mean of remaining comparables, and accordingly, deleted transfer pricing adjustment proposed by Ld.TPO.

**12.** As regards deduction under section 10A claimed by assessee which was reduced by Ld.AO, Ld.CIT(A), followed decision of *Hon'ble Karnataka High Court* in case of *ACIT vs Tata Elxsi Ltd.*, reported in (2012) 17 *taxmann.com* 100, and held that export turnover being part of total turnover is present in both the numerator and denominator. He held that for computing profit exempt under section 10A, once a particular expense is excluded from the numerator it is imperative to exclude the same from the denominator as well. He thus directed Ld.AO to exclude from total turnover, the expenses already excluded from export turnover and accordingly modify computation of exemption allowable under section 10 A in the hands of assessee.

Aggrieved by order of Ld.CIT (A), revenue is in appeal before us now.

**13.** Ld.CIT.DR submitted that **Ground No. 1** is general in nature and therefore do not require any adjudication.

**14. Ground No. 2** is against excluding comparables by applying turnover filter.

**14.1.** He submitted that, Ld.CIT(A) excluded Flextronics Ltd, L&T Infotech Ltd, Infosys Technologies Ltd, Satyam Computer Services Ltd., and iGate Global Solutions Ltd., by applying

turnover filter of 1 crore to 200 crore. Ld. CIT DR submitted that assessee is having a turnover of Rs. 138.61 crores. He placed reliance upon decision of *Hon'ble Delhi High Court* in case of *Chryscapital Investment Advisors India (P.) Ltd. v. DCIT [2017] 82 taxmann.com 167* wherein, *Hon'ble Court* held that unless the turnover affects profit margin of a particular comparable, the filter need not be considered for excluding certain comparables.

**14.2.** On the contrary, Ld.AR submitted that even otherwise these comparables are functionally not similar with assessee which is a captive service provider. Ld.AR placed reliance upon the decisions of this *Tribunal* in assessee's own case for assessment year 2007-08 reported in (2013) 36 *Taxmann.com* 374, assessment year 2008-09 by order dated 18/07/2014 in ITA (TP) A No. 1192/B/2012 and assessment year 2009-10 by common order dated 18/03/2016 in ITA(TP)A No. 1621 and 1664/be/2014, wherein these comparables have been held to be functionally dissimilar with assessee. Ld.AR submitted that there is no dispute that the functions performed by assessee for year under consideration is identical to the functions analysed by this *Tribunal* in subsequent assessment years.

**14.3.** We have perused submissions advanced by both sides in light of records placed before us.

It is observed that revenue is aggrieved by applying the turnover filter for excluding comparables. We note that Ld.AO/TPO has applied filter of more than 1 crore but did not put an upper limit to the filter. This *Tribunal* in case of *Genesis Integrating Systems India Pvt Ltd vs DCIT* reported in (2012) 53 SO T159 and various other decisions have held that companies having turnover in

excess of 200 crores cannot be compared with companies having turnover less than 200 crore. This proposition has been accepted by *Hon'ble Bombay High Court* in case of *CIT vs Pentair Water Pvt.Ltd.*, by order dated 16/09/2015 in *ITA No. 18/2015*. *Hon'ble court* upheld rejection of companies having turnover holding that turnover is a relevant factor in considering comparability of companies.

**14.3.1.** Objection raised by Ld.CIT.DR by placing reliance upon decision of *Hon'ble Delhi High Court* in case of *Chris Capital (supra)* has been dealt with by this *Tribunal* in case of *Autodesk India Pvt.Ltd. vs DCIT in (2018) 96 taxmann.com 263 for assessment year 2005-06*. This *Tribunal* reviewed gamut of case laws to consider, whether identical companies companies having turnover more than 200 crores should be regarded as a comparable with the company having turnover less than 200 crore. This *Tribunal* held as under:

**“17.7** *We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt. Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of Pentair Water India (P.) Ltd. (supra) has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies*

from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

**17.8** In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India (P.) Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

Based upon above discussions we are of opinion that objection raised by revenue cannot withstand the test of law.

**Accordingly ground No. 2 raised by revenue stands dismissed.**

**15. Ground No.3** is challenging exclusion of Bodhtree Consulting Ltd and Geometric Software Solutions Co.Ltd

Ld.CIT DR submitted that in case of Geometric Software Ld.CIT (A) relied upon decision of SAP Labs and applied RPT filter for its exclusion. He submitted that Ld.TPO did not discuss regarding Bodhtree Consulting Ltd. He thus requested for the comparable to be set-aside to Ld. TPO for verification.

**15.1.** On the contrary, Ld.AR relied upon observations of learn CIT (A) and submitted that this comparables are functionally not similar with assessee. He submitted that both trade consulting limited is engaged in diverse functions and has RPT filter of 34.68%. He also submitted that in the profit and loss account there is no break up or segmental details available for various services rendered by this company. In respect of geometric software solutions Ltd., Ld.AR submitted that it is engaged in development and licensing of products and providing product life cycle management which is not at all similar with that of assessee and. It has been submitted that this comparable also has a RPT of 22.52%.

**15.2.** We have perused submissions advanced by both sides in light of records placed before us.

We find that Ld.CIT(A) directed their exclusion of these comparables as they are functionally dissimilar to Assessee. Ld. CIT (A) observed that engaged in developing Software Products and for the reason that this company was rendering both SWD services and was also in providing Information Technology Enabled Services (ITES) and break up of revenues from diverse segments was not available. This *Tribunal* in case of *Sysarris Software (P.) Ltd.vs.DCIT, reported in, (2016)67 taxmann.com 243,*

wherein vide paras 20-21, Bodhtree has been held to be not functionally comparable with a company providing SWD services.

29. In respect of Geometric Software, Ld.CIT (A) observed that RPT filter is more than 15% amounting to 19.47%. It is observed by Ld.CIT(A) that this company earns revenue from sale of software products and services specialised in product life cycle management services for mechanical design, manufacturing and industrial markets. It is noted that Ld.CIT(A) excluded these comparables for functional dissimilarities. Nothing has been brought on record by Ld.CIT DR contrary to observations of Ld.CIT (A) to deviate from the same. We do not find any infirmity in observations of Ld.CIT (A) and the same is upheld.

**Accordingly this ground raised by revenue stands dismissed.**

**16. Ground No.4 and 5** is regarding inclusion of VIJIL Consulting Ltd by Ld.CIT(A)

Ld.CIT DR submitted that this comparable was originally included by Ld.TPO, while issuing show cause notice, however subsequently the same was dropped.

**16.1.** Ld.AR placed reliance upon observations of Ld.CIT (A).

**16.2.** We have perused submissions advanced by both sides in light of records placed before us. We note that Ld.CIT (A) relied upon reply to notice issued by Ld.TPO under section 133 (6). Ld.CIT (A) notes that certain VAT expenses were incurred by this company in UK and not in India. It has been observed that VAT was indirect tax applicable on goods as well as services which is evident from companies annual report that it is primarily into provision of software development services. Ld.CIT (A) however is

not sure whether the payment of VAT indicates sale of products as there is no evidence on record in respect of the said.

**16.2.1** We are of the view that this aspect has not been verified by Ld. AO/TPO. We direct Ld. AO/TPO to verify the same and in the event there is sale of product by this comparable the same may be excluded otherwise it deserves to be retained in the final list.

**Accordingly these grounds raised by revenue stands allowed for statistical purposes.**

**17. Ground No. 6** is against exclusion of Tata Elxsi Ltd

Ld.CIT.DR submitted that this company is into software development services as provided in the annual report of the company. He also submitted that there are segmental information available in respect of both the segments being software development services and system integration and support services and therefore Ld.CIT (A) should not have excluded the same.

**17.1.** Ld.AR on the contrary placing reliance upon view expressed by Ld.CIT(A) submitted that the segment selected by Ld.TPO for purposes of comparability comprises of services such as product design, design engineering and visual computing labs which are in the nature of IT enabled services, and therefore not comparable with software development services provided by assessee. He also placed reliance upon orders passed by this *Tribunal in assessee's own case for assessment year 2007-08 reported in (2013) 36 Taxmann.com 374, assessment year 2008-09 by order dated 18/07/2014 in ITA (TP) A No. 1192/B/2012*

*and assessment year 2009-10 by common order dated 18/03/2016 in ITA(TP)A No. 1621 and 1664/be/2014.*

**17.2.** We have perused submissions advanced by both sides in light of records placed before us.

We note that Ld.CIT (A) excluded this comparable as it was engaged in development of niche products and services which was entirely different from services rendered by assessee to its associated enterprises. Ld.CIT(A) categorically observed that revenue earned by this company comprises of products as well and therefore though the company satisfies that turnover criteria the functional differences requires it to be eliminated. We do not find any infirmity in the observations of Ld.CIT (A) and the same is upheld.

**Accordingly this ground raised by revenue stands dismissed.**

**18. Ground No.7** is against exclusion of Exensys software solutions Ltd and Thirdwere solutions Ltd by Ld.CIT (A)

Ld.CIT.DR submitted that these comparables were excluded for having abnormal profits by Ld.CIT (A). Ld.CIT DR referred to and relied upon his arguments advanced while dealing with ground No. 2 on turnover filter considered herein above.

**18.1.** On the contrary, Ld.AR placed reliance upon decision of this *Tribunal* in case of *ITO vs Net Devices Pvt.Ltd* reported in [2015] 63 *taxmann.com* 94.

**18.2.** We have perused submissions advanced by both sides in light of records placed before us.

Apart from the fact that, profit margins of these companies were abnormally high owing to extraordinary events that happened during the relevant previous year, these two companies have to

be excluded on the ground that these two companies are functionally dissimilar to that of the Assessee which is contract software service provider. As far as Exensys Software Solutions Ltd., is concerned, we have already held that Ld.CIT(A) was justified in excluding this company from the list of comparable companies on the ground that its profits were abnormally high owing to extraordinary event of merger/amalgamation that took place during the relevant previous year.

**18.2.1.** Ld.AR submitted that Thirdware Solutions Ltd., is engaged in multiple diverse activities in FY 2004-05 including (a) software development services under which the company provides application development, customer relationship management and ERP; and (b) sale of software product and related services, without proper segmental data being available for the said diverse activities.

**18.2.2.** We note that it is for such reasons Bangalore ITAT in *Net Devices India Pvt. Ltd. (supra)* at paras 8.1-8.3 and 9.1-9.3 at pages 15-19 and 19-21 respectively] excluded these comparables as functionally not similar service provider such as Assessee. Respectfully following the same we uphold observations of learn CIT (A).

**Accordingly this ground raised by revenue stands dismissed.**

**19.** Both sides submitted that **Grounds 8 and 9** are academic in nature and therefore do not require any adjudication.

**20. Ground No. 10-12** is in respect of claim allowed by Ld.CIT (A) under section 10 A of the Act.

Admittedly this issue stands covered by decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd.*, reported in

(2012) 17 taxmann.com 100. We therefore do not find any infirmity in the view taken by Ld.CIT (A).

**Accordingly this ground raised by revenue stands dismissed.**

**21. Ground No.13-14** are general in nature and therefore do not require any adjudication.

**In the result appeal filed by revenue stands partly allowed.**

Order pronounced in the open court on April, 2020.

Sd/-  
(B. R. BASKARAN)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the April, 2020.  
/Vms/

**Copy to:**

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

By order

Assistant Registrar,  
Income-Tax Appellate Tribunal.  
Bangalore.

		<b>Date</b>	<b>Initial</b>	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	Date of uploading the order on Website			Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk			Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS