

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 584/Bang/2019
Assessment Year : 2012-13

M/s. Unisys India Pvt. Ltd., 5 th to 8 th & 10 th Floor, RGA Tech Park, Sy#31 Wing B, Blk No. 3, Bangalore - 560035. PAN: AAACU1502G	Vs.	The Deputy Commissioner of Income-tax, Circle - 7(1)(1), Bangalore.
APPELLANT		RESPONDENT

&

ITA No. 191/Bang/2019
Assessment Year : 2012-13

The Deputy Commissioner of Income-tax, Circle - 7(1)(1), Bangalore.	Vs.	M/s. Unisys India Pvt. Ltd., 5 th to 8 th & 10 th Floor, RGA Tech Park, Sy#31 Wing B, Blk No. 3, Bangalore - 560035. PAN: AAACU1502G
APPELLANT		RESPONDENT

Assessee by	:	Shri Dhanesh Batra, CA
Revenue by	:	Shri Muzaffar Hussain, CIT (DR)

Date of Hearing	:	01-09-2021
Date of Pronouncement	:	01-11-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals are filed by assessee and revenue against the order of Ld.CIT(A)-7, Bangalore dated 19.11.2018 for A.Y. 2012-13 on following grounds of appeal.

ITA No. 584/Bang/2019 (Assessee's Appeal):

“The grounds mentioned herein by the Appellant are without prejudice to one another.

1. That on the facts and circumstances of the case, the order passed by the learned Commissioner of Income-tax (Appeals) -7, Bangalore [‘CIT(A)’], to the extent prejudicial to the Appellant is bad in law and liable to be quashed.

Grounds relating to transfer pricing matters

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in partially confirming the action of the learned Assessing Officer (learned AO’)/ learned Transfer Pricing Officer (learned TPO’) and not reversing the entire adjustment to the transfer prices of international transactions with associated enterprises of INR 151,235,075/- with respect to software development services and INR 428,312,935/- with respect to information technology (IT’) enabled services.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in:

3.1. Upholding the rejection of the Transfer Pricing (‘TP’) documentation maintained by the Appellant under Section 92D of the Act in good faith and with due diligence;

3.2. Upholding the learned TPO's approach of disregarding the application of multiple year/ prior year data as used by the Appellant in the TP documentation;

3.3. Upholding the learned TPO's approach of using the data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation;

3.4. Upholding the action of the learned TPO in relying on and considering data which was collected under section 133(6) of the Act and which tantamount to choosing secret companies as comparable, whose information was not available in public domain while preparing the TP documentation for the relevant financial year;

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not appreciating that comparability analysis is not an exact science and in doing so specifically erred in:

4.1. Upholding the action of learned TPO of rejecting the comparability analysis and disregarding certain filters as applied by the Appellant in selection of the comparable companies at the time of preparing the TP documentation; and

4.2. Upholding the learned TPO's approach of conducting a fresh comparability analysis and in applying new/ different set of filters for determination of the arm's length price;

5. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not accepting certain contentions of the Appellant against the comparability analysis undertaken by the learned TPO for the software development services segment and IT enabled services segment of the Appellant. In doing so the learned CIT(A) has specifically erred in:*

5.1. *Upholding the action of the learned TPO of including certain companies as comparables, that fail the quantitative filters applied by the learned TPO;*

5.2. *Upholding the action of the learned TPO of including certain companies that are not functionally similar to the software development services activity and IT enabled services activity of the Appellant; and*

5.3. *Upholding the action of the learned TPO of not including companies that are functionally similar to the software development services activity and IT enabled services activity of the Appellant.*

6. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the learned TPO of considering 'provision for bad and doubtful debts' and 'provision for bad debts no longer required' as non-operating in nature. Without prejudice to the above, in doing so the learned CIT(A) has erred in:*

6.1. *Not observing the inconsistency that 'provision for bad debts no longer required' has been considered as operating in nature by the learned TPO, while computing the operating mark-up on cost of Microgenetic Systems Limited; and*

6.2. *Not specifically directing the learned TPO to re-compute the operating mark-up on cost of Microgenetic Systems Limited, by excluding 'provision for bad debts no longer required' as non-operating in nature as per the approach followed by the Learned TPO in other comparable companies.*

7. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not granting appropriate risk adjustment, thereby ignoring the limited risk nature of the contract software development services and information technology enabled services provided by the Appellant, resulting in the selection of full-fledged entrepreneurial companies as comparables.*

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”

ITA No. 191/Bang/2019 (Revenue’s Appeal):

“a. "Whether on the facts and in the circumstances of the case the CIT(A) was right in fact in removing 3 companies in SWD segment

i.e, M/ s. Infosys Technologies Ltd., 2. M/ s. Persistent Systems Ltd., 3. M/ s. ICRA Techno analytics Ltd., and 01 comparable in ITES Segment i.e., M/ s. Infosys BPO Ltd., as comparables on functional dissimilar grounds"?

b. "The Ld. CIT(A) erred in not appreciating in fact that transfer pricing is not an exact science and no two entities can be exact replicas"?

c. "Whether the CIT(Appeals) is right in trying to find out exact replica of the assessee for determining the ALP based on such replicas, even when the law and the international jurisprudence itself recognise that there cannot be an exact comparable to a given situation, especially with TNMM as the most appropriate method"?

d. "Whether the CIT(A) is right in demanding comparability standards that may itself defeat the purpose of law relating to determination of ALP under the IT Act"?

e. "Whether the order of the CIT(Appeals) in imposing conditions is not beyond the scope of law and business reality by rejecting all close comparables on the other ground, without appreciating that no two companies can ever be the same"?

f. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

g. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above."

Assessee has filed revised grounds of appeal on 11/06/2020.

The issues raised by the assessee in revised Grounds 1-2 relates to the determination of Arm's Length Price(ALP) in respect of receipts by the assessee from its AE in respect of transaction of rendering software development services (IT) and ITES.

Ground Nos. 3-6 relates to determination of ALP in respect of receipts by assessee.

Brief grounds of appeal are as under:

2. The facts in this regard are as follows. The Assessee or M/S.Unisys India Private Limited ('Unisys India') was incorporated in India on November 28,

1994. All shares of the Assessee are held by Unisys Mauritius Limited, which is ultimately held by Unisys Corpn., USA. During FY 2005-06, Unisys India was essentially engaged in providing IT enabled services (ITES) and software development (IT) to its overseas group companies. The Assessee is organized into two operating divisions one in Bangalore and one in Mumbai. The Bangalore division primarily provides Software and BPO Services while Mumbai division is primarily engaged in purchase and resale of Unisys Products and Provision of Support Services. The international transactions, in the IT and ITES segments with associated enterprises (AEs) reported in Form 3CEB relevant to this appeal were as follows:-

1. Provision Software Developments services (IT segment) Rs. 1,36,23,62,327
2. Provision BPO Services (ITES segment) Rs.2,49,49,53,352

2.1 From the details filed, Ld.TPO observed that the assessee adopted TNMM as the most appropriate method. The Profit Level Indicator (PLI) chosen was Operating profit to operating cost.

Assessee selected following 14 comparables for SWD segment.

Sl. No	Name of the Company	Average (%)
1	Helios & Matheson Information Technology Ltd	16%
2	L G S Global Ltd	14%
3	Melstar Information Technologies Ltd	-5%
4	Persistent Systems & Solutions Ltd	16%
5	Synetairos Technologies Ltd	15%
6	Asap Automation India Pvt Ltd	11%
7	Cadence Design Systems (India) Pvt Ltd	16%
8	E-Zest Solutions Ltd	29%
9	IDBI Intech Ltd	5%
10	Ideavate Solutions Pvt Ltd	31%
11	Jeevan Scientific Technology Ltd	12%
12	Proteans Software Solutions Pvt Ltd	2%

13	Allied Digital Services Ltd — Solutions	4%
14	Mindtree Ltd —IT Services	16%

2.2 Assessee used following comparables for ITeS segment.

Sl.No	Name of the Company	Weighted Average
1	Cameo Corporate Services Ltd	10%
2	Cosmic Global Ltd	12%
3	Sparsh B P O Services Ltd	2%
4	e4e Healthcare Business Services Pvt Ltd	14%
5	Jindal Intellicom Ltd	13%
6	In House Productions Ltd — Healthcare Division	14%
7	Visesh Infotechnics Ltd — IT Enables Services	15%

2.3 The Ld.TPO rejected the above comparables under both the segments by adopting new filters. The Ld.TPO arrived at a final set of 10 comparables and their operating margins as follows.

For SWD Segment:-

Sl.No.	Name of the taxpayer	OP/OC
1.	Datamatics Global Services Ltd.	14.57%
2.	Genesys International Corpn. Ltd.	30.09%
3.	I C R A Techno Analytics Ltd.	17.24%
4.	Infosys Ltd.	43.10%
5.	Larsen & Toubro Infotech Ltd.	25.47%
6.	Mindtree Ltd.	15.01%
7.	Persistent Systems Ltd.	27.20%
8.	R S Software (India) Ltd.	15.34%
9.	Sasken Communication Technologies Ltd.	12.15%
10.	Spry Resources India Pvt. Ltd.	26.18%
	Average	22.63%

2.4 ITES SEGMENT

As far as the ITES segment of the assessee is concerned, the Ld.TPO after rejecting the TP analysis done by the assessee, chose a list of 8 comparable companies and the same are as follows :-

Sl.No.	Name of the Case	OP/OC
1.	Accentia Technologies Ltd.	11.75
2.	Universal Print Systems Ltd. (Seg) (BPO)	52.46
3.	Informed Technologies India Ltd.	6.08
4.	Infosys BPO Ltd.	36.30
5.	Jindal Intellicom Ltd.	-0.05
6.	Microgenetic Systems Ltd.	19.61
7.	T C S E-Serve Ltd.	63.69
8.	B N R Udyog Ltd. (Seg) (Medical Transcription)	50.61
9.	Excel Infoways Ltd. (Seg)(IT/BVPO)	29.79
10.	e4e Healthcare Services Pvt Limited	19.85
	Average PLI	28.11%

2.5 The margins computed by assessee was 9.27% for SWD segment and 11.68% for ITES segment which was not within the (+) or (-) 5% range of the arithmetic mean of the final set of comparable companies chosen by the TPO. The TPO therefore proceeded to determine the ALP of the international transaction by applying the arithmetic mean of the final list of comparable companies chosen by him.

After allowing working capital adjustment, the TPO computed the ALP as follows:-

SOFTWARE DEVELOPMENT SERVICES

Arm's Length Mean Margin on cost	22.63%
Less: Working Capital Adjustment	1.23%
(As per Annex. C)	
Adjusted margin	21.4%
Operating Cost	1,24,67,85,340
Arm's Length Price (ALP)	1,51,35,97,402
121.4%	of Operating Cost
Price Received	1,36,23,62,327
Shortfall being adjustment u/s 92CA:	15,12,35,075
5% of price received	6,81,18,116
Since the shortfall is exceeding 5% of the International Transaction, adjustment is made	

IT ENABLED SERVICES

Arm's Length Mean Margin on cost	28.11%
Less: Working Capital Adjustment	-2.74%
(As per Annex. C)	
Adjusted margin	30.85
Operating Cost	2,23,40,59,068
Arm's Length Price (ALP)	2,92,32,66,290
130.85%	of Operating Cost
Price Received	2,49,49,53,355
Shortfall being adjustment u/s 92CA:	42,83,12,935
5% of price received	3,57,40,855

Since the shortfall is exceeding 5% of the International Transaction, adjustment is made

2.6 The Ld.AO passed draft assessment order, wherein a further disallowance of telecommunication expenses from Export turnover. However, the same was not reduced from Total turnover for purposes of computing deduction u/s. 10AA of the Act.

Assessee did not file objection before the DRP, but chose to file appeal before Ld.CIT(A) against the assessment order dated 10/05/2016.

2.7 The Ld.CIT(A) excluded Infosys Technologies Ltd., M/s. Persistent Systems Ltd., M/s. ICRA Techno Analytics Ltd. under SWD segment and one comparable in ITES segment i.e., Infosys BPO Ltd. The Ld. CIT(A) relied on order of this *Tribunal* for Assessment Year 2009-10 in assessee's own case.

Aggrieved by the order of the Ld.CIT(A), the assessee and revenue are in appeal before us.

3. Before we undertake the comparability analysis, it is sinequa non to analyse the functions performed, assets owned and risk assumed by assessee under SWD and ITES segment.

1. Functions performed by UGSI

The key services areas for UGSI are the following:

- a. Contract software development and maintenance; and
- b. Business process outsourcing, such as remote IT operations management, technical helpdesks, and shared services ("ITES")

Contract Software development services

UGSI broadly undertakes lifecycle activities of product engineering and development of software relating to application development, product enhancement and maintenance.

Business Process outsourcing services ("ITES")

The functions undertaken by UGSI are summarised hereunder:

Architect Practice(“AP”): The UGSI Architect Practice offers the following services and architectural artifacts to Unisys Group’s clients globally:

- Pre-sales-Client Workshops, Conceptual Design, Estimation, Proof of Concept Designs;
- Delivery – Software architecture documentation, High level designs, Low level designs, Code reviews, Solution development leadership.

Common Services

- Sales and marketing services, including solutions management, market research, support services to Creative Media Services, Digital strategy and Marketing, and Marketing Insights teams;
- Supply chain support services;
- Human resources management, including employee database and separation management and HR analytics;
- UGSI is also part of the Shared Service Center group within Unisys providing mainly financial and transactional services

2. Assets owned:

Assessee is owning routine assets like office premises, furniture/fixtures etc. required to perform day-to-day business activity.

3. Risk assumed:

Assessee assumes less than nominal risk in rendering services to its AE, except for the Foreign Exchange risk. Based on the facts as presented in the above analysis of functions performed, assets employed and risks assumed by UGSI, it is possible to characterise UGSI as a contract captive service provider. UGSI is risk insulated for the provision of software development and IT Enabled services to Unisys Group.”

3.1 At the outset, the Ld.AR submitted that there is an additional ground raised by assessee vide application dated 15/10/2020 as under:

“Grounds relating to other than transfer pricing matters

1. That on the facts and in the circumstances of the case and in law, the Learned Assessing Officer (‘AO’) and Commissioner of Income-tax Appeals [VIT(A7) ought to have granted deduction of Education Cess and Secondary & Higher Education Cess (collectively referred to as ‘Cess’) incurred by the Appellant while arriving at the assessed income for the year under appeal.”

It was submitted that no prejudice will be caused to revenue if the additional ground raised is admitted.

3.2 On the contrary, the Ld.DR strongly opposed the admission of additional ground.

3.3 We note that admission of additional ground is necessary for computing the correct income in the hands of assessee. Therefore respectfully the decision of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in 229 ITR 383 and *Jute Corporation of India* reported in 187 ITR 688, we admit the above ground. Accordingly the application dated 15/10/2020 stands allowed.

Assessee's Appeal:-

4. Ground Nos. 1-2 The Ld.AR submitted that assessee seeks exclusion of two comparables being Genesys International Corpn. Ltd. and L&T Infotech Ltd.

The Ld.AR submitted that M/s. Genesys International Corporation Ltd; and M/s. Larsen & Toubro Infotech Ltd. were considered by the coordinate bench in the case of CGI Information Systems & Management Consultants Pvt. Ltd. (2018) 94 taxmann.com 97 which has been subsequently followed in case of Micro Focus Software India Pvt. Ltd. Vs. ACIT in ITA No. 368/Bang/2017 for A.Y. 2012-13 by order dated 17/03/2020 by holding that they are not good comparables. He further submitted that the above comparables were excluded on reasoning that no segmental information is available. Accordingly, he prayed for exclusion of this company.

4.1 We heard Ld.DR and perused the record.

In the case of Micro Focus Software India Pvt. Ltd.(supra), companies were excluded by observing as under.

“29. We have considered the rival submissions. In the case of Agilis Information Technologies India (P.) Ltd. (supra), this Tribunal considered the comparability of the 3 companies which the Assessee seeks to exclude from the final list of comparable companies chosen by the TPO. The functional profile of me Assessee and that of the Assessee in the case of Agilis Information Technologies India (P.) Ltd. (supra), is identical inasmuch as the said company was also involved

in providing SWD services to its AE and the TPO had chosen some comparable companies which were also chosen by the TPO in the case of the Assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the Assessee seeks to exclude as follows:

.....

(b) Larsen &Tourbro Infotech Ltd., was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of ITAT in the case of Saxo India (P.) Ltd. v. Asstt. CIT [2016] 67 taxmann.com 155 (Delhi - Trib.). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L & T Infotech Ltd., was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the revenue against the tribunal's order was dismissed by the Hon'ble Delhi High Court in ITA No.682/2016.

.....

30. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins. In this regard we are also of the view that the plea of the learned DR for a remand of the issue to the DRP on the ground that the DRP has not given any reasons in its directions cannot be accepted. The DRP has endorsed the view of the TPO in its directions and therefore the reasons given by the TPO should be regarded as the conclusions of the DRP.

31. The learned DR. next submitted that Genesys International Corporation Ltd., should be excluded from the list of comparable companies. The comparability of this company with the Assessee has been discussed by the TPO in page-11 of his order. The Assessee objected to inclusion of this company in the list of comparable companies for the reason that this company is functionally different and owns intangible assets which are peculiar only when the Assessee owns software products. The objections of the Assessee are contained in its letter dated 22.12.2015 addressed to the TPO and in annexure-B to the said letter. The relevant portion of the objection is at pages 711-713 of the Assessee's paper book. According to the Assessee this company is engaged in providing Geographical Information Services comprising of Photogrammetry, Remote Sensing, Cartography, Data Conversion, state of the art terrestrial and 3D geocontent including location based and other computer based related services. Page-38 of the Annual report 2012 containing the above description was brought

to the notice of the TPO, Attention of the TPO was invited to the directors report to the shareholders at page ii of the annual report 2012, wherein the Directors have informed the shareholders that the company continued in its journey, to be innovators and leaders in the fields of location based services related geoplatforms and advanced survey techniques. There is no segmental reporting because it is stated in the annual report that this company is only in one segment viz., GIS based services and therefore there is no requirement of segmental reporting. It was also submitted that this company owns substantial intangibles equivalent to 10.42% of its total turnover.

32. The TPO however has regarded this company as a comparable company by observing that this company develops software for mapping and geospatial services and operates a few development centres in India. The company is predominantly into software development services. The intangibles in the possession of the company are only the GIS database which is only depreciation. It does not add significant value to the company.

33. The objections as put forth before the TPO were reiterated before the DRP. The DRP in paragraphs 6.2.2 & 6.2.3 of its directions dealt with this issue as follows:

"6.2.2 The functions of the Assessee company have been examined in detail. A financial product on which the settlement system of bank runs is a real time system. It is very complex. Any bug or problem in it can crash the entire banking system of several nations. The Assessee's claim of providing only basic software services is rejected.

6.2.3 The Panel holds that the software for financial product is much more complex than a geospatial software. Therefore, the panel holds that the Genesys is a valid comparable."

34. The learned counsel for the Assessee submitted that the DRP has completely proceeded on wrong facts which does not either emanate from the order of the TPO or the submissions of the Assessee. He reiterated submissions made before the TPO and DRP. The learned OR relied on the order of the DRP/TPO.

35. We have given a careful consideration to the rival submissions. It is clear from the material brought to the notice of the TPO by the Assessee that this: company renders mapping and geospatial services. In rendering such services it develops software. But that does not mean that this company is in the business of software development. The business profile of this company as per the annual report does not show that this company is into software development service. The only line of business that this company carries on is rendering GIS based services and this is clear from the annual report which specifies that since the company carries on only one line of business viz., GIS based

services there is no need to give any segmental results. In the circumstances, we are of the view that there is no basis for the TPO to conclude that this company is predominantly into software-development services. The presence of intangible assets is indicative of the fact that this company is not in software development services business. The TPO has overlooked this aspect and proceeded on the basis that the presence of intangible assets would not be significant. Rule 10B(2) of the Income Tax Rules, 1962 (Rules) specifically provides that for the purposes of sub-rule (1) of Rule 10B, the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:—

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

In the given facts and circumstances, we are of the view that Genesys International Corporation Ltd., cannot be considered as a comparable company and the said company should be excluded from the final list of comparable companies. We hold accordingly.”

Nothing has been brought on record by the Ld.DR to distinguish the above findings. Respectfully following the same, we direct the two companies to be excluded from the final list.

Accordingly Ground Nos. 1-2 stands allowed.

5. Ground Nos. 3-5 Assessee seeks exclusion of following 4 comparables.

1. TCS E-Serve Ltd.
2. Universal Print System Ltd.
3. BNR Udyog Ltd.

5.1 Universal Print System Ltd.

We heard the parties and perused the record. M/s Universal Print Systems Ltd (seg.)(BPO) was restored back to the file of Ld.AO/TPO in the case of *CGI Information Systems & Management Consultants P Ltd (2018) 94 taxmann.com 97* at paragraph 47 to 52 of the order of Tribunal. The relevant paragraphs are extracted below:-

“47. The next submission of the learned counsel for the Assessee was with regard to exclusion of 2 comparable companies from the list of 7 comparable companies that remain after the order of the DRP. The first comparable company sought to be excluded is

Universal Print Systems Ltd. This company was chosen as a comparable company by the TPO. In reply to the proposal of the TPO to include this company as a comparable company, the Assessee vide its letter dated 22.12.2015 had pointed out its objections to including this company as a comparable company. A copy of the said objection is at page-785 of the Assessee's paper book. The Assessee pointed out that the OP/TC of this company as worked out by the TPO at 59.40% was wrong and unallocated costs as per the annual report should be allocated to BPO segment and if that is done then the OP/TC of this company will be only 51.80%. The Assessee further pointed out (Page764 of paper book) that the TPO had applied revenue filter of more than 75% being from non-financial service income. The Assessee pointed out that the percentage of income from ITES was only 21.63% of the total revenue from operations of this company as per its annual report. The Assessee also pointed out that in the Pre-press BPO segment this company was providing integrated print solutions to its customers, which includes scanning, design/layout, trapping, hand-outlined clipping path and image masking and magazine and catalogue publishing. The Assessee submitted that the aforesaid services are not in the nature of ITES. The Assessee pointed out that as per the safe harbour rules introduced by the CBDT ITES has been defined as business process outsourcing services provided mainly with the assistance or use of information technology. It was also submitted that this company does not satisfy the definition of ITES as contained in Rule IOTA(e) of the Rules. Since use of information technology is absent .in the various services provided by this company, it cannot be regarded as ITES company. The Assessee also submitted that this company fails the employee cost filter. The employee cost filter requires that the employees cost incurred by the company must be more than 25% of its revenue.

48 to 51

52. There appears to be no bar in the Rules referred to above to considering segmental data under TNMM because the comparison is of "net profit margin realized by the enterprise from an international transaction" with the "net profit realized from a comparable uncontrolled transaction". Therefore comparison is of similar transaction. When segmental information is available and is not disputed, it cannot be argued that filters have to be applied at entity level. It cannot be argued that when the TPO himself applied the filters at the entity level he was not entitled to apply the filters at segmental level. As we have already stated if clear segmental information is available the filters can be applied at the segmental level in TNMM. Therefore the objection with regard to this company failing the employee cost filter and service revenue filter in our view was rightly rejected by the TPO and DRP. It is however seen that this company has four segments viz., Repro. Label Printing, Offset Printing and Pre-press BPO. Whether the label printing and offset

printing segments supplement the functions performed in the Pre-press BPO segment has to be seen. We therefore set aside the order of the DRP in this regard and remand for fresh consideration by the TPO the comparability of this company. In terms of Rule 10B(3) of the rules the profit margins of Pre-Press BPO have to be adjusted taking into account the fact that two other segments supplement the pre-press BPO segment. If such adjustment cannot be reasonably or accurately made then this company has to be excluded from the list of comparable companies. The TPO for this purpose can use his powers u/s. 133(6) of the Act to get required details from this company. As far as the argument that this company fails functional comparability, we find that none of the objections raised by the Assessee in this regard about lack of information about allied services performed by die pre-press BPO segment of this company and the break-up of the revenue from such allied services have been dealt with specifically by the TPO or DRP. Since the comparability of this company is being remanded to be TPO for consideration of adjustments as mentioned above, the objection with regard to functional comparability should also be looked into by the TPO in the remand proceedings on the basis of materials which he may gather u/s. 133(6) of the Act, The Assessee should be given opportunity of being heard by the TPO before the issue is decided by the TPO.”

Following the same, we restore this comparable to the file of AO/TPO for examining it afresh.

5.2 M/s BNR Udyog Ltd

It was held to be not a good comparable in the case of M/s Zyme Solutions P Ltd (Order dated 28-06-2019 passed in IT(TP)A No.1661/Bang/2016) with the following observations:-

“8. We have heard the rival submissions on the comparability of the aforesaid company. The Delhi ITAT in the case of BT e-service (India) Ltd vs. ITO (ITA No.6690/Del/2016 for AY 2012-13 order dated 19-6-2018 considered the comparability of this company and came to the conclusion that this company was carrying out medical transcription, medical billing and coding whereas the Assessee was a captive service provider. The Tribunal followed its own ruling in the same assessee’s case in AY 201112 in ITA No.99/Del/2016 reported in (2017) 87

taxmann.com 251 (Del) in BT e-serve (India) P Ltd vs. ITO giving identical reasons for excluding BNR Udyog Limited from the list of comparable companies in the field of companies rendering ITES such as the Assessee. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid company from the list of comparable companies chosen by the TPO.”

Respectfully following the above said decision of coordinate bench, we direct exclusion of M/s BNR Udyog Ltd from the list of comparable companies.

Accordingly the grounds raised by assessee stands allowed.

6. Additional ground raised by assessee is in respect of considering Education Cess and Secondary Higher Education Cess (collectively referred as Cess) paid by assessee as allowable expenditure u/s. 37(1).

6.1 The Ld.AR at the outset submitted that the issue stands squarely covered by the decision of *Hon'ble Rajasthan High Court* in case of *Chambal Fertilisers and Chemicals Ltd. vs JCIT* in ITA No. 52/2018 by order dated 31/ 07/ 2017.

6.2 Ld.CIT.DR could not controvert the above submissions of assessee.

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

Hon'ble Rajasthan High Court in the above referred case has held cess to be an allowable expenditure in the hands of assessee. Respectfully following the same we direct the Ld.AO to consider the claim of assessee in accordance with law.

Accordingly the ground raised by assessee stands allowed.

Revenue's Appeal:-

7. Revenue is seeking inclusion of Infosys Technologies, M/s. Persistent Systems Ltd., M/s. ICRA Techno analytics under SWD segment.

7.1 At the outset, the Ld.AR submitted that, above comparables have been considered by coordinate bench of this Tribunal in case of *NXP India Pvt. Ltd. vs DCIT in ITA No. 692/B/2017* by order dated 27/04/2020. It has been submitted that NXP India Pvt.Ltd., was also characterised to be a captive software service provider to its AE.

7.2 The Ld.CIT.DR though objected, could not controvert the observations of this Tribunal in case of *NXP India Pvt. Ltd.*, (supra).

7.3 We have perused submissions advanced by both sides in light of records placed before us. We note that the functional profile of this assessee and the assessee in the decision cited by the Ld.AR are same. Above comparables have been dealt with by this *Tribunal* in case of *NXP India Pvt. Ltd.* (supra) as under:

“PERSISTENT SYSEMS LIMITED

The assessee objected for the exclusion of this company by the lower authorities in the tally of comparables by arguing that it is engaged in OPD and there is a difference in OPD and IT services and that the assessee is having revenue from other sources and no segmental data is available. It was also submitted that in the assessment year 2012-2013, it is an abnormal year of operation and it is owning various intangibles. For this purpose, he relied on the order of the Bangalore Bench of the Tribunal in the case of NXP Semiconductor India Private Limited in IT(PA) No.1634/Bang/ 2014 for assessment year 2009-2010 - order dated 22nd July, 2015.

6.1 We have carefully gone through the order of the coordinate Bench in the case of NXP Semiconductor India Pvt. Ltd. (supra) for the assessment year 2009-2010, wherein it was observed that Persysnt Systems Limited was engaged in product development and product design and analysis services is functionally different from a pure software service provider and therefore, excluded it from the list of comparables for software development services. The same view was taken in the case of Saxo India Put. Ltd. in ITA No.6148/De1/2015 - order dated 05th February, 2016, by observing that Persysnt Systems Limited is engaged in running software development services as well as sale of software products. Albeit the percentage of software

products in the total revenue is less, as has been noted by the TPO, and also there is no precise information about the contribution made by such small sale of software products to the total profits of the company. As no segmental information is available in respect of this company and the figures have been adopted by the TPO at entity level, it was directed to exclude Persistent Systems Limited from the list of comparables. In the present case also, it is noticed that Persistent Systems Limited is engaged in software products development. There is a difference between the outsourced software product development and IT services, which is evident from page nos. 973 and 974 of the paper book, as under:-

"Outsourced Software Product Development (OPD) is different from IT services.

Unlike a typical IT services project, where requirements are fixed while time and money are variable, a software product development project starts with fixed time and money, thus leaving requirements as the only variable. Essentially, the product development team's task is to produce the best set of requirements within a fixed time and budget. Persistent Systems has emerged as a leader in the OPD segment — a segment which is fast growing.

OPD and outsourced IT services: the difference.

How is OPD different from outsourced IT services is an oft asked question. In IT services, projects start with well-defined requirements, and vendors use time and money as variables to arrive at a reasonable cost estimate for the project. After completion, the project goes into maintenance mode.

In product development, requirements are less clearly defined. Instead, most product developers are given ship-dates for the product that are typically determined by external factors. Once the ship-dates are identified, the budgets for the product are frozen. In product development projects, all requirements can never be completely fulfilled in a particular version. As a result, most product companies plan multiple product versions for their product. Every team member must contribute not only to building features for the current release but must also contribute enhancements and provide feedback for future releases of the product.

Persistent Systems Limited having revenue of 8103.64 Million from software services and other income of 323.76 million from income from other sources. Assessment year 2012-2013 is an abnormal year of operation to Persistent Systems Limited, which is evident from the annual report placed on record by the assessee in its paper book. Further, Persistent Systems Limited is having intangibles to the tune of 2402.67 million as evident from its balance sheet ended on 31.03.2012. Being so, it is not comparable to assessee's case. We, therefore, direct the TPO to exclude Persistent Systems Limited from the list of comparables.

Above views has been consistently followed by coordinate benches of this Tribunal in various case more particularly in case of CGI Information Systems and Management Consultants Pvt. Ltd., Vs. ACIT reported in (2018) 94 Taxmann.com 97 for assessment year 2012-13.”

Respectfully following the view taken by this *Tribunal* we hold that the aforesaid companies are rightly excluded from the final list of comparables for the purpose of determining the arm's length margin.

7.4 Revenue also seeks inclusion of one comparable under ITES segment which is Infosys BPO Ltd.

INFOSYS LIMITED

The argument of the learned AR is that Infosys Limited is functionally different from the assessee. It owns intangible and undertakes research and development. The Ld.AR also submitted that it has high brand value and turnover.

7.5 On the contrary, the learned DR submitted that the nature of services remains the same irrespective of whether it is engaged in providing onsite / offsite services.

7.6 We have heard the rival submissions and perused the material on record. Similar issue came up for consideration before the Tribunal in the case of *NXP Semi Conductors India Pvt. Ltd. u. DCIT* in *IT(TP)A No.1634/Bang/2014* by order dated 27.07.2015, wherein it was held as under:-

“10.4.1 We have heard both parties and perused and carefully considered the material on record; including the judicial decisions cited and placed reliance upon. We find that a coordinate bench of the Tribunal in the case of Cisco Systems Services B.V., India Branch (supra), for Assessment Year 200910 had held that this company be excluded from the final set of comparables on the ground that it is functionally dis-similar and different from a

purely software service provider and at para 20 of the order has held as under :-

"20. We have perused the orders and heard the contentions. There is no dispute that the M/s. Cisco Systems India (P) Ltd. (supra) is an affiliate of the assessee company and engaged in similar business like that of the assessee namely rendering software services development etc. Though the said company was having other business also, with regard to its software development segment, this Tribunal held Bodhtree Consulting Ltd., Infosys Ltd., Kals Information Systems Ltd. and Tata Elxsi Ltd. to be not proper comparables. Relevant paras of the order dt.14.8.2014 is reproduced hereunder :-

26.2 Infosys Technologies Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. 3DPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-

"11.0 Infosys Technologies Ltd.

11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.

11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention .to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;

(iii) the company has generated several inventions and filed for many patents in India and USA ;

(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;

(v) the company has incurred huge expenditure for research and development;

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems. In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.

11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;

(iii) the company has generated several inventions and filed for many patents in India and USA ;

(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;

(v) the company has incurred huge expenditure for research and development;

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems. In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.

11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly." The decision rendered as aforesaid pertains to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies."

10.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of Cisco Systems Services BE, India Branch (supra), we direct the Assessing Officer/TPO to omit this company from the final set of comparables as it is functionally different from the assessee in the case on hand, who is purely a software service provider."

7.7 In the present case also, Infosys Limited is engaged in a leading global technology services corporation. The company provides business consulting, technology, engineering and outsourcing services to help clients build tomorrows enterprise.

In addition, the company offers software products for the banking industry. It owns high brand value at Rs.56,286 crore in the year 2012 and percentage of brand value to revenue is 1.67% and brand value as a percentage of market capitalization is 34.2%, and also incur huge amount for research and development at Rs.5 crore as a capital expenditure and Rs.655 crore as a revenue expenditure for the year ended 31st March, 2012. Therefore, it cannot be said to be a comparable.

We, therefore, direct the TPO to exclude Infosys Limited from the list of comparables.

Accordingly this ground raised by revenue stands dismissed.

7.8 Other grounds raised by revenue are in support of inclusion of the above considered comparables. As we have upheld the above comparables, these grounds become academic at this juncture.

In the result, assessee appeal stands allowed and revenue appeal stands dismissed.

Order pronounced in the open court on 01st November, 2021.

Sd/-
(B.R. BASKARAN)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 01st November, 2021.
/MS/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.