

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A Nos. 450 & 1214/Bang/2017
Assessment years : 2010-11 & 2011-12

M/s. MFormation Software Technologies India Pvt. Ltd., KH No.37/11/37/28, Village Kapashera, CNG Station, New Delhi – 110 037. PAN: AAECM 0999F	Vs.	The Income Tax Officer, Ward 12(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Priyadarshi Mishra, Addl. CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	14.09.2021
Date of Pronouncement	:	06.10.2021

ORDER

Per Chandra Poojari, Accountant Member

These appeals by the assessee are directed against the separate orders of the CIT(Appeals)-4, Bangalore passed u/s. 143(3) r.w.s. 144C/92CA of the Income-tax Act, 1961 [the Act] dated 30.11.2016 and 21.01.2017 for the assessment years 2010-11 & 20-11-12 respectively.

ITA No.450/B/2017 (AY 2010-11)

2. The Assessee Company is stated to be engaged in the development and export of computer software to its holding company.

The international transactions undertaken by the Appellant are as under:

	Amount Received
Software services	Rs. 23,61,49,062/-
Market support services	Rs. 1,95,82,511/-

3. The assessee has raised the following grounds of appeal :-

“Common Grounds

1. The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Commissioner of Income Tax (Appeals) [Hon'ble CIT (A)] grossly erred in adjusting the transfer price of the Appellant's international transactions with its Associated Enterprises ("AEs") u/s 92CA of the Income-tax Act, 1961 ("the Act").
2. The learned AO/learned TPO/Hon'ble CIT(A) erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.
3. The learned AO/learned TPO/Hon'ble CIT(A) erred in rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.
4. The learned AO/learned TPO/Hon'ble CIT(A) erred in not complying with the guidelines specified under Rule 10B (2) and Rule 10B(3) of the Income-tax Rules, 1962 while selecting comparables, thereby violating the basic tenet of the Indian Transfer Pricing regulations.
5. The learned AO/learned TPO/Hon'ble 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 AO/learned TPO/Hon'ble CIT(A) erred in not allowing appropriate adjustment towards to the risk differential between the Appellant vis-à-vis independent comparable companies.”

4. At the time of hearing, the above grounds (1) to (6) were not pressed and accordingly dismissed as not pressed.

Software Services

5. The Assessee was in receipt of Rs. 23,61,49,062 on account of providing software development services to its AE. The TPO recomputed the arithmetic mean of the profit level indicators of the final comparables, arriving at a shortfall of Rs. 2,13,05,013 which was treated as Transfer-pricing adjustment, in respect of the software-development segment. The TPO while accepting TNMM methodology, however, resorted to a fresh search and revised analysis on basis of fresh comparables.

6. The TPO after considering the assessee's TP study and applying certain filters, arrived at a final list of 11 comparables and determined the arm's length price (ALP) as follows:-

Arm's Length Mean Margin on cost			22.71%
Operating Cost			Rs. 198,926,373
Arms Length Price(ALP)	122.71%	Of operating cost	Rs. 244,102,552
Price Received			Rs. 222,797,539
Shortfall being adjustment			Rs. 21,305,013

7. Vide **ground No.7**, the assessee seeks exclusion of the following comparables:-

- (i) ICRA Techno Analytics Ltd.
- (ii) KALS Information Systems Ltd.
- (iii) Thinksoft Global Services Ltd.

8. During the course of hearing, the assessee sought exclusion of only ICRA Techno Analytics Ltd. and other two comparables were not pressed. As such, the grounds with regard to other two comparables are dismissed as not pressed.

ICRA Techno Analytics Ltd.

9. The assessee submitted for exclusion of this company on the reason of functional dissimilarity. The primary contention is that the aforesaid comparable has diversified with ITES section. The TPO analyzed the director's report, and observed that, the predominant activity of the said counter can be classified as that of software development. The CIT(Appeals) observed that apparently the activity undertaken by ICRA falls within the domain of software services. Even if all the functions of the two companies do not match in its entirety, such exactness of comparative functionality is neither possible nor feasible in any business-environment. The TPO also conducted a FAR analysis, in which the said company has been found to be adequately comparable. The CIT(A) thus upheld the action of the TPO.

10. After hearing the rival submissions, we are of the opinion that this issue came up for consideration before the coordinate Bench of this Tribunal in the case of *Electronic Imaging India Pvt. Ltd., 70 taxmann.com 299* and in paras 14 to 16 of its order, it was held as under:-

“14. At the outset, we note that apart from having the related party revenue at 20.94% of the total revenue, this company was also found to be functionally not comparable with software development services segment of the assessee. The DRP has given its finding at pages 13 to 14 as under:—

"Having heard the contention, on perusal of the annual report, it is noticed by us that the segmental information is available for two segments i.e., services and sales. However, it is evident from the annual report that the service segment comprises of software development, software consultancy, engineering services, web development, web hosting, etc. for which no segmental information is available and therefore, the objection of the assessee is found acceptable. Accordingly, Assessing Officer is directed to exclude the above company from the comparables."

15. We find that the facts recorded by the DRP in respect of business activity of this company are not in dispute. Therefore, when this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, then the same cannot be regarded as functionally comparable with that of the assessee who is rendering software development services to its AE.

16. In view of the above facts, we do not find any error or illegality in the findings of the DRP that this company is functionally not comparable with that of a pure software development service provider."

11. In view of the above findings of the Tribunal and taking a consistent view, we direct the AO/TPO to exclude this company from the list of comparables.

12. **Ground No.8** is regarding rejection of Sasken Communications Technologies Ltd. from the comparables list on the reason of high turnover filter. This comparable was selected by the assessee and accepted by the TPO. Now the contention of the Id. AR is that turnover of this company is more than Rs.200 crores and assessee's

turnover from software services is only 23.61 crores and therefore has to be rejected as a comparable.

13. We have carefully gone through the financials of this company for the year ended on 31.3.2010. The turnover of sales and software services/products and other services of this company is at Rs.401.50 crores. The turnover of the assessee from software services is only Rs.23.61 crores. This company was also considered by the Tribunal in *Electronic Imaging India Pvt. Ltd. (supra)* in para 9 of the order as follows:-

“27. The assessee raised objection that this company has revenue from software services, software products and other services. The DRP has come to the conclusion that this company earned revenue from 3 segments. However, no segmental information is available. Accordingly, the DRP directed the AO to exclude this company from the comparables.

28. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. The DRP has reproduced the break-up of revenue in the impugned order as under:-

Amount in Rs. Lakhs

	Year ended March 31, 2010	Year ended March 31, 2019
Software Services	37,736.22	40,531.20
Software products	2,041.00	6,146.43
Other services	372.77	1,297.05
Total revenues	40,150.89	47,974.68

29. Thus, there is no dispute that this company earns revenue from 3 segments. However, the segmental operating margins are not available. Therefore, in the absence of segmental relevant data and particularly operating margins, this composite data cannot be considered as comparable with the assessee for software development services segment. Accordingly, we do not find any error or illegality in the findings of the DRP.”

14. In the present case also, the turnover of the assessee is only Rs.23.61 crores from software services as compared to the turnover of the comparable company. Following the order of the Tribunal in the case of *Electronic Imaging India Pvt. Ltd. (supra)*, this company is to be excluded from the final comparables. Ordered accordingly.

15. **Ground No.9** regarding inclusion of California Software Co. Ltd. is not pressed and dismissed as such.

16. **Ground Nos. 10 & 11** is with regard to adjustment towards working capital. The contention of the Id. AR is that assessee is entitled for working capital adjustment to the extent of actuals as held by the Bangalore Tribunal in *Huawei Technologies India (P.) Ltd. v. JCIT, 101 taxmann.com 313* wherein it was held where complete working capital adjustment working has been given by the assessee based on which the TPO had worked out the adjustment and no defect had been pointed out in these workings by the TPO, working capital adjustment as worked out by the assessee has to be allowed. The relevant observations of the Tribunal are as under:-

“**17.** In the light of the above discussion we are of the view that the CIT (A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT (A) has not found any error in the TPO's working of working capital adjustment, the working capital adjustment as worked out by the TPO has to be allowed. We may also add

that the complete working capital adjustment working has been given by the Assessee and a copy of the same is at pages 173 & 192 of the Assessee's paper book. No defect whatsoever has been pointed out in these working by the CIT (A). We may also further add that in terms of Rule 10B(1)(e) (iii) of the Rules, the net profit margin arising in comparable uncontrolled transactions should be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market. It is not the case of the CIT(A) that differences in working capital requirements of the international transaction and the uncontrolled comparable transactions is not a difference which will materially affect the amount of net profit margin in the open market. If for reasons given by CIT(A) working capital adjustment cannot be allowed to the profit margins, then the comparable uncontrolled transactions chosen for the purpose of comparison will have to be treated as not comparable in terms of Rule 10B(3) of the Rules, which provides as follows:

"(3) An uncontrolled transaction shall be comparable to an international transaction if—

(i)	none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged to paid in, or the profit arising from, such transactions in the open market; or
(ii)	reasonably accurate adjustments can be made to eliminate the material effects of such differences."

18. In such a scenario there would remain no comparable uncontrolled transactions for the purpose of comparison. The transfer pricing exercise would therefore fail. Therefore in keeping with the OECD guidelines, endeavor should be made to bring in comparable companies for the purpose of broad comparison. Therefore the working capital adjustment as claimed by the Assessee should be allowed. We hold and direct accordingly.”

17. However, there is no specific ground taken before the CIT(Appeals) on this issue, hence we remit this issue to the AO/TPO for fresh consideration in the light of order of the Tribunal cited supra.

Marketing Support Services

18. **Ground No.12** is regarding selecting companies that functionally not comparable to the assessee. This ground is not pressed and dismissed accordingly.

19. **Ground No.13** is with regard to rejection of certain companies from the comparables, out of which Hindustan Housing Co. Ltd. was not pressed and dismissed accordingly.

20. With regard to the other 3 companies viz., Asian Business Exhibition & Conferences Ltd., HCCA Business Services Pvt. Ltd. & Killick Agencies & Marketing Ltd., before the TPO the assessee has not put any objections. However, the assessee objected to the same before the CIT(Appeals), but not given any explanation for rejection of these comparables. The CIT(Appeals) upheld the TPO's order.

21. Now before us, as regards Asian Business Exhibition & Conferences Ltd., the assessee has placed reliance on the order of the Tribunal in the case of *Electronic Imaging India Pvt. Ltd. (supra)* wherein it was held as follows:-

Asian Business Exhibition & Conferences Ltd.

“13. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset we note that the functional comparability of Asian Business Exhibition & Conferences Limited has been examined by this Tribunal in assessee's own case for the Assessment Year 2010-11 vide order dt.24.2.2016 reported in Dy. CIT v.

Electronics for Imaging India (P.) Ltd. [2016] 70
taxmann.com 299 (Bang. - Trib.) in paras 53 & 54 as under:

" 53. We have considered the rival submissions and considered the relevant material on record. As it is clear that the assessee is providing sales and marketing services to its AE which includes identifying potential customers by conducting road shows, presentation and the like, the working also includes educating potential users of the benefit and features of the AEs range of products. However, products for which the assessee is providing sales and marketing services is only software/information technology products. Therefore, Asian Business Exhibition & Conference Ltd. which is mainly engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses. The functions of this company are entirely different from the assessee who is providing sales and marketing support services to its AE for software/IT products. The Mumbai Bench of the Tribunal in the case of RGA Services India (P.) Ltd. (supra) while considering the functional comparability of this company has held at paras 11 and 12 as under:—

'11. We have considered the submission of the parties and perused the relevant material on record. On perusal of the order passed by the TPO it is noticed that the TPO while dealing with assessee's objection with regard to selection of Asian Business Exhibition and Conferences Limited as a comparable has admitted that the nature of function performed by this company is event management. It is further relevant to observe, on perusal of annual report of this company it is seen that as per directors report, the main operation is organizing exhibition and events. Further, schedule 12 of the profit and loss account as well as notes to the accounts reveals, revenue earned by the company is from sponsorship,

delegates attending conferences, events and entry fees charged from visitors for visiting exhibition, sale of stall place etc.

12. Thus, on overall analysis of facts and materials placed on record it is very much clear that the business model of the assessee and Asian Business Exhibition and Conferences Limited are totally different. While assessee undoubtedly is providing support services to its overseas AE's, Asian Business Exhibition and Conferences Limited is primarily and fundamentally engaged in event management. Thus, under no circumstances it can be considered as a comparable to the assessee. Therefore, for the aforesaid reasons the DRP, in our view, was justified in excluding this company as a comparable. As far as the contention of Learned DR that reasons on which this company was excluded equally applies to other comparables retained by the DRP, we may observe, such argument of learned DR is not at all relevant as the issue raised by the department in the present appeal is confined to exclusion of Asian Business Exhibition and Conferences Limited as a comparable. As far as objection of learned departmental representative that assessee itself has selected this company as a comparable, we may observe, that cannot be the sole criteria to reject assessee's objection with regard to selection of a comparable. At the time of preparing T.P. Study report assessee had selected some comparables by considering multiple year data and information available at the relevant time. However, if subsequently on the basis of information available in public domain it is found on the basis of functionality or some other reason a company is not at all comparable, assessee cannot be precluded from objecting to selection of the company as a comparable. This legal proposition is fairly well

settled by the decision in case of *DCIT v. Quark Systems (P.) Ltd.* (2010) 132 TTJ (Chd) (SB) 1 as well as decisions relied upon by the counsel for the assessee. In view of the aforesaid, we do not find any infirmity in the directions of DRP in excluding Asian Business Exhibition and Conferences Limited as a comparable. The ground raised is therefore dismissed."

54. In view of the above facts as well as decision of the Mumbai Bench of the Tribunal, this company cannot be considered as a good comparable with the assessee.'

Thus when there is no change in the business activity of assessee for the year under consideration as well as in the functions of the said company then in view of the earlier order of this Tribunal in assessee's own case we hold that this company cannot be considered as a good comparable of the assessee and accordingly, the TPO/AO is directed to exclude the same from the set of comparables."

22. In view of the above order of the Tribunal, this company is not comparable to the assessee's case and therefore it is to be excluded from the list of comparables.

23. With regard to HCCA Business Services Pvt. Ltd., the Id. AR relied on the order of the Tribunal in the case of *DCIT v. Electronics for Imaging India P. Ltd.*, 70 taxmann.com 299 (Bang) where it was held as under:-

HCCA Business Services Pvt. Ltd.

“41. The assessee objected against inclusion of this company in the list of comparables on the ground that this company is engaged in providing payroll process services and therefore it is functionally different. In support of its contention, the assessee referred to Notes to the Accounts wherein the company's operations comprise of payroll processing services is mentioned and hence it is not possible

to give the quantitative details of sales and certain information separately.

42. The DRP after considering the annual report noted that except the Note 2.14, there is no other observation in the annual report from which it can be established that the company is engaged in marketing and sales support services comparable to the assessee. Accordingly, the DRP directed the AO to exclude the said company from the comparables.

43. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. The DRP has considered the fact that payroll processing services was main part of the operations of the company and quantitative details of sales and certain information as required under Part II of Schedule VI to Companies Act was not possible. Thus, in the absence of any contrary fact on record brought before us, we do not find any reason to interfere with the finding of the DRP, when the functions and business activity of this company was found to be different from marketing and sales support services of the assessee. Accordingly, the objection of the Revenue is rejected.”

24. In view of the above order of the Tribunal, HCCA Business Services Pvt. Ltd. is directed to be excluded from the list of comparables.

25. As regards Killick Agencies & Marketing Ltd., the Tribunal in the case of *DCIT v. Electronics for Imaging India P. Ltd.*, 70 *taxmann.com 299 (Bang)* held as under :-

Killick Agencies & Marketing Ltd.

“**44.** The assessee objected against this company on the ground that commission/service charges income of this company is Rs. 2,19,00,000 out of the operating revenue of Rs. 3,39,00,000. Therefore, the commission/service charges income constitute about 65% of the operating revenue which is less than 75% of the operating revenue filter applied by

the TPO. In the absence of segmental results, this company was sought to be excluded from the set of comparables.

45. The DRP found that this company conducts business as an agent of the foreign principal and deal in maritime equipments. Further, the receipts are mainly in the nature of commission income and service charges. Therefore, this company was functionally dissimilar to that of assessee.

46. We have heard the Id. DR as well as Id. AR and considered the relevant material on record.

47. The Id. DR has submitted that the TPO has considered the relevant information as reported in the annual report of the company and it was found that this company is acting as an agent for various foreign principals for sale of dredgers, dredging equipment and also offers after sales service. Therefore, this company was found to be in the business of marketing support services which is similar to the assessee.

48. On the other hand, the Id. AR has submitted that this company is engaged in the business of construction equipments and earth moving machinery and is not into marketing support services.

49. Having considered the rival submissions as well as relevant material on record, we note that in the profit & loss account for the year under consideration, this company has shown sales (export of Rs. 1,18,00,000 and commission/service charges of Rs. 2,19,00,000. Therefore, export income revenue of this company is less than 75% of the total revenue, a filter applied by the TPO. Once the TPO has applied a filter of 75% of export sale, then this company which fails the filter applied by the TPO cannot be considered as a good comparable. Further, we note that this company is entirely in a different activity with that of the assessee. Undisputedly, this company is acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipments and machineries. Accordingly, we do not find any error or illegality in the findings of the DRP and direct the AO to exclude this company from the comparables.”

26. Taking a consistent view by placing reliance on the above order of the Tribunal, we direct exclusion of this company from the comparables.

27. **Ground No.14** is with regard to rejection of Muller & Phipps as a comparable, which was not pressed and dismissed accordingly.

28. **Ground No.15** is regarding working capital adjustment. As discussed in earlier para relating to software services, this issue is remitted to the AO/TPO with similar directions.

29. **Ground Nos. 16 to 18** are regarding of levy of interest u/s. 234B, 234C & 234D which are mandatory and consequential in nature, to be levied in accordance with law.

30. The assessee has filed petition for admission of additional grounds stating that due to inadvertence, these grounds were not raised in earlier occasion and these additional grounds do not require fresh investigation of facts which are already on record and prayed for admission of the same.

31. The **additional grounds No.19 to 22** are as follows:-

“Ground No. 19: The learned AO/ learned TPO/ Hon'ble CIT(A) while rejecting the following companies on the ground of failure of upper limit of turnover filter of 200 crores, erred in not adjudicating on the functional dissimilarity of these companies, being:

- Infosys Ltd.
- Larsen & Toubro Infotech Ltd.
- Mindtree Ltd.
- Persistent Systems Ltd.
- Tata Elxsi Ltd.

Ground No. 20: The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not rejecting Sasken Communication Technologies Ltd. on the ground of failing upper limit of turnover filter of INR 200 crores, functional dissimilarity and lack of segmental information.

Ground No. 21: The learned AO/learned TPO/Hon'ble CIT(A) has grossly erred in not rejecting the following companies from the list of comparable companies:

- Asian Business Exhibition & Conferences Ltd.
- HCCA Business Services Pvt. Ltd.
- Killick Agencies & Marketing Ltd.
- Hindustan Housing Co. Ltd.

Ground No. 22: The learned AO/ learned TPO/ Hon'ble CIT(A) while erroneously adjusting the transfer pricing adjustment of the Appellant's international transaction with its AE, also erred in in computation of the adjustment u/s 92CA by considering incorrect figures as 'price received" for the international transactions pertaining to Software services and Marketing support services.”

32. We have heard both the parties and perused the material on record. In our opinion, these grounds do not require fresh investigation of facts. Placing reliance on the *Hon'ble Supreme Court judgment in the case of M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted for adjudication.

33. At the time of hearing, the Id. AR has not pressed additional **grounds 19 to 21**. Accordingly they are dismissed as not pressed.

34. By **ground No.22**, the grievance of the assessee is that while adjusting the transfer pricing adjustment of the assessee's international transactions with its ADE, the lower authorities have considered incorrect figures as “price received” pertaining to software services and marketing support services. In our opinion, the same is

to be corrected by the AO/TPO. Accordingly, we remit this issue to the AO/TPO for fresh consideration and decision in accordance with law.

ITA No.1214/B/2017 (AY 2011-12)

35. The assessee has raised the following grounds:-

“1. The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Commissioner of Income Tax (Appeals) [Hon'ble CIT (A)] grossly erred in adjusting the transfer price of the Appellant's international transactions with its Associated Enterprises ("AEs") u/s 92CA of the Income-tax Act, 1961 ("the Act").

2. The learned AO/learned TPO/Hon'ble CIT(A) erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.

3. The learned AO/learned TPO/Hon'ble CIT(A) erred in rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.

4. The learned AO/learned TPO/Hon'ble CIT(A) erred in not complying with the guidelines specified under Rule 10B (2) and Rule 10B(3) of the Income-tax Rules, 1962 while selecting comparables, thereby violating the basic tenet of the Indian Transfer Pricing regulations.

5. The learned AO/learned TPO/Hon'ble 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 AO/learned TPO/Hon'ble CIT(A) erred in not allowing appropriate adjustment towards the risk differential between the Appellant vis-à-vis independent comparable companies.

II. Software Services

7. The learned AO/learned TPO/Hon'ble CIT(A) has grossly erred in not rejecting the following companies from the list of comparable companies:

- Acropetal Technologies Ltd.
- E-Infochips Ltd.
- ICRA Techno Analytics Ltd. -
- Infosys Ltd.
- Larsen & Toubro Infotech Ltd.
- Persistent Systems & Solutions Ltd.
- Persistent Systems Ltd.
- Tata Elxsi Ltd.
- Sasken Communication Technologies Ltd.

8. The learned AO/learned TPO/Hon'ble DRP has erred in making the following errors in the computation of working capital adjustment:

- a. restricting the working capital adjustment to 1.63% without giving any cogent reason.
- b. by not considering the fact that the Appellant does not have contingency on working capital, therefore, no negative working capital adjustment should be allowed.

III. Marketing Support Services

9. The learned AO/learned TPO/Hon'ble CIT(A) erred in selecting companies that are functionally not comparable to the Appellant.

10. The learned AO/learned TPO/Hon'ble CIT(A) has grossly erred in not rejecting the following companies from the list of comparable companies:

- Asian Business Exhibition & Conferences Ltd.
- ICC International Agencies Ltd.

11. The learned AO/learned TPO/Hon'ble CIT(A) erred in not providing adjustment towards on account of the difference in working capital existing between the Appellant vis-à-vis the independent comparable companies.

IV. Corporate Tax

12. The learned AO/learned TPO/Hon'ble CIT(A) erred in levying interest under Section 234B of the Income-tax Act, 1961.

13. The learned AO/learned TPO/Hon'ble CIT(A) erred in levying interest under Section 234C of the Income-tax Act, 1961.

14. The learned AO/learned TPO/Hon'ble CIT(A) erred in levying interest under Section 234D of the Income-tax Act, 1961.

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this 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.”

36. **Ground Nos. 1 to 6** are not pressed and dismissed accordingly.

Software Services

37. Vide **ground No.7**, the assessee seeks exclusion of following companies:-

- i) Acropetal Technologies Ltd.
- ii) E-Infochips Ltd.
- iii) ICRA Techno Analytics Ltd.
- iv) Infosys Ltd.
- v) Larsen & Toubro Infotech Ltd.
- vi) Persistent Systems & Solutions Ltd.
- vii) Persistent Systems Ltd.
- viii) Tata Elxsi Ltd.
- ix) Sasken Communication Technologies Ltd.

38. The assessee has raised **additional ground No.7.1** seeking to exclude E-Zest Solutions Ltd. from the list of comparables stating that the same was omitted to be raised along with the original grounds. In view of the *judgment in the case of M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional ground is admitted for adjudication.

39. The contention of the Id. AR is that Acropetal Technologies Ltd. caters to primarily 3 segments viz., engineering design services, information technology services and healthcare. However, the assessee is engaged in Information technology services and also rendering sales and marketing services to its AE. Further, even on employees filter, the company cannot be considered to assessee's case. Similarly, E-Infochips Ltd., ICRA Techno Analytics Ltd., Persistent Systems & Solutions Ltd., Persistent Systems Ltd. & Sasken Communication Technologies Ltd. are functionally dissimilar and has absence of segmental details. Infosys Ltd. has presence of brand, high turnover, giant company with huge risks and functionally dissimilar. Larsen & Toubro Infotech Ltd. fails RPT filter of 15%, has onsite activities and functionally dissimilar. Tata Elxsi Ltd. and E-Zest

Solutions Ltd. are functionally dissimilar. Therefore all these comparables listed above are to be rejected as comparables.

40. We have heard both the parties and perused the material on record. These companies were considered by the Tribunal in the case of *Electronic Imaging India Pvt. Ltd. in IT(TP)A No.1506/Bang/2015 for AY 2011-12 by order dated 14.07.2017* wherein it was held as under:-

“8. Having considered the rival submissions as well as the relevant material on record, first we will deal with the functional comparability of the six companies namely Acropetal Technologies Limited (Seg.), E-Zest Solutions Ltd., L&T Infotech Ltd., Persistent System & Solution Ltd., Persistent Systems Ltd. and Tata Elxsi Limited. The business activities of these six companies have been examined on the point of functional comparability in the software development services provider by the co-ordinate bench of this Tribunal vide decision dt. 21.9.2016 in the case of *Applied Materials India (P.) Ltd. (supra)* in paras 9.1.1 to 9.2.4; 16.1 to 16.4 and 19 to 20 as under:

' (i) E-Jest Solutions Ltd.

9.1.1 The learned Authorised Representative has submitted that the assessee raised the objection before the DRP for exclusion of this company from the set of comparables but the DRP has not adjudicated the objections of the assessee. He has referred the objections raised before the DRP at page No. 1373 of the paper book as well as referred the relevant part of the Annual Report of this company at page Nos. 39, 42 & 50 of the Annual Report. The learned Authorised Representative has submitted that this company is engaged in the diversified activity and reported the income under only one segment. Therefore it cannot be considered as a comparable of the assessee's software development services segment. He has relied upon the decision of the co-ordinate bench of this Tribunal dt.22.4.2016

in the case of *Electronics for Imaging India (P.) Ltd.* v. DCIT in IT (TP) A Nos. 227 & 285/Del/2013.

9.1.2 On the other hand, the learned Departmental Representative has submitted that the main activity of this company is software development services. Therefore the insignificant variation in activity if any cannot be a determinative factor while computing the ALP under Transactional Net Margin Method (TNMM). He has relied upon the decision of the Delhi Bench of ITAT in the case of *Toluna India (P.) Ltd.* v. ACIT (2014) 151 ITD 177.

9.1.3 We have considered the rival submissions as well as the relevant material on record. We find that the assessee has raised objections against this company before the DRP. However the DRP did not adjudicate the objections raised by the assessee. The decision of this Tribunal in the case of *M/s. Electronics for Imaging India (P.) Ltd.* v. DCIT (supra) relied upon by the learned Authorised Representative is based on two aspects (i) The information received under Section 133(6) of the Act was considered by the TPO without sharing with the assessee and (ii) nature of the activity is KPO. It is pertinent to note that the question of BPO and KPO is relevant only in ITES segment and not for software development services segment. On the contrary, the decision in the case of *Toluna India (P.) Ltd.* v. ACIT (supra), pertains to the Assessment Year 2007-08, therefore the facts of the different year cannot be applied without verification. Accordingly, we set aside this issue of comparability of E-Jest Solutions Ltd. to the record of the Assessing Officer/TPO for deciding the same after verification of the relevant facts as well as considering the objections of the assessee.

(ii)	Persistent Systems and Solutions Ltd.
(iii)	Persistent Systems Ltd.

9.2.1 These two companies were part of the TP Study analysis however the assessee raised objections against these companies before the TPO as well as DRP.

9.2.2 Before us, the learned Authorised Representative of the assessee has submitted that these companies are functionally not comparable to the assessee as these are engaged in diversified activity i.e. rendering of software development services and licensing, royalty of software products. Thus without having the separate segmental details and data these diversified activities cannot be compared with the assessee. He has further pointed out that the company Persistent Systems Ltd. also engaged in developing products and therefore the activities are not comparable with that of the assessee. In support of his contention, he has relied upon the decision of this Tribunal dt. 24.2.2016 in the case of DCIT v. *Electronics for Imaging India (P.) Ltd.* (supra) and submitted that this company was found to be not comparable with the software development services provider. He has further pointed out that in assessee's own case for the Assessment Year 2010-11, the DRP vide its order dt. 24.11.2014 has excluded Persistent Systems and Solutions Ltd. from the list of comparables by holding that this company is not comparable to the assessee.

9.2.3 On the other hand, the ld. DR has submitted that the TPO as well as DRP has examined the functional comparability of these companies and found that these companies are comparable with the assessee. These two companies have satisfied all the filters applied by the TPO and DRP therefore the minor variation in the activity would not render these companies non-comparable when a comparable price is considered under TNMM.

9.2.4 We have considered the rival submissions as well as the relevant material on record. At the outset we note that the functional comparability of these two companies have examined by the co-ordinate bench of this Tribunal in the case of

DCIT v. *Electronics for Imaging India (P.) Ltd.*
(supra) in paras 60 and 61 & paras 24 to 26 as under:

" Persistent Systems & Solutions *Ltd.*

60. The assessee has the grievance against rejection of this company by the DRP. The Id. AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables.

61. Having considered the rival submissions as well as relevant material on record, at the outset, we note that the DRP has examined the functional comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore, no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.

(4) Persistent Systems *Ltd.*

24. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. The assessee raised objections against selection of this company on the ground that this company is functionally not comparable as engaged in the product development. The segmental information for services and product is not available. Further, the assessee has also, pointed out that there was an acquisition and restructuring during the year under consideration.

25. The DRP has noted the fact that this company has reported the entire receipt from sales and software services and product. Therefore, no segmental information was found to be available for sale of software services and product. Further, the DRP has noted that as per Note I of Schedule 15, this company is predominantly engaged in outsource software development service. Apart from the revenue from software services, it also earns income from licence of products, royalty on sale of products, income from maintenance contract, etc. These facts recorded by the DRP has not been disputed before us.

26. Therefore, when this company is engaged in diversified activities and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, etc., the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company cannot be compared with

the assessee and the same is directed to be excluded from the set of comparables."

We further find from the Annual Report that there is no change in the activity and functions of these companies during the year under consideration in comparison to the Assessment Year 2010-11. Accordingly, following the decisions of the coordinate benches of this Tribunal (supra), we direct the AO/TPO to exclude these two companies from the set of comparables."

"16.1 The DRP rejected this company on the ground of employee cost filter. The Id. DR has submitted that the TPO has applied the employee cost filter and this company satisfies the same.

16.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the total employee cost of this company is 11.51 of the total operating revenue therefore it fails the employee cost filter of 25%. Further he has pointed out that this company also fails the software development services revenue filter of 75%. He has referred the details at page Nos. 39 and 53 of the Annual Report and submitted that the income from software development is Rs.81.40 Crores out of total revenue of Rs.141 Crores. Therefore this company fails this filter.

16.3 In a rejoinder the Id. DR has submitted that the TPO has considered only Information Technology transactions segment and therefore it satisfies software development services income filter as well as employee cost filter.

16.4 We have considered the rival submissions as well as the relevant material on record. As per the segmental reporting at page 53 of the Annual Report the income from Information Technology Services is Rs. 81.40 Crores out of

the total income of Rs. 141 Crores. Therefore the revenue from Information Technology transactions services is less than 75% and consequently this company does not satisfy the filter of information technology revenue applied by the TPO itself. Accordingly, we do not find any reason to interfere with the order of the DRP for this issue."

" (iv) L&T Infotech *Ltd.*

19. We have heard the learned DR as well as learned DR and considered the relevant material on record. The DRP rejected this company by recording the facts at page 15 as under:

On perusal of schedule to the notes of the accounts, it is noticed by us that expenses incurred in foreign currency are 938.94 crore (48.84%), out of the total expenses of Rs. 1920.46 crore debited in profit and loss account, these expenses include the sub-contracting expenses to the extent of Rs. 118.01 crore, which indicates that the company has the on-site revenue of about 50%, it is also noticed by us that in the profit and loss account, the revenue has been shown from software development services and products, in the segmenting account it is mentioned that the segment revenue include sales directly identifiable with/allocable to the segment, in Schedule 18, the revenue have been shown from 3 segments, i.e. financial services, manufacturing and telecom. However, in paragraph 23, it is mentioned that the company is mainly engaged in the business of software development. The Assessing Officer has considered entire revenue from 3 segments from the software development services. Out of the software development expenses of Rs.

1,488.30 crore debited in profit and loss account, salary to overseas staff is Rs. 1200.28 crore which also indicates that the company is predominantly engaged in development, of software on-site. In view of the above differences, in our view the above company cannot be retained as comparable, the Assessing Officer is accordingly directed to exclude the above company from comparable.

We further find that the comparability of this company has been considered by the co-ordinate bench of this Tribunal in the case of *DCIT v. Electronics for Imaging India (P.) Ltd. (supra)* in paras 62 to 65 as under :

" 62. The assessee has raised objection against this company on the basis of high turnover in comparison to the assessee. It was also contended that related party transaction (RPT) of this company is 18.66%. The DRP rejected objections of the assessee on the ground that TPO has applied 25% filter of RPT and annual report of the company does not show any other services rendered other than software development services provided by this company. Thus the DRP held that software development segment is comparable to the assessee and therefore this company has to be retained as comparable.

63. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. The ld. AR has submitted that this company is having 18.66% RPT and further this company earns revenue from both services and products. Thus, the ld. AR submitted this company is also in the software products and therefore cannot be considered as good comparable. He has further contended that in a series of decisions, the Tribunal has applied 15% RPT filter and since this company is having more than

15% RPT, the same cannot be considered as a good comparable.

64. On the other hand, the ld. DR has submitted that TPO has applied RPT filter of 25% and therefore only for this company, the RPT cannot be reduced to 15%. Further, the DRP has examined annual report of this company and found that this company earns revenue from software development services and accordingly is comparable.

65. We have considered the rival submissions and relevant material on record. We find that in the normal circumstances the tolerance range of RPT should not be more than 15%. In the case of the assessee, the availability of the comparable is not an issue and therefore we do agree with the view taken by the coordinate Benches of the Tribunal that the threshold limit of tolerance range should not exceed 15% as far as RPT revenue is concerned. Therefore, we direct the AO/TPO to apply 15% RPT filter in respect of all the comparables."

In view of the facts recorded by the DRP as well as the decision of the co-ordinate bench, we do not find any reason to interfere with the directions of the DRP.

(iv) *Tata Elxsi Ltd.* (Seg.) :

20. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The DRP has rejected this company by discussing the fact at page 16 as under:

Directed to exclude as per paragraph 2.7 of the order, further, on perusal of annual report, it is noticed by us from page 14 that software development and services consist of embedded product design, industrial design and visual computing labs which are not comparable to the software development services provided by the assessee and therefore, we direct the Assessing Officer to exclude the

above company from the comparables.

We further note that the DRP has also recorded the fact that export revenue of this company is 73.30% which is less than 75% applied by the TPO. Therefore this company does not qualify the export earning filter applied by the TPO. Further the co-ordinate bench of this Tribunal in the case of *DCIT v. Electronics for Imaging India Pvt. Ltd. (supra)* has considered this issue in paras 30 to 33 as under :

30. The assessee has raised objections against this company on the ground that the company is functionally different from the assessee. Though the TPO has considered the software development and services segment of this company as comparable to that of assessee, however, the assessee contended that even within the software segment, this company is engaged in diverse activities. The assessee placed reliance on the information in the annual report under the Directors Report and submitted before the DRP that even under the software development services segment, this company is engaged in various diversified activities including product design service, innovation design, engineering service, visual computing labs, etc. The assessee also placed reliance on the decision of Mumbai Bench of the Tribunal in the case of *Telcordia Technologies Pvt. Ltd. v. ACIT, 137 ITD 1 (Mum)*.

31. The DRP found that this company is not functionally comparable with assessee company as it is engaged in diversified activities even in the software development services. The DRP has followed the decision of the Mumbai Bench of the Tribunal in the case of *Telcordia Technologies (P.) Ltd. (supra)*.

32. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. We find that this company even in the software development segment is engaged in diversified activities of product design services, innovation design, engineering services, visual computing labs, etc. We further note that in the case of *Telcordia*

Technologies (P.) Ltd. (supra), the Mumbai Bench of the Tribunal vide its order dated 11.5.2012 in para 9.7 has held as under:—

"7.7 From the facts and material on record and submissions made by the learned AR, it is seen that the Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned AR that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable parties."

33. No contrary view has been brought to our notice regarding comparability of this company with that of a pure software development service provider. Accordingly, in view of the decision of the Mumbai Bench of the Tribunal in the case of *Telcordia Technologies Pvt. Ltd. (supra)*, we do not find any reason to interfere with the finding of the DRP. "

In view of the facts recorded by the DRP as well as the decision of the Tribunal in the case of *DCIT v. Electronics for Imaging India (P.) Ltd. (supra)*, we do not find any error or illegality in the directions of the DRP to exclude this company from the set of comparables.'

We further note that the Tribunal in the case of *AMD India (P.) Ltd. (supra)* has again taken similar view in respect of these six companies. Following the earlier order of the Tribunal, we direct the TPO/AO to exclude these six companies from the set of comparables.

E-Infochips Limited.
Sasken Communication Technologies Ltd.

9. The functional comparability of these two companies have been examined by the Delhi Bench of ITAT in the case of *Saxo India (P.) Ltd. (supra)* in paras 10.1 to 10.2 and 15.1 to 15.2 as under:

" (i) E-Infochips Limited:

10.1 The Transfer Pricing Officer included this company in the list of comparables. On being called upon to explain as to why it should not be considered as a comparable, the assessee contended that there was functional dissimilarity inasmuch as this company was engaged in software development and IT enabled services and also Products. The Transfer Pricing Officer observed that the revenues of this company from Products was only 15% of total revenue and hence the same qualified to be eligible for comparison. The DRP did not allow any relief.

10.2 After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from

software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables."

" (vi) Sasken Communications Technologies *Ltd.*

15.1 The TPO included this company in the set of comparables despite the assessee's objection that it was functionally different and also had Product portfolio.

15.2 After considering the rival submissions, we find from page 58 of the TPO's order that he has recognized sale of software products to the tune of Rs. 37 crore and odd. Though the break-up of revenue from software services and software products is available, but, the break-up of operating costs and net operating revenues from these two segments have not been given. It is further observed that the TPO has taken entity level figures for the purposes of making comparison. Since such entity level figures contain revenue from both software services and software products, as against the assessee only providing software services, we are disinclined to treat this company as comparable. The assessee's contention is accepted on this issue."

We further note that the Hon'ble High Court vide its decision dt.28.09.2016 has confirmed the decision of the Delhi Bench of ITAT. We are aware that the co-ordinate bench of this Tribunal in the case of *Applied Materials India (P.) Ltd. (supra)* has remitted the issue of functional comparability of Sasken Communication Technologies Ltd. that in the said case the DRP did not adjudicate the objections of the assessee. Therefore in view of the decision of the Delhi Bench of the Tribunal in the case of *Saxo India (P.) Ltd. (Supra)* which has been confirmed by the Hon'ble Delhi High Court, we direct the TPO/AO to exclude these two companies from the set of comparables.

10. Icara Technology Analytics Limited & Infosys Technologies Limited were rejected by the DRP on functional comparability and the revenue has not challenged the said directions of the DRP. Even otherwise we find that the functional comparability in these two companies was considered in the case of *Applied Materials India Pvt. Ltd. (supra)* wherein the Tribunal found that these two companies are not functionally comparable to the software development captive services provider on various reasons.”

41. In view of the above order of the Tribunal, we direct the TPO to exclude these companies from the comparables.

42. **Ground No.8** regarding working capital adjustment is remitted back to the AO/TPO with similar direction as in AY 2010-11 hereinabove.

Marketing support services

43. **Ground No.9** is dismissed as not pressed.

44. **Ground No.10** is with regard to exclusion of Asian Business Exhibition & Conferences Ltd. & ICC International Agencies Ltd. These companies were considered by the Tribunal in the case of *Electronic Imaging India Pvt. Ltd. in IT(TP)A No.1506/Bang/2015 for AY 2011-12 by order dated 14.07.2017* wherein it was held as under:-

“13. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset we note that the functional comparability of Asian Business Exhibition & Conferences Limited has been examined by this Tribunal in assessee's own case for the Assessment Year 2010-11 vide order dt.24.2.2016 reported in Dy. CIT v. Electronics For Imaging India (P.) Ltd. [2016] 70 taxmann. com 299 (Bang. - Trib.) in paras 53 & 54 as under:

" 53. We have considered the rival submissions and considered the relevant material on record. As it is clear that the assessee is providing sales and marketing services to its AE which includes identifying potential customers by conducting road shows, presentation and the like, the working also includes educating potential users of the benefit and features of the AEs range of products. However, products for which the assessee is providing sales and marketing services is only software/information technology products. Therefore, Asian Business Exhibition & Conference Ltd. which is mainly engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses. The functions of this company are entirely different from the assessee who is providing sales and marketing support services to its AE for software/IT products. The Mumbai Bench of the Tribunal in the case of RGA Services India (P.) Ltd. (supra) while considering the functional comparability of this company has held at paras 11 and 12 as under:—

'11. We have considered the submission of the parties and perused the relevant material on record. On perusal of the order passed by the TPO it is noticed that the TPO while dealing with assessee's objection with regard to selection of Asian Business Exhibition and Conferences Limited as a comparable has admitted that the nature of function performed by this company is event management. It is further relevant to observe, on perusal of annual report of this company it is seen that as per directors report, the main operation is organizing exhibition and events. Further, schedule 12 of the profit and loss account as well as notes to the accounts reveals, revenue earned by the company is from sponsorship, delegates attending conferences, events and entry fees charged from visitors for visiting exhibition, sale of stall place etc.

12. Thus, on overall analysis of facts and materials placed on record it is very much clear that the business model of the assessee and Asian Business Exhibition and Conferences Limited are totally different. While assessee undoubtedly is providing support services to its overseas AE's, Asian Business Exhibition and Conferences Limited is primarily and fundamentally engaged in event management. Thus, under no circumstances it can be considered as a comparable to the assessee. Therefore, for the aforesaid reasons the DRP, in our view, was justified in excluding this company as a comparable. As far as the contention of Learned DR that reasons on which this company was excluded equally applies to other comparables retained by the DRP, we may observe, such argument of learned DR is not at all relevant as the issue raised by the department in the present appeal is confined to exclusion of Asian Business Exhibition and Conferences Limited as a comparable. As far as objection of learned departmental representative that assessee itself has selected this company as a comparable, we may observe, that cannot be the sole criteria to reject assessee's objection with regard to selection of a comparable. At the time of preparing T.P. Study report assessee had selected some comparables by considering multiple year data and information available at the relevant time. However, if subsequently on the basis of information available in public domain it is found on the basis of functionality or some other reason a company is not at all comparable, assessee cannot be precluded from objecting to selection of the company as a comparable. This legal proposition is fairly well settled by the decision in case of DCIT v. Quark Systems (P.) Ltd. (2010) 132 TTJ (Chd) (SB) 1 as well as decisions relied upon by the counsel for

the assessee. In view of the aforesaid, we do not find any infirmity in the directions of DRP in excluding Asian Business Exhibition and Conferences Limited as a comparable. The ground raised is therefore dismissed."

54. In view of the above facts as well as decision of the Mumbai Bench of the Tribunal, this company cannot be considered as a good comparable with the assessee.'

Thus when there is no change in the business activity of assessee for the year under consideration as well as in the functions of the said company then in view of the earlier order of this Tribunal in assessee's own case we hold that this company cannot be considered as a good comparable of the assessee and accordingly, the TPO/AO is directed to exclude the same from the set of comparables.

ICC International Agencies Limited

14. We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. The learned Authorised Representative has submitted that this company is engaged in the trading activity and therefore functionally different from the assessee. He has relied upon the decision of the co-ordinate bench of this Tribunal in the case of ITO v. Interwoven Software Services India (P.) Ltd. [2016] 74 taxmann.com 103 (Bang. - Trib.) and further submitted that a similar view has been taken by the Tribunal in the case of AMD India (P.) Ltd. (supra) for the Assessment Year 2011-12. Hence the learned Authorised Representative has submitted that this company is not functionally comparable and liable to be rejected.

15. On the other hand, the learned Departmental Representative has relied upon the order of the TPO.

16. Having considered the rival submissions as well as the relevant material on record, we note that the DRP has rejected this company on the ground that it is functionally dissimilar as earning income from the trading activity and

further the margins of this company was wrongly computed. The co-ordinate bench of this Tribunal in the case of AMD India (P.) Ltd. (supra) vide order dt.6.4.2017 has considered this issue as under:

' 2. ICC International Agencies Ltd. :

The assessee submitted before the DRP that this company is functionally not comparable since it is engaged in trading activity and thereby functionally different. The DRP rejected this company for the reason that this company is functionally dissimilar and for incorrect margin computation made by the TPO. The Revenue is on appeal. The assessee pleaded that this is functionally different and relies on this Tribunal decision in ITO v. Interwoven Software Services (India) (P.) Ltd. [TS -723-ITAT -2016 -Bang-TP ay 2010-11. The relevant portion of the order from ITO v. Interwoven Software Services (India) (P.) Ltd. [IT(TP) A.No.451/Bang/2015 dt. 26.8.2016 for a.y. 2010-11 is extracted as under:

"28. For this segment, the assessee is seeking exclusion of two comparables i.e. M/s Acentia Technologies Ltd., and M/s ICC International Agencies Ltd., The claim of assessee regarding exclusion of M/s Acentia Technologies Ltd. is also covered in favour of the assessee by the same Tribunal order rendered in the case of M/s Electronics for Imaging India (P.) Ltd., (Supra) and respectfully following the same Tribunal order, we direct the AO/TPO to exclude this company from the list of final comparable because the ld. DR of the revenue could not point out any difference in facts.

29. Regarding exclusion of second company, it was submitted by the learned AR of the assessee that i.e. M/s ICC International Agencies Ltd., (Supra) this is the claim of the assessee that annual report of this company available on pages 1100 & 1104 of the paper book. As per the same, we find that this company is deriving income from trading activity and also maintaining inventories. Both these arguments are supported by annual report of this company available

on pages 1100 & 1104 of the paper book. Since the assessee is not engaged in trading activity, in our considered opinion, this company cannot be considered as good comparable in the present case and hence, we direct the AO/TPO to exclude his company from the list of final comparable.

30. In the combined result, the appeal of the assessee and revenue are partly allowed."

We heard the rival submissions and gone through relevant material. Following the above decision, the assessee's plea and the DRP's directions are upheld and the Revenue's appeal is dismissed.'

Thus it is clear that the Tribunal after considering the nature of functions has followed the earlier order of this Tribunal in the case of Interwoven Software Services India (P.) Ltd. (supra) and taken a similar view. Accordingly, in view of the above decisions of the Tribunal, we do not find any error or illegality in the order of the DRP in rejecting this company."

45. Being so, we direct the AO/TPO to exclude the above two companies from the list of comparables.

46. **Ground No.11** is regarding working capital adjustment. As discussed in software services segment, this issue is remitted to AO/TPO with similar directions.

47. **Ground Nos. 12 to 14** regarding of levy of interest u/s. 234B, 234C & 234D are mandatory and consequential in nature, to be levied in accordance with law.

48. In the result, both the appeals of the assessee are partly allowed.

Pronounced in the open court on this 6th day of October, 2021.

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Sd/-

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 6th October, 2021.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.