

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

<b>IT(TP)A No.182/Bang/2021</b>
<b>Assessment Year : 2016-17</b>

OLF (India) Software Pvt. Ltd., The Milenia Tower-A, 7 <sup>th</sup> Floor, 1 and 2 Murphy Road, Ulsoor, Bengaluru-560 008.	<b>Vs.</b>	The Asst. Commissioner of Income-Tax, Circle-5(1)(2), Bengaluru.
<b>PAN - AADCC 8245 M</b>		
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Ajit Kumar Jain, C.A
Revenue by	:	Shri Pradeep Kumar, CIT (DR)

Date of Hearing	:	11-08-2021
Date of Pronouncement	:	28-09-2021

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

The present appeal has been filed by assessee against order dated 30/03/2021 passed by the Ld.ACIT, National e-assessment centre Delhi for assessment year 2016-17 on following grounds of appeal:

*“Based on the facts and circumstances of the case, OLF (India) Software Private Limited (hereinafter referred to as the Appellant) respectfully craves leave to prefer an appeal against the order passed by National e-Assessment Centre (NeAC) dated 30 March 2021 in pursuance of directions issued by Dispute Resolution Panel (DRP), Bangalore, dated 26 February 2021 under Section 253 of the Income-tax Act, 1961 (‘Act’) on following grounds which are independent of and without prejudice to each other:*

*1. On the facts and circumstances of the case and in law; the learned Assessing Officer (‘AO’)/Transfer Pricing Officer (‘TPO’) and the Hon’ble Dispute Resolution Panel (‘DRP’) erred making I confirming total addition of Rs. 2.21,22,670 under Section 92CA (3) of the Act in respect of software services provided by the Appellant to its Associated Enterprise (‘AE’).*

*2. On the facts and circumstances of the case and in law, the reference made by the learned AO to the learned TPO for determining the arm's length price of the international transaction is bad in law and accordingly, consequential transfer pricing order, DRP directions and final assessment order-are liable to be quashed.*

*3. On the facts and circumstances of the case and in law, the learned AO I TPO and Hon’ble DRP erred in disregarding benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data requirement in the transfer pricing study report maintained as per Section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (‘the Rules’).*

*4. On the facts and in the circumstances of the case and in law, the learned AO / TPO and the Hon’ble DRP have,*

*I. Erred in re-computing operating margin of the Appellant.*

*2. Erred in applying modified and additional filters without providing cogent reasons for arriving at comparable set.*

*3. Erred in not considering application of turnover filter proposed by the Appellant*

*4. Erred in incorrectly rejecting functionally comparable companies selected by the Appellant.*

*5. Erred in selecting high margin companies and rejecting low margin companies without considering Appellant's contentions of functional comparability.*

*6. Erred in incorrectly computing operating margin of comparable companies.*

*7. Erred in not allowing economic adjustments in accordance with provisions of Rule 1 OB of the Income Tax Rules, 1962 to account for difference between the Appellant and comparable companies.*

*Z Erred in not considering the fact that even Safe Harbour rules provides for lower operating margin vis-à-vis median of comparable set.*

*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 Ld. AO to decide this appeal according to law.”*

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

2. The assessee is a company and is engaged in the business of back-end software development services. It filed its return of income for year under consideration on 29/11/2016 declaring total income of Rs.2,87,79,980/-. The case was selected for scrutiny and notice under section 143 (2) was issued to assessee. Subsequently notice under section 142 (1) was also issued. From the details filed, the Ld.AO observed that, assessee had international transaction with associated enterprise exceeding Rs.15 crores and accordingly the case was referred to transfer pricing officer under section 92CA of the Act.

2.1 Upon receipt of the reference, the Ld.TPO called for economic analysis of the international transaction entered into by assessee with its associated enterprise in form 3 CEB. On perusal of the Transfer Pricing report, the Ld.TPO observed the functions performed by assessee as under:

*“2.1. Profile: OLF (India) software Pvt. Ltd. formally known as Cube Logic (India) Pvt. Ltd. was incorporated on 16th December 2009 under company's Act, 1956. OLE (India) Software Pvt. Ltd is the immediate subsidiary of Cube Logic Ltd. UK and by virtue of, and it is providing*

*back end software development services using the technology platform as per the requirement of the letter.*

*2.2 Functions: OLF Software Pvt. Ltd. performs services under the business model of a back end software Development service provider while fulfilling the duties under the scope of work entered with its AEs. The terms and conditions relating to the transactions have been clearly charted into the terms with the Associated Enterprise.”*

2.2 The Ld.TPO observed that assessee had entered into following international transaction with the associated enterprise:

International Transaction				
Particulars	Receivable/Received	Payable / Paid	As per TP Document (INR)	Method
Software development		18,77,87,010	18,77,87,010	TNMM
Trade Advances	4,06,76,816			TNMM
Total	4,06,76,816	18,77,87,010		22,84,63.826

2.3 The Ld.TPO observed that assessee computed its operating margin at 15.18% by using OP/OC as the PLI and TNMM as most appropriate method. Assessee had used following 11 comparables having the 55<sup>th</sup> percentile at 10.97%. Assessee thus concluded its transaction to be at arms length.

S.No.	Name of the company
1.	Ace Software Exports Ltd
2.	Agilisys IT Services India Pvt Ltd
3.	Aithent Technologies Pvt Ltd
4.	e-Infochips Ltd
5.	Evoke Technologies Pvt Ltd
6.	Expert Global Solutions Pvt Ltd
7.	Harbinger Systems Pvt Ltd
8.	InfoBeans Technologies Ltd
9.	KPIT Technologies Ltd
10.	SagarSoft (India) Ltd
11.	Sopra India Pvt Ltd

2.4 The Ld.TPO rejected comparability carried out by assessee and applied fresh filters, thereby shortlisting following 13 comparables as final set having the 35<sup>th</sup> percentile margin to be 24.83% .

S.N	Company Name	Financial Year wise OP/OC (%)			
		2015-16	2014-15	2013-14	Weighted Average
1	Kals Information Systems Pvt. Ltd.	3.97 % %	5.77 %	16.94 %	8.60
2	Rheal Software Pvt. Ltd.	3.20%	2.76%	36.64%	14.50%
3	C G-V A K Software & Exports Ltd.	19.60%	19.87%	13.81%	18.50/0
4	R S Software (India) Ltd.	-2.09%	32.75%	24.14%	20.87%

5	Larsen & Toubro Infotech Ltd.	26.29%	24.22%	23.54%	24.83%
6	Nihilent Ltd.	15.94%	29.19%	35.72%	26.36%
7	Inteq Software Pvt. Ltd.	7.53%	32.14%	45.00%	28.20%
8	Persistent Systems Ltd.	26.92%	31.34%	35.64%	30.89%
9	Infobeans Technologies Ltd.	34.98%	20.78%	41.95%	32.42%
10	Thirdware Solution Ltd.	23.89%	44.39%	44.68%	36.90%
11	Infosys Ltd.	38.22%	41.30%	36.28%	38.61%
12	Aspire Systems (India) Pvt. Ltd.	34.26%	47.56%	38.04%	39.28%
13	Cybage Software Pvt. Ltd.	62.90%	68.68%	68.82%	66.45%
	35th Percentile				24.83%
	Median				28.20%
	65th Percentile				32.42%

2.5 Based on the above, adjustment was proposed by the Ld. TPO for software development service segment to be Rs.2,21,22,670/- being the shortfall.

2.6 Thus, a sum of Rs. 76,45,31,838 was suggested as addition to total income of assessee on determination of ALP by the TPO. The addition suggested by the Ld.TPO in the order passed u/s.

92CA(4) of the Act was incorporated by the Ld.AO in the draft order of assessment dated 6-12-2017.

2.7 Against the addition proposed in the draft order of assessment, the assessee filed objection before the Dispute Resolution Panel (DRP) u/s. 144C of the Act. The DRP excluded SQS India BFSI Ltd. from the list of comparable companies and retained the remaining 7 comparables chosen by the Ld.TPO.

2.8 Before the DRP, assessee alleged exclusion of certain comparables which were rejected. The DRP also rejected objection regarding correcting the margins of the comparables adopted by the Ld.TPO.

2.9 On receipt of the DRP directions, the Ld.AO passed final assessment order by making addition amounting to Rs.2,21,22,670/-.

2.10 Aggrieved by the order of Ld.AO, assessee is in appeal before us now.

2.11 At the outset the Ld.AR submitted that amongst the grounds raised by assessee it is seeking exclusion of following comparables:

Persistent Systems Ltd.

Aspire systems (India) Ltd.

Larsen and Toubro Infotech Ltd.

Nihileant Technologies Ltd.

Infosys Ltd.

Thirdware Solutions Ltd.

Cybage Software Pvt.Ltd

2.12 Accordingly all other grounds raised by assessee stands dismissed as not pressed.

2.13 Before we undertake the comparability analysis it is necessary to understand the functions performed, assets owned and risks assumed by assessee in the software development service segment. Functional analysis carried out by the Ld.TPO has been reproduced in the earlier part of this order. Insofar as the assets owned and risk assumed, we note from the TP study at age 29 of the paper book that it owns tangible assets for running the business like computers and peripherals, furniture fixtures office equipment. As regards the risk assumed, we note that assessee has been undertaking foreign exchange fluctuation risk as the remuneration received is in foreign exchange.

2.14 At page 31 assessee has been characterised to be a captive service provider that assumes less than nominal risk associated with the business of providing software development services to its AE's.

2.15 Based on the above we shall now undertake the comparability of assessee with the alleged comparables sought for exclusion

2.16 It has been submitted by the Ld.AR that all these comparables do not satisfy the turnover filter applied by the Ld.

TPO and at the outset deserves to be eliminated. He submitted that the annual reports of these companies are placed in the paper book volume 2 which reveals that turnover is more than 200 crores which doesn't even reach 10 times the turnover of assessee's crore. It has been submitted that going by the computation of the turnover limit either by considering 1 to 200 crores or 10 times the assessee's turnover these comparables deserves to be excluded. He also submitted that they are functionally also not comparable as these are product companies and carries high intangibles and R&D of its own.

2.17 On the contrary the Ld. DR placed reliance on orders passed by authorities below.

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

3.1 We place reliance on the decision of coordinate bench of this Tribunal in case of *LSI India research development (P.) Ltd. v. DCIT* reported in [2021] 124 taxmann.com 83.

3.2 This Tribunal in *LSI India research development (P.) Ltd. v. DCIT (supra)* observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:

**16.** *As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the ld. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded*

3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-

"5. The Ld A.R submitted that M/s Infosys Ltd, M/s Persistent Systems Ltd and M/s Thirdware Solutions Ltd have been excluded by the co-ordinate bench in the assessee's own case in AY 2008-09 in IT(TP)A No. 1673/Bang/2012.

6. We notice that the co-ordinate bench has excluded M/s Infosys Ltd in AY 2008-09 by following the decision rendered by another co-ordinate bench in the case of 3DPLM Software Solutions Ltd (IT(TP)A No. 1303/Bang/2012 dated 28-11-2013, wherein the decision rendered in the case of Triology E Business Software India P Ltd (ITA No. 1054/Bang/2011) was followed and it was held that M/s Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It was further observed that the break-up of revenue from software services and software product is not available.

6.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Infosys Ltd.

7. In AY 2008-09, the co-ordinate bench has excluded M/s Persistent Systems Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s Persistent Systems Ltd is engaged in product development and product design services while the assessee is a software development service provider. Further, the segmental details were not available.

7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Persistent Systems Ltd.

8. We also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

*8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Thirdware Solutions Ltd.*

**17.** *As far as exclusion of Larsen & Toubro Infotech Ltd., is concerned, the Tribunal in the very same case of LG Soft (P.) Ltd. (supra) in another order dated 27-9-2019 in MP No. 95/Bang/2019 held that exclusion of Larsen & Toubro Infotech Ltd., was omitted to be adjudicated in the original order dated 28-5-2019 passed by the Tribunal referred in the earlier paragraph and held that Larsen & Toubro Infotech Ltd., is also not a comparable company because there were extraordinary events that occurred in the relevant previous year and that it possessed brand and intangibles and there was no segmental information of sub-contracting expenses”.*

3.3 There is nothing on record brought by the Ld.CIT.DR in order to establish that these are comparable with assessee that is a captive service provider which functions at the strict supervision and instructions by the AE's. Further we note that turnover criteria has to be applied with an upper limit which is not been considered by the Ld. TPO. The TPO has applied less than 1 crore turnover limit to eliminate the comparables however it failed to apply upper limit considering the functions performed assets owned and risk assumed by assessee under this segment for the year under consideration.

3.4 Respectfully following the view taken by coordinate benches in respect of the turnover limits that needs to be applied, we direct Ld.AO/TPO to reject these comparables from the finalist.

3.5 Insofar as Aspire systems (India) Ltd., Nihileant Technologies Ltd. And Cybage Software Pvt.Ltd is concerned, it is also been submitted by Ld.AR that direction may be given to

the Ld. AO to consider correct margins of the comparables that is finally retained in the final list.

3.6 Accordingly we direct the Ld. AO/TPO to adopt correct margins of the comparables in accordance with law.

**Accordingly, the grounds raised by assessee stands partly allowed.**

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

Order pronounced in the open court on 28<sup>th</sup> Sept, 2021

Sd/-  
(B.R BASKARAN)  
Accountant Member  
Bangalore,  
Dated, the 28<sup>th</sup> Sept, 2021.  
/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