

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.187/Bang/2016
Assessment year: 2011-12

Aspect Technology Center (India) Private Limited, Embassy Star, 2 nd Floor, No.8, Palace Road, Vasanthnagar, Bangalore – 560 052. PAN: AACCC 3490K	Vs.	The Income Tax Officer, Ward 1(1)(2), Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.175/Bang/2016
Assessment year: 2011-12

The Income Tax Officer, Ward 1(1)(2), Bangalore.	Vs.	Aspect Technology Center (India) Private Limited, Bangalore – 560 052. PAN: AACCC 3490K
APPELLANT		RESPONDENT

Appellant by	:	Ms. Tanmayee Rajkumar, Advocate
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	27.07.2020
Date of Pronouncement	:	30.07.2020

ORDER

Per N.V. Vasudevan, Vice President

IT(TP)A No.187/Bang/2016 is an appeal by the revenue, while
IT(TP)A No.175/Bang/2016 is an appeal by the assessee. Both these

appeals are directed against the order dated 16.12.2016 of the ITO, Ward 1(1)(2), Bangalore passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] in relation to AY 2011-12.

2. The grounds of appeal raised by the revenue in its appeal reads as follows:-

“1. The orders of the Dispute Resolution Panel is opposed to law and the facts and circumstances of the case.

Software development services segment:

2. The DRP erred in directing the AO/TPO to exclude M/s. Acropetal Technologies Ltd., M/s. Mindtree Ltd., and M/s. R.S. Software (India) Ltd., from the list of comparables, holding them to be functionally dissimilar as they are having significant onsite revenues, thereby seeking exact comparability while searching for comparable companies of the assessee under TNMM method, whereas requirement of law and international jurisprudence require seeking similar comparable companies. Also, the nature of activity, ie., software development remains the same, irrespective of the company engaged in providing onsite or offshore services.

3. The DRP erred in directing exclusion of M/s. R.S. Software Pvt. Ltd., M/s. Mindtree Ltd., and M/s. Acropetal Technologies Ltd., on the ground that they have significant onsite revenue, without appreciating the fact that onsite development of software entails more cost and thereby results in lower profit margins.

4. The DRP erred in directing the AO to exclude M/s. Acropetal Technologies Ltd., from the list of final comparables also for the reason that clear segmental information of the employee cost and export earning filter was not available, without appreciating that proper segmental information was available on Prowess database as well as audited financials.

5. The DRP erred in directing the AO to exclude M/s. Mindtree Ltd., from the list of comparables holding it to be

functionally dissimilar also for the reason that there were extraordinary event of merger when it has not been proved that such merger has any material effect on profit margin.

6. The DRP erred in directing to exclude E-infochips Ltd., from the list of comparables holding that it is functionally not comparable as no segmental information is available and for the reason that it fails 75% service revenue filter, by not acknowledging the fact that entire revenue of the company comes from provision of services, and service income being 100% of its sales, the company qualifies the filter.

7. The DRP erred in directing exclusion of M/s. M/s.ICRA Techno Analytics Ltd., from the list of comparables on the ground that it is into diversified activity and no segmental data is available, without appreciating that the basic function of the company is developing software solutions in those and other verticals. The DRP also failed to appreciate that the company's business of analysis of statistical data of its clients before providing software solutions does not render the services to be functionally uncomparable.

8. The DRP erred in directing to exclude M/s.E-Zest Solutions Ltd., from the list of comparables holding it to be functionally uncomparable, thereby seeking exact comparability by imposing condition beyond law whereas requirement of law is to acknowledge only those differences that are likely to materially affect the margin. The DRP ought to have appreciated that the comparable qualified all the qualitative and quantitative filters applied by the TPO and in a computer software services, if considered as a sector of business, the 15 different lines prevailing in the business cannot be considered functionally different from each other.

9. The DRP erred in directing exclusion of M/s.Infosys Technologies Ltd., from the list of comparables holding it to be functionally uncomparable, without appreciating that the primary source of income of the comparable is from provision of software development services. Also, the DRP erred in imposing a condition beyond law in seeking exact comparability, whereas

requirement of law is to acknowledge only those differences that are likely to materially affect the margin.

10. The DRP erred in disregarding the position of law that there could be differences between the enterprises compared under TNMM method that are not likely to materially affect the price or cost charged or the profits accruing to such enterprises.

11. The DRP erred in directing the AO/TPO to exclude M/s. Evoke Technologies Ltd., from the list of comparables, holding it to be functionally uncomparable due to the peculiar economic circumstances without appreciating that the expenditure incurred is a normal phenomenon and a company cannot be excluded merely on abnormal profit margins.

12. The DRP erred in directing the AO/TPO to exclude M/s. R.S. Software (India) Ltd., from the list of comparables merely to maintain consistency, even in the absence of objection with respect to inclusion of the said comparables in the list.

13. The DRP erred in directing the AO/TPO to consider the foreign exchange fluctuation to be operating in nature, without appreciating that the Rule 10B(2)(d) stipulates that the net profit margin realized by the assessee in the international transaction shall alone be computed for comparability under TNMM.

ITES Segment :

14. The DRP erred in directing the AO/TPO to exclude M/s. Acropetal Technologies Ltd., Jeevan Scientific Technology Ltd., Accentia Technologies Ltd., iGate Global Solutions Ltd. and ICRA online Ltd., holding it to be functionally uncomparable in the absence of segmental information, without appreciating that proper segmental information of the company is available on Prowess database and audited financials and only the appropriate segment has been correctly considered by the TPO. The DRP also erred in seeking exact comparability as requirement of law and international jurisprudence require seeking just similar comparable companies.

15. The DRP erred in directing to exclude M/s. Cosmic Global Ltd., holding it to be functionally uncomparable as it is having a

different working model that may have significant effect on the margin by looking only at the ratio of sub-contracting expenses without looking into the entire functional profile of the company, when the comparable satisfied all the filters applied by the TPO. Also, insisting on strict comparability under TNMM method defeats the very purpose of the law relating to determination of ALP under the I.T.Act.

Corporate Issue:

16. The DRP erred in directing the AO to follow the ratio laid down by the Hon'ble Court in the case of Tata Elxsi Limited 349 ITR 98 and exclude telecommunication expenses and travelling expenses incurred in foreign currency from the total turnover also, while computing the deduction u/s 10A of the I.T. Act, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to section 10A provides that such expenses are to be reduced only from the export turnover.

17. The DRP erred in not appreciating the fact that the jurisdictional High Court's decision in the case of Tata Elxsi Limited 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.

18. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.

19. The appellate craves 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.”

3. The assessee in its appeal has raised several grounds, but at the time of hearing, the ld. counsel for the assessee prayed that ground No.4(a)(b)(d)(e) & (i) in the main grounds of appeal and ground No.4(j) and 7.1 raised in the form of additional grounds alone need to be adjudicated. The relevant grounds of ground No.4 and the additional grounds 4(j) and 7.1 read as follows:-

“4. Determination of arm's length price of the Appellant's international transaction of provision of software development services:

(a) That, in view of the high turnovers of L&T Infotech Ltd., Persistent Systems Ltd., Sasken Communications Technologies Ltd., and Tata Elxsi Ltd., indicating, inter alia, high ownership of intangibles and significantly high brand value, they ought to stand excluded from the final list of comparable companies in respect of the Appellant's international transaction of provision of software development services.

(b) That, without prejudice to the above, Tata Elxsi Ltd. ought to stand excluded from the final list of comparable companies as it is engaged in the development of niche products and the provision of product designing services which are entirely different from the services provided by the Appellant and is, hence, functionally dissimilar to the Appellant.

(c) That, without prejudice to the Appellant's contention that the AO/TPO ought not to have arbitrarily rejected those companies having export revenues less than 75% of their total sales, the AO/TPO erred in rejecting Helios & Matheson Information Technology Ltd., Thinksoft Global Services Ltd. and Zylog Systems Ltd. on that ground despite the said companies having export turnovers in excess of 75% of their total turnovers. The DRP further erred in confirming the same.

(d) That, without prejudice to the Appellant's contention that the AO/TPO ought not to have arbitrarily rejected those companies having employee costs less than 25% of their total revenues, the AO/TPO erred in rejecting CG Vak Software & Export Ltd. on that ground despite the said company having an employee cost in excess of 25% of its total revenue. The DRP further erred in confirming the same.

(e) That the DRP grossly erred in rejecting companies selected by the Appellant in its TP Study as well as companies selected by the TPO in the TP order by arbitrarily applying an onsite development of software filter without the TPO having applied such a filter and without affording the Appellant an opportunity of hearing prior to applying such a filter.

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(i) That the DRP has erroneously directed exclusion of Evoke Technologies India Private Limited and RS Software (India) Private Limited from the list of comparable companies while benchmarking the Appellant's transaction of provision of SWD services, despite them being functionally comparable to the Appellant.”

Additional grounds of appeal

“4(j) That e-Zest Solutions Ltd., Larsen and Toubro Ltd., Persistent Systems & Solutions Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd. ought to be excluded from the final list of comparables as the functions performed, assets employed and risks assumed by the companies are different from that of the Appellant.

7.1 That the AO/ TPO erred in law and on facts in determining a negative working capital adjustment.”

4. As far as the question of admission of additional grounds is concerned, it is seen that these grounds arise out of the order of DRP and related to grounds of appeal already raised by the Assessee in its appeal but omitted to be specifically and precisely raised in the original grounds of appeal and are therefore admitted for adjudication.

5. We shall first identify the issues to be decided in these cross appeals. The issues that arise in these cross appeals are with regard to determination of Arm's Length Price (ALP) in respect of two international transactions between the Assessee and its Associated Enterprise (AE) under the provisions of Sec.92 of the Income Tax Act, 1961 (Act) viz., (i) International Transaction of rendering of Software Development Services (SWD services) by the Assessee to its AE and (ii) rendering of Information technology enabled services (ITeS) by the Assessee to its AE. As far as

the appeal of the Revenue is concerned, Gr.No.1, 18 & 19 are general grounds and need no specific adjudication. As far as Grounds 2 to 12 raised by the revenue are concerned, they relate to correctness of exclusion of comparable companies selected by the Transfer Pricing Officer (TPO) in his order u/s.92CA of the Act by the Dispute Resolution Panel (DRP) in its directions, in the SWD services segment. Gr.No.13 raised by the revenue relates to the action of the DRP in directing the TPO/AO to consider foreign exchange gain as part of operating profits of the Assessee for comparing the Assessee's profit margin with the comparable companies. Gr.No.14 & 15 relates to correctness of exclusion of comparable companies selected by the Transfer Pricing Officer (TPO) in his order u/s.92CA of the Act by the Dispute Resolution Panel (DRP) in its directions, in the ITeS segment. Gr.No.16 & 17 relates to the directions of the DRP to exclude from the total turnover whatever is excluded from the Export Turnover while computing deduction u/s.10A of the Act.

6. As far as the appeal of the Assessee is concerned, Gr.No.4(a) (b) (d)(e)(i) & (j) relate to exclusion of comparable companies and inclusion of comparable companies in the SWD services and ITeS segments and correctness of application of certain filters in excluding and including comparable companies. Gr.No.7(i) relates to the action of the TPO in determining negative working capital adjustment while computing ALP in both the SWD services segment and ITeS segments. We shall deal with each of the segments separately.

7. The Assessee is a direct subsidiary of Concerto Software Cayman Holdings Limited. The Assessee is a captive development centre for Aspect US and renders software development and solutions and ITES to support the global contracts negotiated by Aspect US and other affiliates. It is a

registered 100% software export oriented unit under the Software Technology Parks of India(STPI) Scheme.

8. During the previous year relevant to the AY 2011-12, two of the international transactions that took place between the Assessee and its AEs were the provision of software development (“SWD”) services by the Assessee at a price of Rs.17,32,18,123/-, for which a TP adjustment was made by the TPO to an extent of Rs.1,86,43,313/-, and the provision of IT-enabled Services (“ITeS”) by the Assessee at a price of Rs. 6,96,70,912/- in respect of which an adjustment of Rs.75,86,907/- was made by the TPO.

9. Initially, a draft assessment order dated 09.02.2015 came to be passed by the AO upon incorporating the aforesaid TP adjustments. In respect of deduction under Section 10A of the Act claimed by the Assessee, it was sought to be restricted upon disallowing an amount of Rs. 13,70,475/- being telecommunication expenses and an amount of Rs. 8,35,695/- being travel expenses incurred in foreign currency only from the Assessee’s export turnover without making a corresponding reduction of the said amounts from its total turnover.

10. Aggrieved, the Assessee filed its objections before the DRP which, vide its directions dated 05.11.2015, partly allowed the objections raised by the Assessee.

11. Pursuant to the directions of the DRP, the AO passed the final assessment order dated 16.12.2015 in which the total TP adjustment was reworked to Rs. 1,38,55,462/ for the two segments put together. Also, the DRP having accepted the contention of the Assessee that the amounts if any reduced from the export turnover in computing the deduction under Section 10A should also be correspondingly reduced from the total

turnover, there was no reduction in the deduction claimed under Section 10A.

12. To the extent the TP adjustment survives post the DRP's directions, the Assessee has filed the above appeal and to the extent the Revenue is aggrieved by the DRP's directions allowing the Assessee's objections, it has filed the above appeal before this Hon'ble Tribunal.

DETAILS OF THE ASSESSEE'S INTERNATIONAL TRANSACTIONS

Particulars	Amount in Rs.	Outcome of TP Order
Receipt for provision of ITe services	6,96,70,913/-	Adjustment of Rs.75,86,907/-
Receipt of provision of SWD services	17,32,18,123/-	Adjustment of Rs. 1,86,43,313/-

SOFTWARE DEVELOPMENT SERVICES SEGMENT:

13. It is not in dispute between the Assessee and the revenue that the Transaction Net Margin Method (TNMM) was the Most Appropriate Method (MAM) for determination of ALP and that the profit level indicator to be adopted for comparison of the Assessee's profit with that of comparable companies was Operating Profit/Total Cost (OP/TC). The OP/TC of the Assessee was 14.69%. The Assessee in its TP study selected 22 comparable companies whose arithmetic mean of OP/TC was arrived at 13.60%. Since the profit margin of the Assessee was more than the arithmetic mean of OP/TC of the 22 comparables selected by the Assessee, it was claimed by the Assessee that the price charged by it in the international transaction was at Arm's Length. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred by the AO, accepted 6 out of the 22 comparable companies suggested in the TP study by the Assessee as comparable with the Assessee. The TPO on his own

selected 7 other companies as comparable companies with the Assessee. Thus a final set of 13 comparable companies was chosen by the TPO as comparable companies. The arithmetic mean of profit margin of these companies after and before adjustment towards working capital adjustment was as follows:-

Net mark-up on cost earned by the Assessee as computed by the TPO in the TP Order:

Operating Income	Rs. 17,32,18,123/-
Operating Cost	Rs.15,10,36,319/-
Operating Profit (Op. Income – Op. Cost)	Rs. 2,21,81,804/-
Operating/Net mark-up (OP/TC)	14.69%

Comparables selected by Assessee and their arithmetic mean:

Sl. No.	Name of the company	Average NPI (in %)
1.	Akshay Software Technologies Ltd.	4.58
2.	Ancent Software International Ltd.	6.83
3.	Aztecsoft Ltd. (consolidated)	6.80
4.	Caliber Point Business Solutions Ltd.	-0.95
5.	Cat Technologies Ltd.	26.90
6.	CG-VAK software and exports Ltd.	0.31
7.	Evoke Technologies Pvt. Ltd	20.05
8.	Goldstone Technologies Ltd.	4.37
9.	Helios and Matheson Information Technology	17.22
10.	KPIT Cummins Infosystems Ltd.	12.53
11.	Larsen and Toubro Infotech Ltd.	18.12
12.	LGS Global Ltd.	14.15
13.	Maveric Systems Ltd.	14.50
14.	Mindtree Ltd.	12.08
15.	Persistent Systems Ltd.	23.91
16.	RS Software (India) Ltd.	11.99
17.	R Systems International Ltd.	12.10
18.	Sasken Communication Technologies Ltd.	22.79
19.	Saven Technologies Ltd.	17.43
20.	Thinksoft Global Services Ltd.	11.54
21.	Thirdware Solutions Ltd.	21.75
22.	Zylog Systems Ltd.	20.23
Arithmetical Mean		13.60

NOTE: Out of the 22 comparables selected by the Assessee, the TPO accepted the 6 highlighted above, viz. Larsen and Toubro Infotech Ltd., Evoke Technologies Pvt. Ltd., Persistent Systems Ltd., RS Software (India) Ltd., Mindtree Ltd. (at segment level) and Sasken Communication Technologies Ltd., and rejected the other 16.

Comparables selected by TPO and their arithmetic mean:

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)	Mark-up on Total Costs (WC – adj) (in %)
1	Acropetal Technologies Ltd. (seg)	31.98	31.71
2	e-Zest Solutions Ltd.	21.03	21.96
3	E-Infochips Ltd.	56.44	59.21
4	Evoke Technologies Pvt. Ltd.	8.11	10.97
5	ICRA Techno Analytics Ltd.	24.83	25.84
6	Infosys Ltd.	43.39	46.51
7	Larsen & Toubro Infotech Ltd.	19.83	22.90
8	Mindtree Ltd. (seg)	10.66	12.22
9	Persistent Systems & Solutions Ltd.	22.12	24.20
10	Persistent Systems Ltd.	22.84	24.63
11	R S Software (India) Ltd.	16.37	19.21
12	Sasken Communication Technologies Ltd.	24.13	27.55
13	Tata Elxsi Ltd. (seg)	20.91	21.96
AVERAGE MARK-UP		24.82	26.83*

Note: The TPO erroneously considered the adjusted average mark-up of the comparables at 27.03%

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

Arm's Length Mean Mark-up	24.82%
Less: Working Capital Adjustment	-2.21%%
Adjusted mean mark-up of the comparables	27.03%
Operating Cost	Rs. 15,10,36,319/-
Arm's Length Price – 127.03% of Operating Cost	Rs. 19,18,61,436/-
Price Received	Rs.17,32,18,123/-
Shortfall being adjustment u/s. 92CA	Rs.1,86,43,313/-

14. The AO incorporated the addition to the total income by way of shortfall being adjustment u/s.92CA of the Act, in his draft order of Assessment. Against the said addition in the draft assessment order, the Assessee filed objections u/s.144C of the Act before the DRP. The DRP accepted some of the contentions of the Assessee. Briefly, the directions issued by the DRP are as follows:-

(i) Functionality Filter:

The following companies were directed to be excluded by accepting the contentions of the Assessee:

- (i) Acropetal Technologies Ltd.
- (ii) E-Infochips Limited
- (iii) ICRA Techno Analytics Ltd.
- (iv) Infosys Ltd.

The DRP, however, rejected the contention of the Assessee that Sasken Communication Technologies Ltd. was not functionally comparable to it and consequently upheld its inclusion in the final list of comparables. The DRP also *suo moto* directed the exclusion of R S Software (India) Ltd., Mindtree Ltd. and Evoke Technologies Pvt. Ltd. As regards the Assessee's contentions for inclusion of its TP study comparables, the DRP rejected the same and thereby upheld their exclusion by the TPO.

(ii) Onsite Software Development activities:

In addition to the above, the DRP rejected the following companies selected by the TPO on the basis that they were predominantly engaged in onsite activities, although no onsite revenues filter had been applied by the TPO:

- (a) Acropetal Technologies Ltd. (rejected by DRP on other grounds also)
- (b) RS Software (India) Ltd. (rejected by DRP *suo moto* only on this ground)
- (c) Mindtree Ltd. (rejected by DRP *suo moto* on other grounds also)

15. On giving effect to the above directions issued by the DRP, the final list of comparables is as follows:-

Sl. No.	Name of the Company
1	e-Zest Solutions Limited
2	Persistent Systems & Solutions Ltd.
3	Persistent Systems Ltd.
4	Sasken Communication Technologies Ltd.
5	Tata Elxsi Ltd.
6	L & T Infotech Limited

16. Pursuant to the directions of the DRP, the TP adjustment as regards the international transaction of provision of SWD services was reworked to **Rs. 1,38,55,462/-**.

17. Aggrieved by the relief allowed by the DRP, the Revenue is in appeal before the Tribunal. Aggrieved by the order of DRP not accepting some of the contentions raised by the Assessee, the Assessee is in appeal before the Tribunal.

18. As far as the appeal of the Revenue is concerned, the grounds in Revenue's appeal are as follows:-

- (i) That the DRP erred in *suo moto* applying the onsite revenue filter and in consequently excluding RS Software Pvt. Ltd. Mindtree Ltd. and Acropetal Technologies Ltd. (**Ground Nos. 2 and 3**)
- (ii) That the DRP erred in directing exclusion of Acropetal Technologies Ltd. For the reason that segmental information regarding employee cost and export earnings were not available. (**Ground No. 4**)
- (iii) That the DRP erred in directing exclusion of Mindtree Ltd. for the reason that the company is functionally dissimilar and that there was extraordinary event of merger, when the same was not proved to have any material effect on its margin (**Ground No. 5**)

- (iv) That the DRP erred in deleting E-infochips Ltd. on the ground that it fails the filter of service revenue income less than 75% of the sales. (**Ground No. 6**)
- (v) That the DRP erred in directing exclusion of ICRA Techno Analytics Ltd. on the ground that segmental details were not available (**Ground No. 7**)
- (vi) That the DRP erred in direction exclusion of E-zest Solutions Ltd., Evoke Technologies Ltd. and Infosys Technologies Ltd. on the ground that they were not functionally comparable (**Ground Nos. 8, 9 and 11**)
- (vii) That the DRP erred in directing exclusion of RS Software (India) Ltd. in the absence of objection with respect to its inclusion (**Ground No. 12**)

19. As far as the appeal of the Assessee is concerned, the grounds in the Assessee's appeal which are being pressed are as follows:

- (i) That the TPO erred and the DRP further erred in including Sasken Communications Ltd. in the list of comparables although it fails the test of comparability. (**Ground No.4(a) and 4(j)**-[additional ground])
- (ii) That the DRP erred in rejecting RS Software Pvt. Ltd., and Evoke Technologies Pvt. Ltd. from the list of comparables (**Ground Nos. 4(e) and (i)**).
- (iii) That the AO/TPO erred in rejecting CG Vak Software and Export Ltd. for the reason that it failed the filter of employee cost in excess of 25% of its total revenue. (**Ground No. 4(d)**)
- (iv) That e-Zest Solutions Ltd., Larsen and Toubro Ltd., Persistent Systems & Solutions Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd. ought to be excluded from the final list of comparables (**Ground No. 4(j)**-[additional ground])
- (v) That Tata Elxsi Ltd. ought to be excluded from the final list of comparables (**Ground No. 4(b)**)
- (vi) That the AO/ TPO erred in law and on facts in determining a negative working capital adjustment. (**Ground No. 7.1**-[additional ground])

19. As far as Revenue's appeal is concerned, in ground Nos. 2 to 5, the Revenue has challenged the action of the DRP in *suo moto* rejecting companies selected by the TPO, viz. **Acropetal Technologies Ltd.**,

Mindtree Ltd. and **RS Software (India) Ltd.**, on the basis that they were predominantly engaged in the onsite development of software in FY 2010-11. It was rightly contended that the exclusion of these companies from the final list of comparable companies chosen by the TPO, by the DRP was arbitrary because the TPO did not apply any filter as regards onsite revenues nor did the Assessee seek to apply these filters either before TPO or DRP. It was also rightly contended that the filter was not applied by defining or setting out a particular threshold or percentage at which it was applied with reference to the actual figures of onsite revenues in these companies. We find that out of the aforesaid 3 companies the following two companies were rejected on application of the onsite development of software filter alone, viz., **RS Software (India) Ltd.** and **Mindtree Ltd.** We are of the view that for the reasons given above, these two companies have to be included in the list of comparables and therefore allow in part Gr.No.2 & 3 and allow Gr.No.5. In this regard we also note that these two companies were selected by the Assessee in its TP study and subsequently included by the TPO in the final list of comparables. They pass all the filters applied by the TPO. In fact, the Assessee is also seeking inclusion of RS Software (India) Ltd. in the list of comparables vide Gr.No.4(e) in its appeal. We also find that this Tribunal in the cases of *Applied Materials India Pvt. Ltd. v. ACIT* [TS-815-ITAT-2016(Bang)-TP at paras 21-21.2 on pages 1614-1615]; *Commscope Networks (I) Pvt. Ltd. v. ITO* [TS-161-ITAT-2017(Bang)-TP at para 8 on page 1639]; and *Cypress Semi-conductor Technology India Pvt. Ltd. v. DCIT* [IT(TP)A No. 356/Bang/2016 at paras 10 and 11 at pages 1764-1765], directed the inclusion of these two companies under identical circumstances. We therefore direct inclusion of **R S Software (India) Ltd.** and **Mindtree Ltd.** in the final list of comparables.

20. However, as far as **Acropetal Technologies Ltd. (Ground No. 4 in Revenue's appeal)** is concerned, **Acropetal** was directed to be excluded by the DRP not only on the ground that it was held to be predominantly engaged in onsite development of software in view of its expenses in foreign currency, but also on the following grounds – (i) that, in the absence of segmental information containing the break-up of its export sales, it was not possible to ascertain if it passed the export earnings filter; and (ii) that, in the absence of segmental information containing the break-up of its employee costs, it was not possible to ascertain if it passed the employee costs filter (Pages 18-20 of the DRP's directions). Revenue vide ground Nos. 2 to 4 is seeking the inclusion of the company in the final list of comparables. After hearing the rival submission on exclusion of Acropetal from the list of comparable companies, we find that exclusion of this company from the list of comparable companies should be upheld because this company fails the employee cost filter of employee cost being equal to at least 25% of the total operating revenue. From the annual report of the company it can be seen that the employee costs incurred by the company is 11.51% of the total operating revenue. Apart from the above, the Company also fails the TPO's filter of service revenue is excess of 75% as the income from software development activity is Rs. 81.40 Crores out of total operating revenue of Rs. 141 Crores. As it is clear that the company fails TPO's own filters of employee cost in excess of 25% and service revenue is excess of 75%, the company ought to remain excluded from the final list of comparables. We also find that this Tribunal in *Applied Materials India Pvt. Ltd. v. ACIT* [IT(TP)A Nos. 17 & 39/Bang/2016] at paras 16.1 to 16.4 at pages 1606-1607]; *Finastra Software Solutions (India) (P.) Ltd. v. ACIT* [[2018] 93 taxmann.com 460 (Bangalore - Trib.) at para 15 at page 1744]; *Electronic Imaging India P. Ltd v. DCIT* [(2017) 85 taxmann.com 124 (Bangalore-Trib) para 8 at pages 1725-1726] and

Commscope Networks (I) Pvt. Ltd. v. ITO [TS-161-ITAT-2017(Bang)-TP at para 9 on pages 1639-1640] held that this company should be excluded from the list of comparable companies in the case of companies engaged in rendering SWD services such as the Assessee. Thus, Gr.No.4 is dismissed and Gr.No.2 & 3 are also partly dismissed to the extent of exclusion of Acropetal.

21. As far as Gr.No.6 raised by the Revenue is concerned, the revenue in this ground has challenged exclusion of **E-Infochips Ltd.** on the ground that it failed the software service income filter at 75%. At the outset, the Assessee submits that E-Infochips Ltd. was excluded by the DRP on the ground that: (i) no segmental information regarding its diverse functions is available; (ii) there is presence of significant inventory and (iii) it failed the software service income filter at 75% (Pages 17-18 of the DRP's directions). The Revenue, in its appeal, has challenged its exclusion only the first and the third grounds. In other words, the Revenue has not challenged its exclusion on the ground of presence of significant inventory and thus its exclusion on this ground has attained finality and cannot be disturbed by this Hon'ble Tribunal. Apart from the above, we find that the company's software development service revenue for FY 2010-11 was less than 75% of its total operating revenue for that year. Thus, the above action of the DRP in rejecting the above company is correct. The DRP has also rightly appreciated that the above company is engaged in diverse activities such as product development and the provision of IT enabled services for which no separate segmental information is available in its Annual Report. On the contrary, the diverse activities of software development and the IT enabled services are considered and reported together in one segment. Thus, in the absence of such segmental details, the company was rightly held to be functionally not comparable to the Assessee which is a captive software development service provider (relevant submissions at internal

page 73 of the objections filed before the DRP and pages 237-239 of the paperbook). Further, as was noted by the DRP, the company also has presence of inventory and is, therefore, incomparable to the Assessee. We also find that this Tribunal in *Electronic Imaging India P. Ltd v. DCIT* [(2017) 85 taxmann.com 124 (Bangalore-Trib) para 9 at pages 1726-1727]; *Saxo India Pvt. Ltd. v. ACIT* [2016] 67 taxmann.com 155 (Delhi - Trib.) (paras 10.1 and 10.2 at pages 1656-1657)] (which came to be upheld by the Hon'ble Delhi High Court); *Finastra Software Solutions (India) (P.) Ltd. v. ACIT* [[2018] 93 taxmann.com 460 (Bangalore - Trib.) at para 17 at page 1744]; *Cypress Semi-conductor Technology India Pvt. Ltd. v. DCIT* [IT(TP)A No.356/Bang/2016 at paras 19-20 at pages 1773-1775]; and *Commscope Networks (I) Pvt. Ltd. v. ITO* [TS-161-ITAT-2017(Bang)-TP at para 9 on pages 1639-1640] held that this company ought to be excluded from list of comparable companies in the case of companies rendering SWD services similar to that of the Assessee. Consequently, for the above reasons, the action of the DRP in directing the exclusion of **E-Infochips Ltd.** is upheld and the ground is dismissed.

22. As far as Gr.No.7 raised by the revenue is concerned, the revenue in this ground has challenged the action of the DRP in excluding **ICRA Techno Analytics Ltd.** This company was rejected by the DRP for the reason that the entire revenue of the company has been reported under one segment, and in the absence of segmental information regarding the same, the company could not be held as a comparable to the Assessee. At the outset it is submitted that the action of DRP in rejecting this company is right in law and does not require any interference by this Hon'ble Tribunal. We find that this company is engaged in diversified activities of software development and consultancy, licensing and sub-licensing, annual maintenance for software support, web development & hosting and revenue from all the activities are reported under one segment, without any

segmental information regarding the same made available. Therefore, in the absence of segmental information, it cannot be ascertained whether the company passes all the filters applied by the TPO and therefore ought to stand excluded from the final list of comparables. We also find that this Tribunal in *Applied Materials India Pvt. Ltd. v. ACIT* [IT(TP)A Nos. 17 & 39/Bang/2016] at paras 17.1 to 17.2 at pages 1607-1609]; *Finastra Software Solutions (India) (P.) Ltd. v. ACIT* [[2018] 93 taxmann.com 460 (Bangalore - Trib.) at para 17 at page 1744]; and *Electronics Imaging India P. Ltd v. DCIT* [(2017) 85 taxmann.com 124 (Bangalore-Trib) para 10 at pages 1727] excluded this company from the list of comparables in the case of companies that were engaged in rendering SWD services similar to that of the Assessee. We therefore find no merit in Gr.No.7 raised by the revenue.

23. As far as Gr.No.8 raised by the revenue is concerned, the revenue in this ground seeks inclusion of e-Zest Solution Ltd. As rightly submitted on behalf of the Assessee, this ground of the Revenue is misconceived as the company was not directed to be excluded by the Tribunal and features in the final list of comparables. Therefore, Grd.No.8 is dismissed.

24. As far as Gr.No.9 raised by the revenue is concerned, the revenue in this ground has questioned the correctness of exclusion of Infosys Technologies Ltd. from the list of comparable companies. The grounds on which DRP excluded this company was that it is functionally incomparable to the Assessee. We find that this company is functionally dissimilar to the Assessee on numerous counts such as the fact that it is engaged in the development of software products, that it has inventories, has ownership of marketing intangibles and intellectual property rights, high brand value, high expenditure on R&D, and so on, for which no adjustments can be made to eliminate the said differences between it and the Assessee. This

company has been consistently rejected by this Hon'ble Tribunal as being functionally dissimilar to captive software development service providers such as the Assessee for every assessment year which has been heard and disposed of so far. In the case of *Applied Materials India Pvt. Ltd. v. ACIT* [IT(TP)A Nos. 17 & 39/Bang/2016] at para 18 at page 1609]; *Finastra Software Solutions (India) (P.) Ltd. v. ACIT* [[2018] 93 taxmann.com 460 (Bangalore - Trib.) at para 17 at page 1744]; *Commscope Networks (India) Pvt. Ltd. v. ITO* [IT(TP)A Nos. 166 and 181/Bang/2016] at para 9 at pages 1639-1640]; and *Electronics Imaging India P. Ltd v. DCIT* [(2017) 85 taxmann.com 124 (Bangalore-Trib) para 10 at pages 1727] this company was rejected as not comparable company in the case of pure SWD service provided such as the Assessee. Grd.No.9 is accordingly dismissed.

25. As far as Gr.No.10 is concerned, it is a general ground without reference to any instance where there was no material difference on price or cost charged or profits and hence rejected.

26. As far as Ground Nos. 11 and 12 raised by the Revenue is concerned, the revenue in these grounds seeking the inclusion of RS Software (India) Ltd. and Evoke Technologies Ltd. in the final list of comparables. Submissions as regards RS Software (India) Ltd. As far as RS Software (India) Ltd., is concerned, this company has already been included in the list of comparable companies and therefore Gr.No.12 is allowed. As far as Gr.No.11 is concerned, we find that the company Evoke Technologies Ltd., was selected by the Assessee in its TP study and was subsequently accepted by the TPO as having passed all the filters applied by him (page No. 7 of the TPO's order). In the proceedings before the DRP, the Assessee did not object to its inclusion in the list of comparables. However, despite the above, the DRP on its own directed its exclusion solely on the ground that its margin was held to be abnormally low at

8.11% despite its revenues having increased 33% from the preceding year. The DRP was of the view that its margin was low because its expenditure on consultancy charges increased 1118% from the prior year which, according to the DRP, constituted a peculiar economic circumstance that made its retention in the list of comparables inappropriate. We find that vide ground Nos. 4(i) in its appeal has challenged the action of the DRP in excluding Evoke Technologies Ltd. In that view of the matter and also since the company has been consistently held as being comparable to the assessee similar to that of the Assessee herein, the Evoke ought to be included in the final list of comparables. We also find that this Tribunal in *Applied Materials India Pvt. Ltd. v. ACIT* [IT(TP)A Nos. 17 & 39/Bang/2016] at paras 14-14.1 and 21-21.2 at pages 1605, 1614-1615]; *Cypress Semiconductor Technology India Pvt. Ltd. v. DCIT* [IT(TP)A No.356/Bang/2016 at paras 11,12 at pages 1764-1765]; and *Commscope Networks (India) Pvt. Ltd. v. ITO* [IT(TP)A Nos. 166 and 181/Bang/2016] at para 8 at page 1639 included this company in the list of comparable companies in the case of Assessee providing SWD services such as the Assessee. We therefore allow Gr.No.11 raised by the revenue and also Gr.No.4(i) raised by the Assessee in its appeal.

27. In Gr.No.13, the revenue has contended that the DRP erred in directing the AO/TPO to consider the foreign exchange fluctuation to be operating in nature. The Assessee, in its objections before the DRP, had submitted that the foreign exchange earnings ought to be treated as non-operating in nature (page No. 102 of the objections filed before the DRP). However, the DRP directed the same to be treated as being operating in nature (page Nos. 24-25 of the DRP's directions). The Revenue, vide the above ground is challenging the action of the DRP in directing the foreign exchange gains to be treated as being operating in nature while computing the margins of the Assessee and the comparable companies. As the

Revenue is in support of the Assessee's contention that the gains must be treated as being non-operating in nature, to this extent, the Assessee submitted that the Revenue's ground may be allowed with the foreign exchange earnings being treated as non-operating in nature. In view of the above concession of the learned counsel for the Assessee, we allow Gr.No.13 raised by the revenue.

28. Now we shall take up for consideration the grounds of appeal of the Assessee in its appeal with regard to the SWD services segment. Ground No. 4(a) of the Assessee's appeal the Assessee, is seeking the exclusion of **Sasken Communication Technologies Ltd.** from the list of comparables.

29. **Sasken Communication Technologies Ltd.** – As far as exclusion of Sasken Communication Technologies Ltd. ('Sasken' for short) is concerned, the reasons for exclusion of this company by the DRP was that this company is engaged in the development of software products, as it has inventories, intangible assets and also because it has high expenditure on R&D, and is therefore functionally not comparable to the Assessee. The first aspect that it is to be noticed that this company was selected as comparable company by the Assessee in its TP study and did not challenged the inclusion of this company before the DRP. For this reason alone, the Assessee cannot be denied the right to seek its exclusion before the Tribunal and in this regard the learned counsel for Assessee has rightly placed reliance on the decision of the Special Bench of the Hon'ble Tribunal in the case of DCIT v. Quark Systems (P.) Ltd. ([2010] 38 SOT 307 (CHD.) (SB)) for the proposition that the Assessee cannot be precluded from seeking exclusion of a company selected by it in its TP study, when the company is otherwise not comparable to the Assessee. We find that as per its Annual Report, Sasken derives revenue from

software products and, what is more, even launched a new product called VypaarSEWA during FY 2010-11. Further, as can be seen from its Annual report, R&D constitutes an important part of the operational and functional profile of Sasken. Also, as Sasken has significant intangibles and inventories, the Assessee submits that it ought to be rejected as a comparable. Thus, Sasken has diverse functions and segmental details are not given separately for the varied activities it is engaged in. The Assessee therefore submits that Sasken ought to stand excluded from the final list of comparables. We also find that this Tribunal in *Finastra Software Solutions (India) (P.) Ltd. v. ACIT* [[2018] 93 taxmann.com 460 (Bangalore - Trib.) at para 17 at page 1744]; *Electronic Imaging India P. Ltd v. DCIT* [(2017) 85 taxmann.com 124 (Bangalore-Trib) para 9 at pages 1726 and 1727]; *Cypress Semi-conductor Technology India Pvt. Ltd. v. DCIT* [IT(TP)A No.-356/Bang/2016 para 8 at page 1763]; and *Commscope Networks (India) Pvt. Ltd. v. ITO* [IT(TP)A Nos. 166 and 181/Bang/2016] at para 9 at pages 1639-1640] has directed inclusion of this company in the list of comparable companies.

30. As far as Ground Nos. 4(e) and 4(i) of the appeal of the assessee is concerned, in these grounds, the Assessee seeks the inclusion of **Evoke Technologies Pvt. Ltd.** and **RS Software Ltd.** in the list of comparables. These companies have already been directed to be included in the list of comparables while deciding similar grievance of the revenue in its appeal and that decision will hold for these grounds also.

31. In Ground No. 4(d) the Assessee inclusion of CG Vak Software and Export Ltd. ('CG Vak' for short), which was part of its TP study, in the final list of comparables as the company is functionally comparable to the assessee. The TPO rejected the company on the ground that it fails the employee cost filter. The DRP then proceeded to uphold its rejection on the

ground that it was not possible to ascertain whether the company passes the employee cost filter in the absence of details regarding the same being made available, and also for the reason that in the absence of details regarding the expenses 'cost to services' being made available, it was not possible to ascertain if the company was engaged in sub-contracting its software development services. After hearing the rival submissions we find that this company is engaged in the provision of routine software development services, and therefore, the major portion of expenses under the head 'cost of services' could only relate to employee cost. The ratio of cost of services to total sales amounts to 77.65% and therefore it could be held that the company passes the employee cost filter. Detailed submissions in this regard are made at pages 231-233 of the paperbook. This company has been consistently included in the final list of comparables in case of assessees placed similarly that of the Assessee herein. Further, the DRP's observation that the company could be engaged in sub-contracting of services for the reason that expenses have been debited under the head 'cost to services' is without any basis more so, when there is no filter regarding sub-contracting of services applied by the TPO or the DRP. We also find that in the decision of this Tribunal in the cases of Cisco Systems (India) (P.) Ltd. v. DCIT ([2014] 50 taxmann.com 280 (Bangalore- Trib.) at para 27.8 page 1795; and DCIT v. Ivy Comptech Pvt. Ltd. (common order passed in ITA No. 222/Hyd/2015 and ITA No. 334/Hyd/2015) in paras 21 to 21.3 at pages 1837-1838, this company has been directed to be included in the list of comparable companies. We therefore direct that this company be included in the final list of comparable companies.

32. In Ground No. 4(j) the Assessee seeks exclusion of e-Zest Solutions Ltd., Larsen and Toubro Ltd., Persistent Systems & Solutions

Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd., from the list of comparable companies.

33. As far as e-Zest Solutions Ltd., and Persistent Systems & Solutions Ltd., is concerned, these were Comparable companies chosen by the TPO. The Assessee did not object to inclusion of these two companies before the TPO nor were objections filed against inclusion of these two companies before the DRP. The Assessee now wants to contend that these two companies are functionally different and based on judicial decisions in which these two companies were excluded as functionally not comparable with a company rendering SWD services such as the Assessee. The Assessee seeks to rely on the decision of the Special Bench ITAT Chandigarh in the case of DCIT Vs. Quarks Systems Pvt. Ltd., 42 DTR 414 (Chandigarh-SB) wherein it was held that there cannot be estoppel against law and that non-comparable companies even if selected by the assessee in TP study can be sought to be excluded by the assessee based on functional comparability or other valid reasons. We therefore admit the relevant ground of appeal seeking exclusion of these two companies. Since the TPO/AO did not have opportunity to decide the issue, we are of the view that it would be just and appropriate to remand the issue to the TPO for deciding the correctness of choosing this company as a comparable company. The TPO/AO shall afford opportunity of being heard to the Assessee.

34. As far as Larsen & Toubro Infotech Ltd., and Persistent Systems Ltd. are concerned, these were Comparable companies chosen by the Assessee in its TP Study. The Assessee did not object to inclusion of these two companies before the DRP. The Assessee now wants to contend that these two companies are functionally different and

based on judicial decisions in which these two companies were excluded as functionally not comparable with a company rendering SWD services such as the Assessee. The Assessee seeks to rely on the decision of the Special Bench ITAT Chandigarh in the case of *DCIT Vs. Quarks Systems Pvt. Ltd.*, 42 DTR 414 (Chandigarh-SB) wherein it was held that there cannot be estoppel against law and that non-comparable companies even if selected by the assessee in TP study can be sought to be excluded by the assessee based on functional comparability or other valid reasons. We therefore admit the relevant ground of appeal seeking exclusion of these two companies. Since the TPO/AO did not have opportunity to decide the issue, we are of the view that it would be just and appropriate to remand the issue to the TPO for deciding the correctness of choosing this company as a comparable company. The TPO/AO shall afford opportunity of being heard to the Assessee.

35. As far as the comparable company Sasken Communications Ltd., is concerned, while dealing with Gr.No.4(a) raised by the Assessee, we have already excluded this company from the list of comparable companies and hence no separate adjudication on this company is required on the basis of Gr.No.4(j) raised by the Assessee.

36. In Gr.No.4(b), the Assessee seeks exclusion of Tata Elxsi Ltd., a comparable company chosen by the TPO. The Assessee did not object to inclusion of this company before the TPO nor were objections filed against inclusion of these two companies before the DRP. The Assessee now wants to contend that these two companies are functionally different and based on judicial decisions in which these two companies were excluded as functionally not comparable with a company rendering SWD services such as the Assessee. The Assessee seeks to rely on the decision of the Special Bench ITAT Chandigarh in the case of *DCIT Vs. Quarks*

Systems Pvt. Ltd., 42 DTR 414 (Chandigarh-SB) wherein it was held that there cannot be estoppel against law and that non-comparable companies even if selected by the assessee in TP study can be sought to be excluded by the assessee based on functional comparability or other valid reasons. We therefore admit the relevant ground of appeal seeking exclusion of these two companies. Since the TPO/AO did not have opportunity to decide the issue, we are of the view that it would be just and appropriate to remand the issue to the TPO for deciding the correctness of choosing this company as a comparable company. The TPO/AO shall afford opportunity of being heard to the Assessee.

37. No other grounds relating to Transfer Pricing adjustment in SWD services segment was pressed or argued. The TPO is directed to compute ALP in the SWD services segment, as per the directions contained in this order and after affording opportunity of being heard to the Assessee.

INFORMATION TECHNOLOGY ENABLED SERVICES SEGMENT:

38. It is not in dispute between the Assessee and the revenue that the Transaction Net Margin Method (TNMM) was the Most Appropriate Method (MAM) for determination of ALP and that the profit level indicator to be adopted for comparison of the Assessee's profit with that of comparable companies was Operating Profit/Total Cost (OP/TC). The OP/TC of the Assessee was 14.67%. The Assessee in its TP study selected 12 comparable companies whose arithmetic mean of OP/TC was arrived at 12.68%. Since the profit margin of the Assessee was more than the arithmetic mean of OP/TC of the 12 comparables selected by the Assessee, it was claimed by the Assessee that the price charged by it in the international transaction was at Arm's Length. The Transfer Pricing

Officer (TPO) to whom the determination of ALP was referred by the AO, accepted 4 out of the 12 comparable companies suggested in the TP study by the Assessee as comparable with the Assessee. The TPO on his own selected 6 other companies as comparable companies with the Assessee. Thus a final set of 10 comparable companies was chosen by the TPO as comparable companies. The arithmetic mean of profit margin of these companies after and before adjustment towards working capital adjustment was as follows:

Net mark-up on cost earned by the assessee as computed by the TPO in the TP Order:

Operating Income	Rs.6,96,70,912/-
Operating Cost	Rs.6,07,56,385/-
Operating Profit (Op. Income – Total. Cost)	Rs.89,14,527/-
Operating/Net mark-up (OP/TC)	14.67%

Comparables selected by assessee and their arithmetic mean:

Sl. No.	Name of the company	Weighted Average (%)
1	Aditya Birla Minacs Worldwide Ltd.	0.30
2	CG-VAK Software & Exports Ltd.	-2.39
3	Caliber Point Business Solutions Ltd.	18.09
4	Cepha Imaging Pvt. Ltd.	1.94
5	Cosmic Global Ltd.	23.83
6	Fortune Infotech Ltd.	9.95
7	Informed Technologies India Ltd.	19.33
8	Infosys BPO Ltd.	22.53
9	Jeevan Softech Ltd.	46.34
10	Jindal Intellicom Pvt. Ltd.	6.39
11	Microgenetics Systems Ltd.	0.87
12	R Systems International Ltd.	5.01
Arithmetical Mean		12.68

Note: Out of the 12 comparables selected by the Assessee, the TPO accepted the 4 highlighted above viz., Cosmic Global Ltd., Infosys BPO Ltd., Jeevan Softech Ltd. and Jindal Intellicom Ltd., and rejected the other 8.

Comparables selected by TPO and their arithmetic mean:

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)	Mark-up on Total Costs (WC – adj) (in %)
1	Accentia Technologies Ltd.	28.89	29.47
2	Acropetal Technologies	26.86	26.12
3	Cosmic Global Ltd.	9.81	13.86
4	e4e Healthcare Business Services Pvt. Ltd.	12.38	17.20
5	ICRA Online Ltd. (seg.)	34.21	36.30
6	Jeevan Scientific Technology Ltd.	70.66	74.58
7	Infosys BPO Ltd.	17.89	19.24
8	Jindal Intellicom Pvt. Ltd.	11.13	14.94
9	Mindtree Ltd. (seg.)	10.76	12.11
10	iGate Global Solutions Ltd.	25.07	27.76
AVERAGE MARK-UP		24.77	27.16

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

Arm's Length Mean Mark-up	24.77%
Less: Working Capital Adjustment	-2.39%
Adjusted mean mark-up of the comparables	27.16%
Operating Cost ('OC')	Rs.6,07,56,385/-
Arm's Length Price ('ALP') = 127.16% of OC	Rs. 7,72,57,819/-
Price Received	Rs. 6,96,70,912/-
Shortfall being adjustment u/S. 92CA	Rs. 75,86,907/-

39. The AO incorporated the addition to the total income by way of shortfall being adjustment u/s.92CA of the Act, in his draft order of Assessment. Against the said addition in the draft assessment order, the Assessee filed objections u/s.144C of the Act before the DRP. Briefly, the directions issued by the DRP were as follows:

The following companies were directed to be excluded by accepting the contentions of the Assessee:

- (a) Accentia Technologies Ltd.
- (b) Acropetal Technologies Ltd.
- (c) ICRA Online Ltd. (seg.)
- (d) Jeevan Scientific Technology Ltd.
- (e) iGate Global Solutions Ltd.

The DRP *suo moto* directed the exclusion of Cosmic Global Ltd. on the ground that it had incurred sub-contracting expenses to the extent of 41% thereby suggesting a different working model which may have significant impact on its margin. As regards the Assessee's contentions for inclusion of its TP study comparables, the DRP rejected the same and thereby upheld their exclusion by the TPO. **List of Comparables post the DRP's Directions**

As per the DRP's directions, the final list of comparables was as follows:

SI. No.	Name of the Company
1	e4e Healthcare Business Services Pvt. Ltd.
2	Infosys BPO Ltd.
3	Mindtree Ltd.
4	Jindal Intellicom Pvt. Ltd.

40. Pursuant to the directions of the DRP, as the arithmetical mean of the working capital adjusted margins of the above comparables was within the +/-5% range of the Assessee's NCP mark-up for provision of ITE services, the TP adjustment made towards the said international transaction was deleted in the final assessment order. Aggrieved, the revenue is in appeal before the Tribunal. Briefly, the grounds in the Revenue's appeal are as follows:-

- That the DRP erred in holding that Acropetal Technologies Ltd., Jeevan Scientific Technology Ltd., Accentia Technologies Ltd., iGate Global Solutions Ltd. and ICRA Online Ltd. cannot be taken as a comparable to the Assessee as segmental information of the companies were not available (**Ground No. 14**)

- That the DRP erred in directing exclusion of Cosmic Global Ltd. for the reason that it was functionally incomparable to the Assessee. (**Ground No. 15**)

41. We have heard the rival submissions of the parties. As far as Gr.No.14 of the revenue's appeal is concerned, the Revenue is seeking the inclusion of Acropetal Technologies Ltd., Jeevan Scientific Technology Ltd., Accentia Technologies Ltd., iGate Global Solutions Ltd. and ICRA Online Ltd. We find that the above companies were rightly rejected by the DRP and the same requires no interference from this Hon'ble Tribunal. We find that **Acropetal Technologies Ltd.**, is engaged in the business of software development and services, contract centre service and IT enabled services and the same are reported together as one segment. In the absence of segmental details made available, the company could not be treated as a comparable. The TPO, while choosing the company as a comparable, has selected its Engineering Design Segment ('EDS' for short) which is in the nature of high end IT enabled services which are in the nature of Knowledge Process outsourcing ("KPO"). The high end services provided by the company cannot be compared with the routine services provided by the Assessee. This is a settled position and reliance can be placed on the decision of this Hon'ble Tribunal's in the case of *Symphony Marketing Solutions India Pvt. Ltd.*(ITA No. 1316/Bang/2012) where it was held that Acropetal cannot be considered as a comparable to assessee performing routine low end IT enabled services function. As far as exclusion of company **Jeevan Scientific Technology Ltd.**, we find that this company was rejected by the DRP for the reason that it was engaged in diverse functions and the same were reported under one segment without segmental details regarding the same being made available. The DRP is right in excluding the company as without segmental details, the comparability of the company cannot be determined. In any event, the ERP

segment of the company is not comparable to the assessee, the BPO segment of the company fails the filter of service income being greater than 75% of total revenue, and the company suffers from huge fluctuations which indicate that certain peculiar circumstances influencing the profit margin of the company exist, for which appropriate adjustments cannot be made to balance the effect. It is submitted that the ERP implementation services are not in the nature of IT enabled services which were notified by CBDT vide Notification No. SO 890(E) dated 26.09.2000. If the BPO segment is considered, the company fails to satisfy the TPO's own filter of service revenue from the relevant segment having to be in excess of Rs. 1 crore as the revenue from the BPO segment of the said company is Rs. 79 lakhs only. The company is therefore not comparable to the Assessee. This Tribunal in the case of Swiss Re Shared services (India) Pvt. Ltd. v. ACIT (order dated 08.07.2016 in IT(TP)A No. 380/Bang/2016) directed the TPO to verify as to whether the TPO's filter of Sales > 1 Crore is satisfied by this company. In the present case, as can be seen from the annual report of the company the sale of the company in respect of the BPO segment amounts to only 79 lakhs, and therefore it fails the TPO's filter. As far as exclusion of **Accentia Technologies Ltd.**, is concerned, we find that this company was excluded by the DRP for the reason that the details regarding its diverse functions were reported under one segment, without segmental details regarding the same being made available. In the absence of segmental details being made available, the comparability of the company with that of the assessee cannot be determined. In any event, Accentia is engaged in providing high end services in the nature of Knowledge Process Outsourcing ('KPO') which is evident from its annual report, whereas, the assessee is engaged in rendering routine low end information technology enabled services. Further, the said company not only does medical transcriptions, but has also ventured into healthcare receivables cycle

management and high end consultancy to start-ups requiring field experts. As can be seen from the annual report, coding income is contributing 15% of the total income which activities are akin to software development activity while the assessee is a mere provider of IT enabled services. The company has invested huge sums in the development of EMR software. Segmental details of its various activities are unavailable. The company further owns significant intangibles. This Tribunal in the case of *Swiss Re Shared India Pvt. Ltd. v. ACIT* [TS-598-ITAT-2016(Bang)-TP at paras 9-20 on pages 7-21] where, in similar circumstances and for the same assessment year, this Hon'ble Tribunal directed the exclusion of this company from the list of comparables. **Accentia Technologies Ltd.** is, therefore, not comparable to the Assessee and was rightly rejected as a comparable. As far as **iGate Global Solutions Ltd.**, is concerned, DRP rejected this company as comparable company for the reason that the details regarding its diverse functions are reported under one segment without segmental details regarding the same being made available. Therefore, the comparability of the company cannot be determined. It is seen that iGate is engaged in provision of varied services and no segmental breakup of the same is available in its Annual Report. Further, the company's' software services segment is clubbed with its ITES segment and there is no breakup between the revenues generated from the two segments. During the year under consideration, the company has acquired majority equity interest in Patni Computer Systems Ltd. rendering it incomparable due to it failing the TPO's own filter of having peculiar economic circumstances. In addition, the company owns significant intangibles in its name, which is evident from the balance sheet of the company for the Financial Year 2010-11. For the reasons above, the company is not comparable to the Assessee and the DRP's findings on exclusion of iGate is right in law. As far as the company **ICRA Online**

Ltd., is concerned, the DRP excluded this company for the reason that the details regarding its diverse functions are reported under one segment without segmental details regarding the same being made available. Therefore, the comparability of the company cannot be determined. In any event, this company is functionally dissimilar for the reason that the outsourced services segment of the company is engaged in the provision of high end consultancy services which cannot be compared to the assessee who is into provision of low end IT enabled services which are routine in nature. Further, the company fails the TPO's own filter of export turnover in excess of 75% of total sales as the export turnover of the company amount to only 61.88% of its sales. Therefore, the company cannot be held as a comparable to the assessee.

42. As far as Gr.No.15 raised by the revenue is concerned, the Revenue is seeking the inclusion of Cosmic Global Ltd. in the final list of comparables. The above comparable was selected by the Assessee in its TP Study and by the TPO and thus included by him in the list of comparables. In the proceedings before the DRP, the Assessee did not object to its inclusion in the list of comparables. The Assessee has no objection for inclusion of this company as a comparable company and hence Gr.No.15 of the revenue is allowed.

43. As far as the appeal of the Assessee in the ITeS segment is concerned, it was submitted that the arithmetical mean of the margins of the comparables after giving effect to order of the DRP would fall within the +/-5% range of the Assessee's NCP margin for provision of ITE services. Consequently, the international transaction of provision of ITE services by the Assessee to its AE in FY 2010-11 can be concluded as being at arm's length. Therefore, the grounds raised in the Assessee's appeal in relation

to its international transaction of provision of ITE services are not pressed at this stage.

44. The TPO is directed to compute ALP in the SWD services segment, as per the directions contained in this order and after affording opportunity of being heard to the Assessee.

45. In Gr.No.7.1 the Assessee has challenged the action of the DRP in upholding the order of the TPO allowing and determining a negative working capital adjustment in both the SWD services Segment and ITeS segment. In this regard, it is submitted that working capital adjustment is made for the time value of money lost when credit time is given to the customers. The Assessee however is not an entrepreneur but a captive service provider which is entirely funded by the AEs. This being so, the Assessee does not stand to lose anything as it is compensated on a total cost plus basis. The Assessee is running the business without any working capital risk as compared to the comparables. Therefore, requirement for adjustment of negative working capital does not arise. In this regard, we find that in the case of *Lam Research India Pvt Ltd, ITA No. 1473 & 1385/2014* (order dated 30.04.2015) and *Software AG Bangalore Technologies Pvt. Ltd. in ITA No. 1628/2014* (order dated 31.03.2016) passed by this Tribunal, it has been held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated on a total cost plus basis. Consequently, Gr.No.7.1. raised by the Assessee is allowed.

46. The other grounds that remain for adjudication in revenue's appeal is the corporate tax issue raised in Gr.No.16 & 17 regarding re-computation of deduction under Section 10A by reducing travel expenses incurred in foreign currency and communication charges only from export turnover. In its return of income for AY 2011-12, the Assessee claimed a deduction

under Section 10A of the Act of Rs.3,72,68,882/-, being the profits of business of its unit eligible for deduction under Section 10A of the Act. In computing the said deduction, the Assessee had not reduced telecommunication charges to the extent of Rs.13,70,475/- from its export turnover as the said charges were not attributable to the delivery of computer software outside India. Further, the Assessee had also not reduced travel expenses to the extent of Rs.8,35,695/- incurred in foreign currency from its export turnover as it was not engaged in the provision of technical services outside India which alone would have warranted reduction of such charges from its export turnover. The AO, however, proceeded to re-compute the deduction by reducing the telecommunication charges and travel expenses incurred in foreign currency from only its export turnover without making a corresponding reduction in its total turnover. Thereby, the AO made a disallowance of Rs.22,06,170/- from the deduction claimed under Section 10A.

47. Although the DRP rejected the primary contention of the Assessee that neither the telecommunication charges nor the travel expenses ought to be reduced from its export turnover, it accepted its alternate contention that they should also be reduced from its total turnover by following the decision of the Hon'ble High Court of Karnataka in *CIT v. Tata Elxsi Ltd. and others*. Accordingly, it directed the AO to exclude the above expenses from both its export and total turnovers while computing the deduction allowable under Section 10A. Thus, on the basis of the DRP's above directions, the disallowance under Section 10A came to be deleted in toto in the final assessment order. In Ground Nos. 16 and 17 in its appeal, the Revenue is challenging the aforesaid directions of the DRP. In this regard, it is seen that the DRP's directions are in accordance with the aforesaid binding decision of the jurisdictional High Court in *CIT v. Tata Elxsi Ltd.*, reported in [2012] 349 ITR 98 (Kar) which subsequently came to be upheld

by the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd. 404 ITR 719 (SC). Therefore, in the light of the above judgment, the Revenue's above ground stand rejected.

48. In the result appeal by the Assessee and the appeal by the Revenue are partly allowed, to the extent indicated in this order.

Pronounced in the open court on this 30th day of July, 2020.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 30th July, 2020.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.