

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

IT(TP)A Nos.337/Bang/2014
Assessment Year : 2005-06

<p>M/s CoreOne Technologies India Pvt. Ltd., (formerly known as M/s CAPCO IT Services India Pvt. Ltd) Mobius Tower, 2nd Floor, SJRI Park, EPIP Zone I, Whitefiled, Bangalore-560 066.</p> <p>PAN : AACCC 1734 G</p>	Vs.	<p>The Commissioner of Income-tax (Appeals)-IV, Bangalore.</p>
APPELLANT		RESPONDENT

IT(TP)A No.204/Bang/2014
Assessment Year : 2005-06

<p>The Income-tax Officer, Ward-2(1)(1), Bangalore-560 052.</p>	Vs.	<p>M/s CoreOne Technologies India Pvt. Ltd., (formerly known as M/s CAPCO IT Services India Pvt. Ltd) Symphony Infospace, 6th Floor, Block 5A, Pritech SEZ, Varthur Hobli, Outer Ring Road, Bellandur, Bangalore-560 037.</p> <p>PAN : AACCC 1734 G</p>
APPELLANT		RESPONDENT

Appellant by	:	Shri L Barath, C.A
Respondent by	:	Shri Manjeet Singh, Addl. CIT – DR

Date of Hearing	:	17-06-2020
Date of Pronouncement	:	14-08-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals has been filed by assessee as well as revenue against order dated 22/01/2009 passed by Ld.CIT(A)-4, Bangalore for assessment year 2005-06 on following grounds of appeal. Ld.AR submitted that on 09/05/2018, assessee filed revised grounds in assessee's appeal which needs to be considered.

ITA (TP) A No.337/B/2014

I. Transfer Pricing

1. *The learned Commissioner of Income-Tax (Appeals) erred in determining an adjustment of Rs.13,718,665/- to the arms length price of the appellants international transactions with associated enterprises, with respect to the software development services rendered by the appellant u/s 92CA of the Income Tax Act.*

2. *The learned Assessing Officer/learned Transfer Pricing Officer erred in not giving any effect to the directions provided by learned CIT(A) in the CIT order dated 03 January 2014 with respect to the turnover filter and the foreign exchange earnings / losses.*

3. *The learned CIT(A) erred in rejecting the Transfer Pricing documentation maintained by the appellant by invoking provisions of sub-section (3) of 92C of the Act contending that the information or data used in the computation of the arms length price is not reliable or correct. In doing so:*

3(a) *the learned CIT(A) erred in rejecting the set of filters applied by the appellant in the TP documentation and in introducing additional filters for selection/ rejection of companies as comparable to the appellant.*

3(b) *the learned CIT(A) erred in rejection of comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis based on application of additional filters in determining the arms length price.*

3(c) *the learned CIT(A) erred in upholding the action of learned TPO of considering 25 percent as the threshold limit for the related party*

transactions filter as this number is an arbitrary number and has been adopted without any reasonable basis.

3(d) the learned CIT(A) erred in rejecting companies that are comparable to the appellant while performing the comparability analysis and erred in including companies which do not satisfy the test of comparability.

3(e) the learned CIT(A) ought to have excluded the following companies from the ambit of comparable companies on the ground of not satisfying the test of comparability due to difference in functions:

- Exensys Software Solutions Ltd.;*
- Sankhya Infotech;*
- Four Soft Ltd.;*
- Thirdware Solution Ltd.;*
- Geometric Software Solution Co. Ltd.; and*
- Tata Elxi Ltd.*

3(f) the learned CIT(A), even though has excluded the following companies on the ground of turnover filter, has erred in not adjudicating on the issue that these companies are functionally not comparable: -

- Flextronics;*
- L&T Infotech Ltd.;*
- Satyam Computers Services Ltd.;*
- Infosys Technologies Ltd.; and*
- iGate Global Solutions Ltd.*

4. The learned CIT(A) erred in not applying multiple year / prior year data for comparable companies while determining arm's length price.

5. The learned CIT(A) erred in using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining arm's length price.

6. The learned CIT(A) erred in ignoring the limited risk nature of the contractual services provided by the appellant and in not providing an appropriate adjustment towards the risk differential, even when the full-fledged entrepreneurial companies are selected as comparable companies.

7. The appellant retains the right to have the benefit of applying the range of +/-5% in determination of the arm's length price.

ADDITIONAL GROUND

8. The AO/TPO erred in not excluding Bodhtree Consulting Ltd. from the list of comparable companies selected by the TPO without appreciating that the said comparable company is functionally dissimilar.

The appellant craves leave to add, alter and modify the above grounds during the course of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

ITA No.204/B/2014

1. The order of the CIT (A) is opposed to law and the facts and circumstances of the case.

2. The CIT (A) erred in directing the AO to compute the margin of both the assessee as well as the comparable companies by including the foreign exchange gains or loss without appreciating the fact that the foreign exchange loss or gain though attributable to operating activity is not derived by the operating activity.

3. The CIT (A) erred in directing the AO to compute the margin of both the assessee as well as the comparable companies by including the foreign exchange gains or loss without appreciating the fact that operational expenses are those expenses which are incurred to earn that income and that foreign exchange loss or gain cannot be said to be one realized from international transaction though they form part of the gain/loss of the enterprise and therefore they should be excluded while determining the operational cost.

4. The CIT (A) erred in not appreciating the fact that if any filter or criteria applied by the assessee is accepted or if any filter or criteria applied by the TPO is relaxed, the entire accept / reject matrix changes resulting in a new set of comparables including those comparables which are neither taken by the assessee or the TPO and which do not find a place in the order under section 92CA.

5. The CIT(A) erred in directing the AO to verify whether the assessee/comparable have been claiming deferred revenue expenditure over the past three years and thereafter apply the principles emerging from the orders of the Delhi Bench of the Hon'ble Tribunal in *Haworth (India) P. Ltd. V Deputy Commissioner of Income-tax (11 ITR (Trib) 757)* and The Bangalore Bench of the Hon'ble Tribunal in *Trilogy E-Business Software v Deputy Commissioner of Income-tax (23 ITR (Trib) 464)* without appreciating the fact that the directions issued are beyond the mandate of the provisions of Sec.25(1)(a) of the Act which does not empower the CIT(A) to set aside the issue.

6. The CIT(A) 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 the data link charges of Rs. 21,27,178/- from the total turnover also while computing the deduction u/s. 10A of the I.T. Act as the decision of the Hon'ble High Court is binding, 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.

7. The CIT(A) 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.

8. 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.

9. 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.”

Application for condonation of delay

2. At the outset, Ld.AR submitted that, there is delay of 64 days, in filing present appeal. Ld.AR placed reliance on affidavit by assessee dated 23/08/2018, wherein, it is submitted that, prima facie reading of impugned order, it appeared to erstwhile consultant of assessee that, appeal need not be filed. However, subsequently, when assessee approached present representatives, various issues that should have been raised before this *Tribunal*, was brought to notice of assessee. It was only thereafter that appeal was filed, thereby causing delay of 64 days. It has been thus submitted that, delay in filing present appeal was not intentional.

Ld.AR thus humbly prayed for the delay to be condoned in the interest of natural Justice.

3. On the contrary, Ld.Sr.DR, though opposed application for condonation of delay, could not make out a case of intentional delay on behalf of assessee, in filing present appeal.

4. On perusal of affidavit filed by assessee dated 23/08/2018, we note that, assessee has made out reasonable cause to support unintentional delay in filing present appeal before this *Tribunal*. In the interest of Justice, we are of the view to condone the delay.

Accordingly, application filed by assessee dated 24/08/2018 for condonation of delay in filing present appeal stands allowed.

Brief facts of the case are as under:

5. Assessee is a company and filed its return of income for year under consideration on 31/10/2005 declaring nil income. The return was processed under section 143 (1) of the act and

the case was subsequently selected for scrutiny. Consequentially, notice under section 143 (2) was issued to assessee in response to which representative of assessee appeared before Ld.AO and submitted details as called for.

6. Ld.AO observed that, during financial year relevant to assessment year under consideration assessee had international transactions and the case was referred to transfer pricing officer to determined arm's length price of such international transactions.

Upon receipt of reference under section 92CA, Ld. TPO called upon assessee to file economic details of international transaction in form 3 CEB.

7. Ld.TPO from Transfer Pricing study filed by assessee, observed that, assessee was a software development service provider and had received 10.72 crores for providing such services to its AE. It was noted that assessee used TNMM as most appropriate method to determine arm's length margin at 12.61%. It was observed that, assessee used 45 comparables with an average margin of 9.97% and therefore assessee had considered its transaction with associated enterprise to be at arms length.

8. Ld.TPO, though did not dispute the method of determining ALP, rejected filters applied by assessee, and applied new set of following filters:

- software development service income less than 1 crore
- software development service revenue is less than 75% of total operating income.
- Related party transaction greater than 25%
- export earnings less than 25% of sales

- diminishing revenue/persistent losses for the period under consideration.
- Different year ending or data is not available for 12 months.
- Employee cost to sales is less than 25%.
- On-site income is more than 75%.

9. Ld.TPO thus accepted 8 comparables from assessee's list and included further comparables totalling to 17 comparables with average margin of 26.59%, the details of which are as under:

<i>SL No.</i>	<i>Company Name</i>	<i>OP to Total Cost%</i>
1.	<i>Bodhtree Consulting Ltd</i>	24.85
2.	<i>Lanco Global Systems</i>	13.65
3.	<i>Exen_sys Software Solutions Ltd.</i>	70.68
4.	<i>Sankhya .h?ftech Ltd.</i>	27.39
5.	<i>Sasken Network Systems Ltd.</i>	1664
6.	<i>Four Soft Ltd.</i>	22.98
7.	<i>Thirdware Solution Lid</i>	66.09
8.	<i>R S Software (India) Ltd.</i>	8.07
9.	<i>Geometric Software Solutions Co. Ltd.</i>	20.34
10.	<i>Tata Elxsi Ltd. (seg)</i>	24.35
11.	<i>Visual Soft Technologies Ltd. (seg)</i>	23.52
12.	<i>Sasken Communication Technologies Ltd. (seg)</i>	14.42
13.	<i>Igate (seg)</i>	4.32
14.	<i>Flextronics (seg)</i>	32.19
15.	<i>L&T Infotech</i>	10.33
16.	<i>Satyam</i>	29.44
17.	<i>Infosys</i>	42.83
<i>Avg.</i>		<i>26.59%</i>

10. Ld.TPO, thus proposed adjustment, being difference between margin of comparables selected by Ld.TPO at Rs.1,37,18,665/-.

Aggrieved by adjustment, assessee filed appeal before Ld.CIT (A).

Before Ld.CIT(A), assessee raised following issues:

- Rejection of assessee's comparables and introducing fresh comparables on application of various filters.
- Failure to applied turnover filter.

- Failure to apply the test of functional dissimilarities.
- Failure to provide risk adjustment.
- Failure to provide standard deduction of 5%.
- Forex gain taken as non-operating income.

11. Ld.CIT(A), while considering issues raised by assessee, was of the opinion that, certain comparables were to be rejected due to high turnover, by following decision of coordinate bench of this Tribunal in *Genesis integrating systems vs DCIT* reported in 15 ITR (Trib) 475, *Kodiak networks vs ACIT* reported in 15 ITR (Trib) 610 and *Triology e-business software India vs DCIT* reported in 23 ITR (Trib) 464 wherein, consistently it has been held that only companies with turnover range of Rs.1crore to Rs.200 Crore should be taken into consideration for transfer pricing study.

12. Ld.CIT(A), categorically observed that, Transfer Pricing officer himself having rejected loss making companies as comparables ought to have applied upper limit. Ld.CIT (A) was of the opinion that turnover filter is important and assessee being in the range having turnover of Rs.8.15 crore companies, having turnover of Rs.1crore to Rs.200 crore had to be taken into consideration, for making transfer pricing study. He therefore directed Ld.TPO to exclude following comparables due to high turnover:

- iGate (SEG)
- Flextronics (SEG)
- L& T Infotech
- Satyam
- Infosys

13. In respect of other comparables, Ld.CIT (A) upheld their inclusion.

14. Assessee had also raised issue regarding treatment of foreign exchange gain/deferred revenue as non-operating expenses. Ld.CIT(A), relying on decision of *coordinate Bench of this Tribunal* in case of *Triology E e-business Software vs DCIT* reported in *23 ITR (Trib) 464* and decision of *ITAT Delhi Bench* in case of *Haworth (India) Pvt.Ltd. vs DCIT* reported in *11 ITR (Trib) 757*, held that, these expenses have direct nexes with revenue earned, and has to be taken as operating cost.

15. Ld.CIT(A) allowed claim of assessee, to reduce value of telecommunication expenses from export turnover for purposes of computed deduction under section 10A, by placing reliance on decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd.*, reported in *349 ITR 98*.

16. Ld.CIT(A) however did not grant risk adjustment for the reason that Ld.TPO granted working capital adjustment. Ld.CIT(A) also denied benefit of +/-5% range of margin.

17. Aggrieved by order passed by Ld.CIT(A), both assessee as well as revenue are in appeal before us.

We shall first take up revenue's appeal.

18. Ground No.1 raised by revenue is general in nature and therefore do not require any interference.

19. Ground No.2-3 is in respect of granting treatment of foreign exchange gain or loss as operational expenses by Ld.CIT (A).

20. We have considered submissions advanced by both sides and perused the impugned order of Ld.CIT (A) in respect of this issue. It is noted that Ld.CIT(A) allowed claim of assessee, placing

reliance upon decisions of this *Tribunal* which has been consistently followed and also upheld by *Hon'able Karnataka High Court* in case of *CIT vs SAP Labs India Pvt.Ltd.*, in *ITA NO. 340/2012, vide order dated 10/07/2018.*

21. We therefore do not find any infirmity in the view taken by learnt CIT (A) and therefore the same is upheld.

Accordingly these grounds raised by revenue stands dismissed.

22. Ground 4-5 have been raised by revenue is challenging the rejection of certain comparables by applying turnover filter.

23. Ld.CIT.DR submitted that this filter has been applied by Ld.CIT(A) for the first time, and therefore, should be sent back to Ld.TPO for verification.

24. On the contrary, Ld.AR submitted that, assessee had raised a ground before Ld.CIT(A), for applying only lower limit of turnover. Ld.CIT(A), while considering this issue referred to landmark decision of this *Tribunal* in case of *Genesis integrating systems vs DCIT (supra)*, wherein, necessity to exclude certain companies having huge turnover as compared to small company is have been upheld. It has been submitted that Ld.CIT(A) considered the upper limit of turnover to be Rs.200 crores considering the turnover of assessee being Rs.8.15 crores. Ld.AR, thus supported view taken by Ld.CIT(A).

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

26. There are various decisions of this *Tribunal*, wherein, turnover filter has been considered to be necessary filter for short listing comparables. There are various decisions of this *Tribunal*,

wherein comparables having huge turnover of either more than 200 crores or comparables having 10 times the turnover of assessee have been rejected. It is observed that Ld.TPO rejected various comparables of assessee for having turnover less than Rs.1 crore, without providing an upper limit. In our view Ld.CIT(A) followed *Genesis Integrating Systems vs DCIT (supra)* and applied turnover filter of 1 crore to 200 crores, which cannot be found fault with.

27. The objection raised by Ld.CIT.DR is therefore rejected since this filter has been applied by Ld.TPO partly for rejecting such comparables with turnover less than Rs.1 crore, without capping it with a upper limit. This *Tribunal* in case of *Genesis Integrating Systems vs DCIT(supra)* rejected such approach of having broad-based set of comparables, which would then be compared with a small company that works in a captive environment.

28. We do not find any infirmity in view taken by Ld.CIT(A) for rejecting comparables having turnover more that Rs.200 Crores.

Accordingly, these grounds raised by revenue stands rejected.

29. Ground No.6-7 raised by revenue is against allowing the deduction claimed by assessee under section 10A, on account of adjustment of export turnover by Ld.AO.

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

31. It is noted that, Ld.CIT(A) followed decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd.*, reported in 349 ITR 98 and directed Ld.AO to compute 10A deduction in accordance with the ratio laid down by *Hon'ble Court*. We do not

find any infirmity in the view taken by Ld.CIT(A), and the same is upheld.

Accordingly these grounds raised by revenue stands dismissed.

32. Ground No.8-9 are general in nature and therefore do not require any adjudication.

In the result, appeal filed by revenue stands dismissed.

Assessee's appeal-

33. At the outset, Ld.AR submitted that, **Ground No. 1-3** are general in nature and therefore do not require adjudication.

34. Ld.AR submitted that, **Ground 3 (a)-3 (d)** is not pressed. Similarly, **Ground 4-6** has also been not pressed by Ld.AR.

35. Upon a query being raised by this Bench regarding **Ground 3 (f)** certain comparables are alleged by assessee as functionally not comparable, which has been excluded by Ld.CIT(A) against which revenue is in appeal. To this, Ld.AR expressed his consent and accepted that, alleged comparables in Ground 3(f) may be considered either on turnover filter or, on functional comparability.

This bench during the hearing, expressed the opinion that, in the event view taken by Ld.CIT(A) is upheld, deciding assessee's Ground.3(f) would become academic.

36. In preceding paragraphs, we have decided **Ground 4-5** in revenue's appeal, and we have upheld exclusion of these alledged comparables on turnover filter. Accordingly, as per consent expressed by Ld.AR during the hearing, we hold Ground 3(f) to be academic in nature, and assessee is at liberty to contest these

grounds for functional dissimilarities/similarities in appropriate case.

Accordingly, Ground 3 (f) is left unanswered.

37. Ld.AR thus submitted that the only grounds that needs to be adjudicated by this *Tribunal* is Ground 3 (e) and Additional Ground raised by assessee vide its application dated 08/02/2018.

38. Before dwelling into Ground 3(e), we shall first decide Application dated 08/02/2018, for admission of Additional ground.

It has been submitted by assessee that, while raising substantive ground before this *Tribunal*, assessee inadvertently omitted to raise exclusion of Bodhtree Consulting Ltd. It has been submitted that, before Ld. CIT (A), this comparable was challenged by assessee and therefore it arises out of the order of Ld.CIT (A). He placed reliance upon decision of *Hon'ble Supreme Court* in case of *NTPC Ltd vs CIT* reported in 229 ITR 383 and *Jute Corporation of India vs CIT* reported in 53 taxman 85, submitted that comparables specified in additional grounds may be admitted.

39. Ld.CIT DR, though opposed admission of additional ground, could not controvert submissions advance by Ld.AR.

40. We have perused details relied upon by both sides. In our considered opinion the comparables alleged in additional ground arises out of the records and was objected before DRP for its exclusion/inclusion. Considering inadvertent mistake on behalf of assessee in raising these grounds before this *Tribunal*, we allow additional ground raised.

Accordingly, we admit additional ground raised by assessee.

41. Thus, to sum up the issues to be addressed, we are left with following comparables to be considered on functional similarities/dissimilarities:

- Exensys software solutions Ltd.,
- Sankhya Infotech
- Four Soft Ltd
- Thirdware Solutions Ltd
- Goemetric Software Solutions Co. Ltd.,
- Tata Elxsi Ltd.,
- Bodhtree Consulting Ltd.

42. At the outset, both parties submitted that comparables alleged for inclusion by revenue has been considered by this Tribunal in case of *Sharp Software Development (India) Pvt Ltd.*, in ITA No.1109/Bang/2016 along with CO No.13/Bang/2012 for assessment year 2005-06 and *Kodiak network India Pvt Ltd* in ITA No.523/Bang/2013, along with CO No.119/Bang/2015 for assessment year 2005-06.

43. In our considered opinion, comparability is to be carried out on broad object of benchmarking international transaction and according to law laid down under section 92B of the Act, read with Rule 10B(2) Income Tax Rules, 1963. Comparables must be similar in material aspects and must be compared on the basis of products/services, characteristics, functions undertaken, assets used and risk assumed. Merely because certain comparables has been upheld for its exclusion/inclusion by various decisions, does not *ipso facto* lead to exclusion/inclusion in a given set of facts. In our considered opinion, exclusion/inclusion of any comparables

must be strictly analysed on basis of FAR, in accordance with Rule 10 B (2). We also are of opinion that comparables selected must be for relevant year which is to be compared and unless contemporaneous data as section 92D read with Rule 10D(4), is not available for relevant year, multiple year data should not be used.

44. Before we undertake comparability analysis, it is *sine qua non* to understand functions performed by assessee, risks assumed and assets owned during the year under consideration.

45. We note that, the Ld.TPO has captured FAR of assessee in its order as under:

Functions:

46. Assessee is stated to be wholly owned subsidiary of Capco Belgium. It has been submitted that assessee is engaged in the business of rendering software development services to Capco group companies and is remunerated on cost plus basis for the services rendered. Ld.TPO has noted that assessee has characterised itself as a routine service provider for the group companies in TP documentation for provision of software services. Assessee for year under consideration has earned revenue of Rs.10,72,07,025/- from software development services

47. As per TP study, assessee is stated to be providing following functions for its associated enterprise in relation to software development services:

- marketing/business development

It is submitted therein that, CAPCO group companies are the front end contact with the customer and they undertake lead

in marketing and sales activity of the software products and secures the solutions to be provided. Assessee does not undertake any marketing activity with respect to the software product solutions that this deliverable to the customers.

- Conceptualisation and design of the product

48. CAPCO group companies based on customers need, requirement undertake conceptualisation and design of the final software product/solutions deliverable to that.

49. Assessee does not perform the conceptualising and design of the software product deliverable to the customer.

- Functional specifications and requirement analysis

it has been submitted that based on design and functional specifications provided by CAPCO group companies, assessee confirms its understanding of the design and the functional specifications and requirement with CAPCO group companies before commencing the assignment.

- Coding and Documentation

assessee undertakes the software coding according to the functional specifications and software requirement analysis. Assessee receives technical assistance if required from the associated enterprises during the coding coupled with regular reviews and feedback by them. Assessee is also required to generate the and maintain documentation for the code generated.

51. In respect of modules/solutions not being developed by assessee, the associated enterprises undertake the coding of software.

- project management

it has been stated that assessee interacts regularly with the associated enterprises and project tracking happens through emails and conference calls. This ensures close coordination quality control and minimal rework in the development process.

- Testing

assessee undertakes the responsibility of initial unit testing of the modules/developed by it to ensure that the activity undertaken by assessee meet the specifications agreement provided by the associated enterprises. These are further responsible for the final testing of the complete product/solutions to be delivered to the customer.

- quality control

assessee is responsible for the quality of work undertaken by it based on the quality control procedures defined by the group entities.

- Integration

assessee along with associated enterprise are jointly responsible for the integration of the module developed by assessee into the final product/solution is being developed by the associated enterprises.

Assets

50. It has been noted that assessee owns routine assets like computers, office equipments, vehicles furniture fixtures etc.

Risks

51. It has been claimed that assessee being a contract service provider does not bear risk like market risk, financial risk, credit and collection risk and service liability risk which are normal in

case of an independent entrepreneurs. Assessee is stated to have been compensated at cost +10% for the technical services provided.

52. Based upon above FAR analysis, we shall analyse compatibility of assessee with following comparables, objected for exclusion.

Exensys Software Solutions Ltd:

53. Ld.TPO considered this to be a comparable with that of assessee as, it is a software service provider. Ld.AR submitted that this company has underwent amalgamation with M/s Holool India Ltd. It has been submitted that this company is engaged in multiple activities including software products, software services and BPO services. It has been submitted that due to extraordinary event of amalgamation of this company, there is an abnormal increase in profits. Ld.AR has submitted that this company cannot be functionally compared with that of assessee. It was submitted that Ld.TPO was aware about these exceptional circumstances however considered it to be a comparable as he was of the opinion that there is no significant impact on the profitability of this company.

54. Ld.AR also submitted that this company is into development of customised software, based on current customers requirements on its own, and therefore cannot be compared to a contract service provider like assessee.

55. Ld.CIT DR, relied on observations of Ld.CIT(A) and submitted that 95% of the revenue earned by this company is from export of software and therefore functionally similar with assessee.

56. We note that, this company had an exceptional year of operation due to amalgamation with Holool India Ltd. in the notes on accounts at page 36 of paper book it has been submitted that income accruing and expenses incurred by Holool India Ltd has been incorporated into the accounts of assessee for the year under consideration. Therefore it was not right on Ld. AO to observed that the merger has not impacted significantly on the profitability. At the outset we also note that Ld.TPO noticed that merged company is highly competent and the merger has improved export performance of assessee. Ld.TPO rejected contention of assessee, since assessee failed to show functional dissimilarities due to merger. From the annual report of this company we note that this company generates income under the head, export of software, sale of domestic software, software training and other income. On a comparative study of previous year financial year income, income from export of software has escalated from 22 crores to 69 crores in the year under consideration which supports the submissions of assessee that the merger has improved the export earnings of assessee during the year. Likewise the expenditure also increased from 87 lakhs to 17 crores approximately during the year under consideration. We therefore do not find any merit in the reasoning of Ld. TPO to reject the submissions of assessee. We also note that this comparable is full-fledged enterprise and not a contract service provider like that of assessee.

57. As this *Tribunal* has been consistently excluding comparables, that have underwent amalgamation or any special event during a relevant year. We are therefore of opinion that, this comparable cannot be compared with a captive service provider with that of assessee.

Accordingly, we direct learnt TPO to exclude this comparable from final list.

Thiridware Solutions Ltd

58.Ld.CIT (A) included this comparable as it is engaged in software development services. Ld.AR placing reliance on written submission of assessee filed before the Ld.TPO submitted that this company is functionally not similar in activities carried on by assessee.

59. On the contrary Ld.Sr.DR submitted that these companies are functionally similar with respect to the software service provided by assessee in the present case. In support he placed reliance upon the view of Ld. AO.

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

61. As regards Thirdware Solutions Ltd is concerned, P&L account as well as schedules to P&L account are placed at page 89-94 of Paper Book- Index to Annual report. It is observed that, this company earned revenue from software services amounting to Rs.8,06,02,781/-, and export revenue amounting to Rs.147,425,780. In the annual reports revenue has been recognised from software development and implementation. It is

also noted that this company focused in R&D activities in software engineering and technology. It is observed that, this company is having huge profits. Annual report does not specify nature of export income earned by assessee. Also, foreign exchange earnings show that, there were other revenues earned by this company along with software development services.

62. Though the annual reports provide segmental information for software services, there are various concerns regarding the functions performed by assessee under this segment. However we also note that this company does not seem to be a contract service provider like that of assessee and therefore cannot be considered as a comparable in the present case.

Accordingly, Ld.TPO is directed to exclude this comparable.

Tata Elxi Ltd (Seg.):

63. Ld.AR submitted that, this comparable is functionally different with that of assessee, as it is engaged in research and development activities which results in creation of intellectual property rights.

64. Ld.CIT DR supported observations of authorities below and prayed for its inclusion.

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

66. It is observed that this comparable caters basically in providing software development services wherein, huge intangibles are generated owned by this comparable. It is also observed that

this comparable is a group concern of TATA, which makes it to be economically different with that of assessee's who undertakes limited risks and provides technical assistance to its AE's in products developed for AE. We do not find this comparable to be functionally similar in any manner whatsoever with that of assessee.

Accordingly this comparable is directed to be excluded from final list.

Sankhya Infotech

67. Ld.AR submitted that this comparable is not functionally similar with assessee, as it is engaged in business of development of software product for aviation industry and services and training. Ld.AO however rejected assessee's contention based on reply sought under 133(6) of the Act from this company.

68. The Ld.Sr.DR placed reliance upon orders passed by authorities below.

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

70. We note that annual report of this company has been placed at page 183 of paper book. In the director's report at page 192, it has been mentioned that company has been focusing on development of niche products for the transport and aviation industry. It has been submitted that due to this reason us this company had to spend heavily on the development of the same in the initial years and hence inadequacy of profits. Further at page 197 where management discussion and analysis are mentioned performance review for the year has also been recorded wherein it

has been mentioned that, company changed its target areas of its operation and is fully focusing to market its products and services which are related as “the best” by many leading airline companies including the manufacturers.

71. Further in the profit and loss account assessee has incurred huge expenditure towards software development expenses. In schedule 13 at page 213, reveals that this company has purchased software developed during the year.

72. In the paper book, some case laws have been filed, wherein, is reliance placed on decision of this *Tribunal* in case of *DCIT vs Textron Global Technology Centre (P) Ltd* reported in (2015) 56 *Taxmann.com* 465. We note that for relevant year under consideration this tribunal has directed exclusion of this comparable. Further the tribunal also recorded that this company also owns various products. Considering observations from annual report as well as the view expressed by coordinate benches of this tribunal in respect of this comparable, in our opinion this cannot be compared with a captive service provider like assessee performing certain limbs of software development for its AE's.

Accordingly, we direct Ld.TPO to exclude this comparable in the finalist.

Four Soft Ltd

73. Assessee objects for inclusion of this comparable due to the functional differences with assessee. It has been submitted by Ld. AR that this company is into product development and owns products namely 4S eTrans and 4S e Log. It has been submitted that these products are used in Sun Microsystems IMC 9

application verification Kit certified for enterprises. Ld.AO however rejected this contention of assessee for the reason that product revenue only amounts to 16% of total sales and the rest is attributable to software services and hence it is comparable.

Ld.Sr.DR relied on observations by authorities below.

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

75. We note that, this company is engaged in research and development and has categorised itself to be a product company at page 78. In the P&L account income has been shown under the category of sales and in schedule 12 there are no segmental details available from product sales and services sales.

76. Even otherwise this company is functionally not comparable to assessee majorly for the reason that it is a product company. And a product company cannot be compared to a captive contract-based service provider like assessee.

Accordingly, we direct Ld.TPO to exclude this company from the list.

Goemetric Software Solutions Co. Ltd.,

77. Ld.AR objected for this company to be included as it has income generated from product sale. It is also been submitted that this company has increased its revenue and has launched the 1st CAD PDM product. Further it has been submitted that this company has its own research and development for software product development in PLM domain. Ld. A.R. has emphasised that this company is a full-fledged enterprise in thereby making it functionally not similar with a contract service provider like assessee.

78. On the contrary learn senior DR submitted that income generated from sale of products are less than 25% of overall business and therefore is comparable in respect of the software development service segment.

79. We have perused submissions advanced by both sides in light of records placed before us. Annual report of this company is placed at page 119 of paper book. At page 16 to be note the profit and loss account wherein income is generated from sale of software packages and services. Annual report specifies the company to be a product based company having its own research and development for development of the software products. Further the profit and loss account does not specify the segmental details of software products and services rendered by this company.

80. We are therefore of opinion that, functions performed by this company is functionally not similar with that of a contract service provider like assessee.

Accordingly, we direct Ld.TPO to exclude this comparable from finalist.

Bodhtree Consulting Ltd

81. This comparable has been objected by Ld.AR on the basis that, it is functionally not comparable with assessee. It has been submitted that this is a product company and revenue recognition is on a fixed-price model.

82. The Ld. senior DR however placed reliance upon orders passed by authorities below.

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

84. We note that annual report of this company is placed at page 1 of paper book. From the fixed assets a scheduled we note that this company has computer software as a part of block of assets. It also has capital work in progress. Thus in our view this is a company develops software on its own and is a full-fledged entrepreneur which cannot be compared to a contract service provider like assessee that functions strictly on the instructions of its AEs.

Accordingly, we direct Ld.TPO/AO to exclude this company from final list.

Accordingly ground 3 (e) and Additional ground 8 raised by assessee stands allowed.

85. Grounds 4-6: Ld.AR has submitted that assessee do not wish to press these grounds.

Accordingly these grounds are dismissed.

86. Ground 7 is regarding the benefit of applying the range of +/-5% in determination of arm's length price.

87. We direct Ld.TPO/AO to consider this claim in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

In the result appeal stands allowed as indicated hereinabove.

Order pronounced in the open court on 14th Aug, 2020

Sd/-

(B. R. BASKARAN)
Accountant Member

Bangalore,

Dated, the 14th Aug, 2020.

/Vms/

Sd/-

(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-08-2020		Sr.PS
3.	Draft proposed & placed before the second member	-08-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-08-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-08-2020		Sr.PS/PS
6.	Kept for pronouncement on	-08-2020		Sr.PS
7.	Date of uploading the order on Website	-08-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-07-2020		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