

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

(Through Virtual Court)

BEFORE SHRI R.S.SYAL, VP AND  
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 632/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

SAS Research & Development (India)  
Pvt. Ltd.  
Level 2A and Level 3, Tower-5,  
Cyber City, Magarpatta, Hadapsar,  
Pune-411 013  
PAN : AAEC8099L

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,  
Circle-6, Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 619/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

The Deputy Commissioner of Income Tax,  
Circle-6, Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. SAS Research & Development (India)  
Pvt. Ltd.  
2<sup>nd</sup> & 3<sup>rd</sup> Floor, Tower-5,  
Magarpatta City, Hadapsar,  
Pune-411 013  
PAN : AAEC8099L

.....प्रत्यर्थी / Respondent

Assessee by : Shri Rajendra Agiwal

Revenue by : Shri Anurag Srivastava

सुनवाई की तारीख / Date of Hearing : 01.04.2021

घोषणा की तारीख / Date of Pronouncement : 10.05.2021

**आदेश / ORDER****PER PARTHA SARATHI CHAUDHURY, JM:**

These cross appeals preferred by the assessee and Revenue emanates from the common order of the Ld. CIT(Appeals)-13, Pune dated 01.12.2016 for the assessment year 2012-13 as per the grounds of appeal on record.

2. At the time of hearing both the parties conceded that facts and circumstances and issues involved in these cross appeals are identical and similar and therefore, after recording the submissions of both the parties, these cases are heard together and disposed of vide this consolidated order.

3. First, we would take up assessee's appeal in ITA No.632/PUN/2017 for the assessment year 2012-13 for adjudication.

**ITA No.632/PUN/2017 ( By Assessee)**  
**A.Y.2012-13**

4. In ITA No.632/PUN/2017, grounds of appeal raised by the assessee are as follows:

***“Grounds of appeal pertaining to transfer pricing adjustment***

***1. In appropriate transfer pricing adjustment even though the pricing of all international transactions of the Appellant was at arm's length***

*Erred in making/confirming transfer pricing adjustment by rejecting the analysis undertaken by the Appellant to determine arm's length price for its international transactions pertaining to rendering of software development support services to the AEs.*

***2. In appropriate use of single year and non-contemporaneous financial data comparable companies for transfer pricing analysis.***

*Erred in considering the operating profit margins on operating cost of the comparable companies based on the financial data pertaining only to financial year ended 31 March 2012 and rejecting use of*

*financial data of comparable companies for multiple years i.e. including 31 March 2011 and 31 March, 2010.*

*Further, erred in computing the arm's length price using the financial information of comparable companies available at the time of assessment proceedings although such information was not available at the time of when the Appellant complied with the transfer pricing regulations.*

**3. Inappropriate modification of export earning filter applied by the Appellant**

*Erred in appropriate modification of export earnings filter applied by the Appellant rejecting companies having export earning less than 75% of operating revenue as against the filter of 25% applied by the Appellant.*

**4. Inappropriate rejection of the turnover filter applied by the Appellant**

*Erred in inappropriately rejecting the turnover filter of Rs.1 Crore to Rs.200 Crores applied by the Appellant while conducting its transfer pricing study for FY 2011-12 and inappropriately applying a turnover filter of Rs.1 Crore to Rs.500 Crores.*

**5. Inappropriate consideration of companies earning super normal profit as comparable to the Appellant**

*Erred by considering super normal profit making companies as comparable for AY 2012-13*

**6. Inappropriately rejecting certain functionally comparable companies merely on the ground that these companies incurred losses during AY 2012-13**

*The appellant in its transfer pricing study report had applied a filter for rejecting companies that were declared sick or had persistent negative net worth. However, Hon'ble CIT(A) erred in rejecting functionally comparable companies merely on the ground that these companies incurred losses during AY 2012-13*

**7. Inappropriate rejection of certain companies merely on the ground that these companies have different financial year end than that of the appellant**

*Erred by rejecting certain companies identified by the Appellant merely on the ground that these companies have different financial year end than that of the appellant*

**8. Inappropriate rejection of certain comparable companies identified in the transfer pricing study report**

*Erred by rejecting certain companies identified by the Appellant in its transfer pricing study report for benchmarking its international transaction pertaining to rendering of software development support and consultancy services even though these companies satisfied all the comparability criteria/filters applied while conducting the transfer pricing study.*

**9. Inappropriately considering additional companies as comparable to the Appellant**

*Erred in identifying additional non-comparable companies as comparable to the Appellant*

**10. Inappropriately rejecting adjustment to account for differences in the risk profile of the appellant vis-à-vis the comparable companies.**

*Erred in comparing full-fledged risk bearing entities with the Appellant's captive operations without making any risk adjustment for differences between the risk profile of comparable companies vis-à-vis the risk profit of the appellant.*

**Other Grounds of appeal:**

**11. Inappropriate levy of interest and initiation of penalty proceedings**

*Erred in levying interest under section 234B of the Act and initiating penalty proceedings under section 271(1)(c) of the Act.*

*The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Honourable Income Tax Appellate Tribunal to decide this appeal according to law."*

5. The assessee has also filed modified grounds in respect of **Ground Nos. 8 & 9** of the grounds of appeal in the appeal memo specifically mentioning the concerned companies which reads as follows:

**"Modified grounds of appeal**

**8. Inappropriately rejecting certain companies identified in the transfer pricing study**

*Erred by rejecting following company from the set of comparable companies identified by the Appellant in its transfer pricing study report for benchmarking its international transaction pertaining to software development and consultancy services even though this company satisfied all the comparability criteria/filters applied while conducting the transfer pricing study.*

- Thinksoft Global Services Limited

**9. Inappropriately considering functionally different companies as comparable to the Appellant**

*Erred in adopting an incoherent approach and identifying following inappropriate additional non-comparable companies as comparable to the Appellant on an ad-hoc basis (cherry picking).*

- *Cybermate Infotek Limited*
- *Infobeans Systems Private Limited and*
- *Cybercom Datamatics Information Solutions Limited*

*The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal any time before or at the time of hearing of the appeal so as to enable your honours to decide this appeal according to law.”*

6. The assessee has filed additional Ground as **Ground No.12** which reads as follows:

**“Additional Ground of appeal**

**12. Ground of Appeal No. 12 : Rejection of Thirdware Solutions Limited as a comparable company to the Appellant**

*Based on the facts and circumstances of the case, the Appellant would like to mention that Thirdware Solutions Limited is functionally different and accordingly, should not be considered as comparable to the Appellant for FY 2012-12.*

*The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal any time before or at the time of hearing of the appeal so as to enable your honours to decide this appeal according to law.”*

7. The assessee further filed an additional ground as **Ground No.13** which reads as follows:

**“Additional Ground of appeal**

**1. Ground of Appeal No. 13 : Order of the Learned CIT(A) liable to be quashed to the extent of set aside to the AO**

*Without prejudice to the other grounds of appeal, the learned CIT(A) in setting aside the matter to the learned AO for examination of one of the comparable identified by the Appellant in the TP study report i.e. Thinksoft Global Services Limited which is beyond the powers of the learned CIT(A) by virtue of Section 251(1)(a) as amended w.e.f.01.06.2001.*

*The Appellant prays that the order of the learned CIT(A) to the extent of remanding the matter be vacated and the direction should be granted to include the comparable on the basis of merits submitted before the learned CIT(A).*

*The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal any time before or at the time of hearing of the appeal so as to enable your honours to decide this appeal according to law.”*

8. At the very outset, the Ld. Counsel for the assessee submitted that they are not pressing Grounds of appeal No.1 to 7 & Ground No.10. After hearing the submission of the Ld. Counsel for the assessee, **Grounds of appeal No.1 to 7 & Ground No.10 are dismissed as not pressed.**

9. The Ld. Counsel for the assessee submitted that **Ground No.11** is premature and consequential and hence, the same does not call for any adjudication.

10. Therefore, the effective grounds of appeal as per grounds of appeal memo are **Ground Nos. 8 & 9** which has been further modified and the same is extracted hereinabove vide Para 5 of this order.

11. The brief facts in this case are that the SAS R & D is wholly owned subsidiary of SAS Institute Inc. (SAS US). SAS R & D was established on 28<sup>th</sup> July 2000 as a private limited company under the Indian Companies Act, 1956. During the year under consideration, SAS R & D is primarily engaged in providing software development and software consultancy services to AEs. These services have been collectively referred as 'Software services'. The assessee has entered into the following international transactions with its AEs during the year under consideration:

	Nate of Transaction	Amount (Rs.)	Method
1	Software Development Services	73,13,58,400	TNMM
2	Software Consultancy Services	35,93,156	TNMM
3	Payment of publication/training	13,918	TNMM

	expenses		
4	Reimbursement of Expenses received	32,97,472	
	Total	73,82,62,946	

12. The assessee has used the Transactional Net Margin Method (TNMM) as the most appropriate method by using the Profit Level Indicator (PLI) of operating profit/operating cost (OP/OC) for benchmarking its international transactions of rendering software development services, consultancy and support services and publication/training expenses. The Ld. TPO had observed that the assessee determined the average PLI of the comparable companies at 9.70% as against its own margin of 10.77%. The assessee has declared very low net margin of 10.77% as compared to the industry standards. The assessee has not furnished any business reasons for earning such low margin as against industry norm. The TPO in its order passed u/s.92CA(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') determined the average PLI of the comparable companies at 26.19% as against its own margin of 10.77%. The TPO passed the order u/s.92CA(3) of the Act and made the upward adjustment of Rs.10,31,89,058/- to the value of the assessee's international transactions.

13. **Ground No. 8** of the modified grounds of appeal pertains to the grievance of the assessee that the TPO rejected Thinksoft Global Services Limited as comparable company with that of the assessee. It is the contention of the assessee that said company satisfied all the comparability criteria/filters applied while conducting the transfer pricing study. The TPO has not accepted Thinksoft Global Services Limited as comparable company since the annual report of this Company was not available in public domain

and as such rejected this company from the list of the comparable companies with that of the assessee company.

14. With regard to this company i.e. Thinksoft Global Services Limited, the assessee submitted that the name of Thinksoft Global Services Limited has been changed into "SQS India BFSI Limited" in FY 2014-15. The said company is listed on the Bombay Stock Exchange and the Annual Report of the company is available on the BSE website (i.e. in public domain). That further, the assessee submitted that Thinksoft Global Services Limited satisfies all the comparability filters that have been applied by the TPO in his TP order.

15. The Ld. CIT(Appeals) vide Para 2.2.2.12.3 and 2.2.2.12.4 has observed that the company's annual report was placed before him which was not examined by the TPO and therefore, he directed the TPO/AO to examine the company's annual report submitted from the point of view of its comparability and re-adjudicate the matter.

16. The assessee on the other hand contends the very fact that in the public domain, annual report of Thinksoft Global Services Limited is available for which the assessee also has computed the margin for that company which is evident at Page 6 of the TPO's order. Therefore, the ground of TPO for not considering this company as comparable company that annual report of Thinksoft Global Services Limited is not available in public domain, is therefore, not correct. That further, the Ld. CIT(Appeals) after receiving the annual report of Thinksoft Global Services Limited could have called for remand report from AO/TPO. The Ld. Counsel for the assessee took us in detail through Director's report for Thinksoft Global Services Limited and

demonstrated that it is functionally similar to that of the assessee company with regard to software development services.

17. Having perused the Director's report, Annual report of Thinksoft Global Services Limited, it is evident that data is available in public domain as the company is listed with the Bombay Stock Exchange. These facts were not refuted by the Ld. DR. Further, the Ld. DR also could not bring on record any materials contrary to these facts. Having heard the parties herein, taking totality of facts and circumstances, **we direct the AO/TPO to include Thinksoft Global Services Limited as comparable Company with that of the assessee company in the final list of comparables.** Thus, **Ground No.8 raised in appeal by the assessee is allowed.**

18. Now coming to the **Ground No.9** of the modified grounds of appeal wherein the AO/TPO has selected certain companies as comparable with that of the assessee for which the assessee wants exclusion of these three companies' viz. (i) Cybermate Infotek Limited (ii) Infobeans Systems Private Limited and (iii) Cybercom Datamatics Information Solutions Limited.

**(i) Cybermate Infotek Limited:-**

19. The TPO in his order has held that Cybermate Infotek Limited is comparable with that of the assessee because it meets all the filters applied by the assessee. That however, before the Ld. CIT(Appeals), the assessee had made detailed written submissions which is on record submitting that this company should be excluded from the final list of comparable companies with that of the assessee. The assessee has stated various reasons submitting that Cybermate Infotek Limited was functionally different from that of the assessee

company for FY 2011-12 relevant to assessment year 2012-13. Broadly, the contention of the assessee was that this company is also into product development and the assessee provides Software development services, secondly, it had extra-ordinary event of labour unrest during the year, thirdly, it is a super normal profit making company and fourthly, it fails the net fixed asset to sales filter used by the TPO. Thereafter, the Ld. CIT(Appeals) vide Para 2.3.1.2.4 onwards as per reasons given in his order, rejected the contention of the assessee and upheld the order of TPO.

20. At the time of hearing, the Ld. Counsel for the assessee took us to the annual report of the Cybermate Infotek Limited at Page 1083 of the paper book onwards. That therein, at Page 1096, the evidence of products of this company i.e. Cybermate Infotek Limited has been specifically mentioned. That, reiterating the submissions already made before the Department, the Ld. Counsel for the assessee submitted that this company is functionally dissimilar with that of the assessee company since the said company i.e. Cybermate Infotek Limited is into product development whereas the assessee provides software development services. Evidencing these facts at Page 1096 of the Paper book, where it is clearly mentioned that Cybermate Infotek Limited has made products called "HEALSOFT". That apart from HEALSOFT, Cybermate Infotek Limited has made 38 products. Therefore, it can be seen Cybermate Infotek Limited is into product development.

21. The Pune Bench of the Tribunal in the case of **M/s. PubMatic India Private Limited Vs. ACIT, ITA No.655/PUN/2017 for the assessment year 2012-13 dated 09.03.2018** vide Para 10 to 14 of the decision has discussed this issue by observing as follows:

*"10. We proceed to decide the present appeal in line with the arguments put forward by the learned Authorized Representative for the*

assessee. The learned Departmental Representative for the Revenue has objected to the submissions made by the assessee. The first concern which is sought to be excluded by the assessee is Cybermate on the ground that it was engaged in providing both software development services and was a product company and in the absence of segmental details, the same cannot be compared. Both these business activities were clubbed under the head 'Software segment' and in the absence of segmental details being available, the assessee argues that the same cannot form part of list of comparables. The perusal of annual report of the said concern reflects the said concern to be engaged in providing software development services as well as developing variety of software products i.e. in the field of Hospital Management, Software HEAL SOFT and 38 other products. The financials of the said concern reflect no segmental reporting and the services are declared under one head. In such circumstances, where the segmental details were not available of the concern which was engaged in multiple activities i.e. in the present case, in providing software development services as well as being a product company; then we hold that the margins of said concern cannot be applied to benchmark the international transactions of the concern which was engaged in providing software development services to its associated enterprises. The assessee was also providing back office support services to its associated enterprises but was maintaining segmental details for both the activities undertaken by it and hence, the two transactions have been benchmarked separately even by the TPO and the Assessing Officer. The concern which is functionally different from the assessee i.e. in addition to providing software development services, was also product company, then the margins of said concern cannot be compared with the margins of assessee.

11. The Hon'ble High Court of Delhi in *Prl.CIT Vs. Saxo India Pvt. Ltd.* in ITA No.682/2016, for assessment year 2011-12, judgment dated 28.09.2016 had held that the cost for a particular segment had to be available in order to determine the exact profitability and if same was not available, then the said company could not be selected as comparable company. The Hon'ble High Court of Delhi (*supra*) while deciding the case of a company which was engaged in providing software development services and its margins were compared with a company which were involved in both software development services as well as sale of software products held that the said concern was to be rejected from final set of comparables.

12. The Mumbai Bench of Tribunal in *Ness Technologies (India) Pvt. Ltd. Vs. ACIT* in ITA No.7016/Mum/2012, relating to assessment year 2008-09, order dated 24.09.2014 had excluded Cybermate as not comparable to the company providing software development support services to associated enterprises. The learned Authorized Representative for the assessee has pointed out that profile of concern Cybermate for assessment year 2008-09 and in the year under appeal i.e. assessment year 2012-13 is the same and hence, the said proposition is to be applied. We find merit in the plea of assessee in this regard.

13. We further find that Pune Bench of Tribunal in *MSC Software Corporation India (P.) Ltd. Vs. ACIT (2017) 80 taxmann.com 55 (Pune-Trib)* while deciding the case of exclusion of a product company had held as under:-

"18. On perusal of record and the order of Tribunal in *John Deere India Pvt. Ltd. Vs. ACIT (supra)*, we find that the concern E-zest

*Solutions Ltd. is a product company and is engaged in both the provision of software services and sale of software services. On the other hand assessee is engaged in Software development services where the segmental details are not available, accordingly, E-zest Solutions Ltd. is functionally not comparable. Accordingly, we hold that the said concern is to be excluded from the final set of comparables.”*

14. *The said proposition was applied by Pune Bench of Tribunal in DCIT Vs. Amber Point Technology India Pvt. Ltd. in ITA Nos.756 & 757/PUN/2014 and cross appeals in ITA Nos.761 & 762/PUN/2014, relating to assessment years 2008-09 and 2009-10, order dated 25.01.2018 for exclusion of concern which was engaged in providing both software services and was also selling its products. Accordingly, we hold that the concern Cybermate which is engaged in both sale of software products and providing software development services and where no segmental details are available for each of the segments, then the margins of said concern could not be applied to benchmark the arm's length price of international transactions of providing software development services to associated enterprises by the assessee.”*

22. The Ld. DR also submitted that this issue is squarely covered in favour of the assessee by the aforesaid decision and therefore, following the same parity of reasoning, **we direct the AO/TPO to exclude Cybermate Infotek Limited from the final list of comparable companies as regards the assessee. Hence, this part of ground is allowed.**

**(ii) Infobeans Systems Private Limited :-**

23. The TPO had held that this company is comparable to that of the assessee since it passes all the filters provided to the assessee. Broadly, the assessee wants exclusion of this company based on extraordinary event i.e. the event of demerger that has taken place and therefore, the assessee wants exclusion of this company from the final list of comparables. The assessee had filed detailed written submissions before the Department in this regard. The Ld. CIT(Appeals) was of the opinion that demerger became effective only on 26.09.2012 as per High Court's order.

24. At the time of hearing, the Ld. Counsel for the assessee took us to the annual report of this company at Pages 689 to 692 of the Paper book wherein it has been stated as follows:

**MERGER**

*A scheme of Arrangement ("Scheme") between the company, Infobeans Systems India Private Limited ("the Demerged Company") currently known as Seed Enterprises Private Limited) to Infobeans Software Solutions Private Limited ("Resulting Company, currently known as infobeans Systems India Private Limited"). Under the scheme, the Resulting Company had acquired the Software Business of the Demerged Company along with all the assets and liabilities pertaining to that business with retrospective effect from 1<sup>st</sup> April, 2011 (Appointed Date). The Scheme had accordingly been given effect to the Financial Statement."*

**ACKNOWLEDGEMENT**

*Yours Directors place on record their appreciation of the sincere co-operation received from the employees, banks and other Government Agencies.*

FOR AND ON BEHALF OF THE BOARD OF DIRECTORS

*Place : Indore*

*Date : 31<sup>st</sup> December, 2012*

CHAIRMAN "

Therefore, he submitted, it was evident that accounts got finalized on 26<sup>th</sup> September, 2012 and the company was still in finalization of accounts and thus, the observation of the Ld. CIT(Appeals) is contrary to materials available on record.

25. On the same set of facts, the Pune Bench of the Tribunal in the case of **M/s. PubMatic India Private Limited Vs. ACIT, ITA No.655/PUN/2017 for the assessment year 2012-13 dated 09.03.2018** vide Para 16 to 19 has excluded Infobeans Systems Private Limited from the final set of comparables. The relevant Paras are extracted as follows for the sake of completeness:

*"16. The third concern which the assessee wants to be excluded is Infobeans Systems Pvt. Ltd. on the ground that the said concern was earning foreign exchange from export of goods on FOB basis. Hence, the same was not comparable with a concern engaged in software*

*development services. Our attention was drawn to the financials of the said concern placed at page 624 onwards, wherein in the Profit and Loss Account, the revenue from sale of software was also shown. The learned Authorized Representative for the assessee also stressed that no segmental details were available. Further, our attention was drawn to the notes to accounts, wherein the export of goods on FOB and services rendered is reported.*

17. *Another aspect which has been stressed by the assessee is the extraordinary event of demerger, wherein the financial statements of said concern included the financial statements of software business of demerged company i.e. Seed Enterprises Pvt. Ltd., are available at pages 614 and 633 of the Paper Book.*

18. *We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee.*

19. *Before parting, we may also refer to the observations of DRP on Safe Harbour Rules but the same at present cannot be applied and in any case the same cannot be applied to equate software product with software development company. Another aspect which had taken place during the accounting period is the demerger of business of Seed Enterprises Pvt. Ltd., for which the said concern had filed revised accounts. The extraordinary event which had taken place makes the said concern as not comparable to the assessee. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in M/s. Aptara Technologies Pvt. Ltd. Vs. ACIT in ITA No.259/PN/2015 and cross appeal in ACIT Vs. M/s. Aptara Technologies Pvt. Ltd. in ITA No.579/PN/2015, relating to assessment year 2010-11, order dated 31.05.2016 and in Cummins Turbo Technologies Limited Vs. DDIT in ITA No.784/PN/2014, relating to assessment year 2009-10, order dated 30.03.2016. Accordingly, we direct the Assessing Officer to exclude Infobeans Systems Pvt. Ltd. from final set of comparables.”*

26. The Ld. DR placed strong reliance on the orders of the Sub-ordinate Authorities but principally agreed that the issue is covered in favour of the assessee by the aforesaid decision of the Pune Bench of the Tribunal (supra.) Therefore, following the same parity of reasoning, **we direct the AO/TPO to exclude Infobeans Systems Private Limited from the final set of**

**comparables with that of the assessee company. Thus, this part of the ground is allowed.**

**(iii) Cybercom Datamatics Information Solutions Limited:-**

27. The TPO in his order has stated that this company as comparable company to that of the assessee company on the grounds that it clears all filters and that super normal profit making companies is not a criteria for its rejection. The assessee has filed detailed written submissions before the Ld. CIT(Appeals) which is on record. The Ld. CIT(Appeals) after considering the submissions of the assessee and the assessment order observed that the assessee has not furnished the annual report of the company for the year under consideration. However, the assessee has submitted annual report for FY 2012-13 (AY 2013-14). The Ld. CIT(Appeals) held that since the annual report provides minimum critical informations about the company in the public domain, therefore, without it, the company's comparability or otherwise would be based on presumptions.

28. Therefore, on perusal of the observations of the Ld. CIT(Appeals), we are of the considered view that it is an undisputed fact, the assessee had submitted annual report for AY 2013-14 and not for AY 2012-13. Thus, qualitative as well as quantitative data regarding this company i.e. Cybercom Datamatics Information Solutions Limited was not available before the Ld. CIT(Appeals) for proper adjudication to decide whether this company should be excluded from the final list of comparables or not. In view thereof, in the interest of justice, we set aside the order of the Ld. CIT(Appeals) on this comparable and remand the same to the file of the AO/TPO to determine from company's annual report for the year under consideration in respect of

Director's report, notes of accounts and audit report regarding the functional comparability of the company. The assessee is directed to provide full details so that the AO/TPO would adjudicate the matter as per law complying with the principles of natural justice. Thus, **this part of ground is allowed for statistical purposes.**

29. Thus, **ground No.9 raised in appeal by the assessee is partly allowed for statistical purposes.**

30. Now coming to the additional ground i.e. **Ground No.13**, the assessee submitted that they are not pressing this ground. After recording the submissions of the assessee, this additional ground of appeal i.e. **Ground No.13 is dismissed as not pressed.**

31. Next additional ground i.e. **Ground No.12** pertains to rejection of Thirdware Solutions Limited as comparable company with that of the assessee.

32. The Ld. Counsel for the assessee brought to notice to the Bench at Page 1065 of the Paper book referring description of the products or services of Thirdware Solutions Limited wherein it has been specifically stated as follows:

*“Acquisition/purchase of IT hardware and software including software as a service (SAAS).”*

Therefore, Thirdware Solutions Limited is involved in purchase of IT hardware and thus, functionally different with that of the assessee company.

32.1 The Ld. Counsel for the assessee for this proposition further relied on the decision of the Delhi Bench of the Tribunal in the case of **M/s. Siemens Industry Software (I) P. Ltd. Vs. DCIT, ITA No.1307/Del/2014** for the

assessment year 2009-10 wherein vide Para 33 to 36 of the said decision, the Tribunal has held and observed as follows:

*“33. It is the argument of the learned AR that the annual report for the Asstt. Year 2009-10 of Thirdware Solutions Ltd. Shows that the company derives revenue from various services, sale of licences, export from SEZ unit, revenue from subscription etc. and the company engaged in diversified business including software products and hence cannot be treated as comparable with the assessee at all as it is not possible to work out and exclude the receipts and expenditure of different categories of income not related to the software development. Besides this, he further submitted that there is no information relating to segmental break up in the annual report of this company for the Asstt. Year 2009-10 providing information on revenue and expenditure from software services and hence, segmental margin cannot be computed for benchmarking the international transaction of providing software development services with attendant ITSS.*

*34. Per contra, it is the submission of the learned DR that the Thirdware Solutions ltd. Is also involved in software development and other services but of course, there is revenue from sales also. He also relied upon the observations and findings of the authorities below in respect of this company.*

*35. We have gone through the record including the annual report of this company and find from page 318 that this company derives income of Rs.77,03,21,375/- from sales whereas the other income is Rs.2,30,48,603/- Schedule XII relates to sales shows that this company is deriving income of Rs.2,32,37,588/- from sales of licences, Rs.8,91,77,023/- from software services, Rs.47,85,72,420/- from export of SEZ unit, Rs.16,29,00,630/- from export from STPUI unit and a sum of Rs.1,64,33,744/- from subscriptions. No segmental information is available.*

*36. On a careful consideration of the diversified functions performed by Thirdware Solutions Ltd. we are of the considered opinion that this company is not suitable to be compared with a captive contract software developer like the assessee and this company is liable to be excluded from the list of the comparables. We accordingly direct learned AO to delete this company from the list of comparables for benchmarking the international transactions.”*

33. The Ld. DR submitted that this issue may be remanded to the file of the AO/TPO for detailed factual verification based on annual report and other relevant documents in order to verify the nature and scope of the function of Thirdware Solutions Limited. The Ld. Counsel for the assessee did not raise any objection to this proposition. We are of the considered view, in the

interest of justice, we agree with the submissions of the Ld. DR and considering the facts and circumstances, we restore this ground to the file of the AO/TPO for determining functionality of this company as per law while complying with the principles of natural justice. Thus, **additional ground i.e. Ground No.12 is allowed for statistical purposes.**

34. In the result, **appeal of the assessee in ITA No.632/PUN/2017 is partly allowed for statistical purposes.**

**ITA No.619/PUN/2017 ( By Revenue)**  
**A.Y.2012-13**

35. In ITA No.619/PUN/2017, the Revenue has raised following grounds of appeal:

*“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred on facts and in law in directing to consider M/s.Cigniti Technologies Ltd. as comparable ignoring AMD/Sales filter applied by the Transfer Pricing Officer (TPO)?*

*2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred on facts and in law in directing to consider Presidential Systems and Solutions Ltd. as comparable in spite of more than 10 times difference in turnover and ignoring criteria of Rs.500 crore prescribed in the Sale Harbor Rules.*

*3. For this and such other reasons as may be urged at the time of hearing, the order of the CIT(A) on above issue may be vacated and that of the Assessing Officer be restored.*

*4. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”*

36. That with regard to **Ground No.1** of Revenue's appeal, the grievance of the Revenue pertains to the fact that the Ld. CIT(A) has directed the AO/TPO to consider M/s.Cigniti Technologies Ltd. as comparable ignoring AMD/Sales filter applied by the Transfer Pricing Officer (TPO).

37. The TPO vide Para 10.5.11 of his order regarding M/s.Cigniti Technologies Ltd. has held and observed that the assessee tends to misconceive itself on lots of facts. The said comparable was never selected or agreed by the TPO. This company fails on filter forex to sales filter. Therefore, TPO rejected this company i.e. M/s.Cigniti Technologies Ltd. since this company fails AMD/sales filter.

38. At the very outset, the Ld. Counsel for the assessee submitted that they are not contesting this appeal filed by the Revenue.

39. Per contra, the Ld. DR has placed strong reliance on the order of the TPO.

40. In view of the fact that the assessee does not want to contest this appeal filed by the Revenue, in such scenario, we uphold the order of the TPO reversing the order of the Ld. CIT(Appeals). Thus, **Ground No.1 raised in appeal by the Revenue is allowed.**

41. **Ground No.2** of Revenue's appeal pertains to the fact that the Ld. CIT(Appeals) has directed AO/TPO to consider Presidential Systems and Solutions Ltd. as comparable in spite of more than 10 times difference in turnover and ignoring criteria of Rs.500 crore prescribed in the Safe Harbour Rules.

42. The observation of the TPO on this ground is that this company's turnover is more than Rs.500 Crore and hence, it cannot be accepted as comparable company. This company fails the turnover criteria as prescribed in the Safe Harbour Rules. The Ld. CIT(Appeals) on this issue rejected the TPO's contention and considered Presidential Systems and Solutions Ltd. as

comparable with that of the assessee for benchmarking international transaction.

43. The Ld. Counsel for the assessee already stated that they are not contesting this appeal filed by the Revenue.

44. Per contra, the Ld. DR has placed strong reliance on the order of the TPO.

45. After hearing the parties and on the very fact that the assessee does not want to contest this appeal filed by the Revenue, we uphold the order of the TPO reversing the order of the Ld. CIT(Appeals). Thus, **Ground No.2 raised in appeal by the Revenue is allowed.**

46. **Ground No. 3 and 4** of the Revenue's appeal are general in nature and hence, no adjudication is required.

47. In the result, **appeal of the Revenue in ITA No.619/PUN/2017 is allowed.**

48. In the combined result, **appeal of the assessee in ITA No.632/PUN/2017 is partly allowed for statistical purposes and appeal of the Revenue in ITA No.619/PUN/2017 is allowed.**

Order pronounced on 10<sup>th</sup> day of May, 2021.

Sd/-  
**R.S.SYAL**  
**VICE PRESIDENT**

Sd/-  
**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 10<sup>th</sup> May, 2021.

SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-13, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच,  
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	01.04.2021	Sr.PS/PS
2	Draft placed before author	10.05.2021	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		