

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

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 1139/Bang/2016
Assessment Year : 2009-10

The Deputy Commissioner of Income Tax, Circle – 4(1)(1), Bangalore.	Vs.	M/s. Micro Semi Storage Solutions India Pvt. Ltd., (formerly known as PMC-Sierra India Pvt. Ltd.) 19, Church Street, Bangalore – 560 001. PAN: AADCP6802F
APPELLANT		RESPONDENT

**&
C.O. No. 84/Bang/2017
(in IT(TP)A No. 1139/Bang/2016)
(By Assessee)**

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Revenue by	:	Shri Sankar Ganesh K, JCIT & Shri Sumer Singh Meena, CIT DR

Date of Hearing	:	23-12-2021
Date of Pronouncement	:	28-02-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals are filed by revenue as well as assessee against the assessment order dated 30.04.2013 by the Ld.DCIT,

Circle-12(2), Bangalore u/s. 143(3) r.w.s. 144C(3) of the Act for Assessment Year 2009-10.

2. Brief facts of the case are as under:

The Assessee, formerly known as PMC Sierra India Pvt. Ltd., was during the relevant previous year a wholly owned subsidiary of PMC-Sierra Mauritius Limited which was in turn a subsidiary of PMC-Sierra Inc. The Assessee provides SWD services as well as sales support services to its AEs for which it is compensated on a cost plus mark-up basis.

During the year under consideration, the international transactions that took place between the Assessee and its AEs was the provision of SWD services by the Assessee at a price of Rs.63,36,37,442/-.

As the value of the international transactions was more than Rs. 15 Crores, reference was made to the Ld.TPO. On receipt of the reference, the Ld.TPO called for economic analysis of the international transaction in form 3CEB. The Ld.TPO observed that assessee had following international transactions with its Associated Enterprises:

International Transactions	Amount (in Rs.)
Provision of software development services	63,36,37,442/-
Provision of sales support services	89,37,146/-
Reimbursement of expenses	2,09,59,098/-
Recovery of FBT expenses	62,224/-
Allocation of computer service expenses (paid)	1,10,70,097/-

The Ld.TPO observed that assessee used TNMM as the most appropriate method to compute its margin at 15.94% by using OP/OC as PLI.

The Ld.TPO observed that assessee selected following 17 comparables with an average margin of 13% and thus held its transaction to be at arm's length:

Company Name	Average Margin
Akshay Software Technologies Ltd.	7
Bodhtree Consulting Ltd.	27
E2E Infotech Ltd.	11
FCS Software Solutions Ltd.	40
ICRA Techno Analytics Ltd.	8
Indus Networks Ltd.	3
LGS Global Limited	25
Larsen & Toubro Infotech Limited	16
Mindtree Ltd.	20
PSI Data Systems Ltd.	5
SIP Technologies & Exports Ltd.	-9
Synetairos Technologies Ltd.	17
eZest Solutions Ltd.	33
Persistent Systems Ltd.	20
Computech International Ltd.	2
H S India Ltd.	-27
Techprocess Solutions Ltd.	26
Number of Companies	17
Mean	13

The Ld.TPO applied following filters and rejected most of the comparables selected by assessee. He thus finalised following 11 comparables with an average margin of 24.32%.

Filters applied by the TPO:

Step	Particulars
1.	Data for FY 08-09 not available – excluded
2.	Companies whose software development service income is < 75% of total revenue – excluded
3.	Companies whose employee cost is <25% of sales - excluded
4.	Companies whose export earnings are <75% of sales - excluded
5.	Companies having related party transactions >25% - excluded
6.	Companies having software development service income is <Rs.1 cr excluded
7.	Companies which had persistent losses for the last three years, up to and including FY 2008-09 – excluded
8.	Companies having different financial year ending - excluded
9.	Companies which are functionally dissimilar - excluded
10.	Companies having peculiar economic circumstances - excluded

Comparables Selected by TPO

SI.No.	Comparables	Margins(W C- Un.adj)
1	Akshay Software Technologies Ltd.	8.11
2	Bodhtree Consulting Ltd.	62.27
3	Infosys Ltd.	45.61
4	Kals Information Systems Ltd.	13.89
5	Larsen and Toubro Infotech Ltd.	24.72
6	Mindtree Ltd.	5.52
7	Persistent Systems Ltd.	41.4
8	RS Software (India) Ltd.	9.97
9	Sasken Communication Technologies Ltd.	27.91
10	Tata Elxsi Ltd. (seg)	20.28
11	Zylog Systems Limited	7.81
Arithmetical Mean		24.32

The Ld.TPO thus proposed an adjustment of Rs.4,76,06,151/- as under:

Arm's Length Mean Margin	24.32%
Less: Working Capital Adjustment	-0.05%
Adjusted mean margin of the comparables	24.37%
Operating Cost	Rs.56,46,07,776/-
Arm's Length Price (ALP): 124.37% of Operating	Rs.70,22,02,691/-
Price Received	Rs.65,45,96,540/-
Short fall being adjustment u/s. 92CA	Rs.4,76,06,151/-

On receipt of the TPO order, the Ld.AO while passing the draft assessment order observed as under:

The Ld.AO noted that assessee also claimed deduction under Section 10A at Rs.12,74,45,327/-. The Ld.AO recomputed the deduction by reducing lease line charges to the extent of Rs.29,64,932/- and travel expenses incurred in foreign currency of Rs.44,29,333/- from only its export turnover without making a corresponding reduction of the amounts from its total turnover.

Since assessee did not opt for filing objections before DRP, the assessment order was passed by the Assessing Officer.

Aggrieved by the order of Ld.AO, assessee filed appeal before the Ld.CIT(A).

The Ld.CIT(A) partly allowed the appeal as a result of which the TP adjustment made to the price charged for provision of SWD services was liable to be deleted. As for the issue relating to claim of deduction under Section 10A of the Act, the Ld.CIT(A) accepted the Assessee's alternate contention of the expenditure incurred in foreign currency and telecommunication charges are to be reduced from its export turnover, then they ought to also be reduced from its total turnover.

Aggrieved by the order of Ld.CIT(A), revenue preferred appeal before this *Tribunal* against the transfer pricing adjustments considered by the Ld.CIT(A) and the claim u/s. 10A in favour of assessee.

On receipt of notice of the above Revenue's appeal, assessee also filed the cross-objections seeking inclusion of certain comparables.

Before we undertake the comparability analysis, it is *sine qua non* to understand the FAR performed by the assessee under the SWD segment.

Functions:

Assessee provides research and development pertaining to software development services and sales support services to the AE Group. Assessee also provides sales support services in relation to PMC products in India. In consideration for the services provided, assessee is entitled to be compensated on a cost plus markup basis.

The business of assessee, thus, can be categorized into two broad areas (a) Software development services provided to AE Group and (b) Sales support services provided to PMC-Sierra US Inc. and PMC- Sierra International Inc.

The commencement of a project by assessee requires the approval of Research and development manager and that of other relevant managers in AE Group. The engineering centre manager generates a document, detailing the various steps to be followed as to specification, design etc. This document is co-developed by assessee and AE Group. The employees of assessee are given internal training on the relevant technologies and product. All the projects are closely reviewed by AE Group. Assessee performs various acceptance tests before it is delivered to AE Group.

Sales Support Services: As per the Sales Support Services Agreement, assessee provides sales support services to PMC-Sierra US Inc and PMC-Sierra International Inc., with regard to AE Group products. The services are

in the nature of identification of potential customers, technical support and co-ordination with distributors. Assessee acts as a liaison between PMC-Sierra US Inc. and PMC-Sierra International Inc. and its customers in India. In consideration for the services performed assessee receives a total cost plus mark-up. Assessee, acting as a contract service provider assists and supports PMC-Sierra US Inc. and PMC-Sierra International Inc. with the products in India. Assessee also provides PMC-Sierra US Inc. and PMC-Sierra International Inc. with commercial, market, ongoing developments in the industry, government initiatives and related other information as required.

Assets Employed:

Any business requires assets for undertaking its operations. AE Group is the owner or licensee, as the case may be, of rights, titles and interest in intellectual properties and assessee do not own any significant intangibles. Assessee uses the process, technical data software, quality standards etc. owned by the AE Group for its provision of services.

Risks assumed:

Services rendered by assessee are entirely consumed by AE Group. Assessee is assured payment from AE Group on time or mostly, in advance. Therefore, assessee bears no credit risk.

Manpower Risk: Assessee has a certain amount of power risk since the assessee has the responsibility of attracting and retaining key personnel.

It has been submitted that assessee does not have any exposure to market risk, product and technology risk and credit risk except for manpower risk and foreign exchange risk.

Assessee is assured of the payments from the group and therefore do not have the risk of non-payment for the services provided. Except for foreign exchange risk due to the payment received in foreign currency, assessee is a risk mitigated company operating towards the provision of services only to the AE.

Characterization:

Based on the facts as presented in the above analysis of functions performed, assets employed and risks assumed by PMC-Sierra India, for transfer pricing purposes, it is possible to characterize assessee as a contract service provider (undertaking research and development pertaining to software development services and sales support services) which assumes less than normal risks associated with carrying out such business.

Based on the above we shall now deal with the inclusion/exclusion of the comparables sought by both sides as under.

Revenues's Appeal

The Ld.DR submitted that **Ground no. 1** is general in nature and therefore do not require adjudication.

The only issue alledged by the revenue is in respect of Grounds 2 & 3. It is submitted by the Ld.DR that the other grounds are general in nature and do not require adjudication.

Accordingly, we dismiss Grounds 4 to 9 raised by the revenue.

Ground no. 2 in revenue's appeal is in respect of the deduction granted to assessee u/s. 10A of the eligible unit.

It is submitted by both sides that this issue now stands covered in favour of assessee by the decision of *Hon'ble Supreme Court* in case of *CIT v. HCL Technologies Ltd.* reported in (2018) 93 *taxmann.com* 33.

Accordingly this ground raised by revenue stands dismissed.

Ground no. 3 raised by revenue is in respect of comparables excluded by the Ld.CIT(A). The Ld.DR submitted that following

companies were directed by the Ld.CIT(A) to be excluded from the list of comparables by holding them to be functionally not similar with assessee.

Tata Elxsi Ltd.,

Sasken Communication Technologies Ltd.,

Persistent Systems Ltd.,

Infosys Ltd.,

He placed reliance on the order of the Ld.TPO.

On the contrary, the Ld.AR submitted that the Ld.CIT(A) rightly excluded above comparables from the final list by holding them to be functionally dissimilar to the Assessee's SWD service segment. She submitted that the findings of the Ld.CIT(A) are consistent with the view taken by this *Tribunal* in various decisions for same assessment year. The Ld.AR submitted that the above comparables have consistently been held by this *Tribunal* to be functionally incomparable with captive software development service providers such as the Assessee.

In respect of Persistent Systems Ltd., Sasken Communication Technologies Ltd. and Tata Elxsi Ltd., reliance is placed by the Ld.AR on the decision of coordinate bench of this *Tribunal* in case of *VMware Software India Pvt.Ltd v. DCIT* reported in TS-71-ITAT-2017 and *Infinera India (P.) Ltd. v. ITO* reported in (2016) 72 *taxmann.com* 68 in support of her contentions that they ought to remain rejected.

As for Infosys Technologies Ltd., reliance is placed by the Ld.AR on the decision of coordinate bench of this *Tribunal* in case of

Infinera India (P.) Ltd. v. ITO reported in (2016) 72 taxmann.com 68 in support of its contention that it ought to remain rejected.

We have perused the decision relied by the Ld.AR. We note that in similarly placed circumstances, this Tribunal in case of *Infinera India (P.) Ltd. v. ITO (supra)* excluded these comparables, by observing as under:

“3. M/s Tata Elxsi Ltd., For exclusion of this company also, reliance has been placed on the same Tribunal order rendered in the case of M/s Cisco Systems (Ind.) Pvt.Ltd.,(Supra) and our attention was drawn to para- 26.4 to 26.5 of the order available on pages 103 to 105 of the case law compendium. For the sake of ready reference these paras are reproduced hereunder;

“26.4 Tata Elxsi Ltd.:- As far as this company is concerned, it is not in dispute before us that in assessee's own case for the A.Y. 2007-08, this company was not regarded as a comparable in its software development services segment in ITA No.1076/Bang/2011, order dated 29.3.2013. Following were the relevant observations of the Tribunal:-

II. UNREASONABLE COMPARABILITY CRITERIA :

19. The learned Chartered Accountant pleaded that out of the six comparables shortlisted above as comparables based on the turnover filter, the following two companies, namely (i) Tata Elxsi Ltd; and (ii) M/s. Flextronics Software Systems Ltd., deserve to be eliminated for the following reasons :

(i) Tata Elxsi Ltd., : The company operates in the segments of software development services which comprises of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There is no sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. The company has also in its response to the notice u/s.133(6) stated that it cannot be considered as comparable to any other software services company because of its complex nature. Hence, Tata Elxsi Ltd., is to be excluded from the list of comparables.

(ii) Flextronics Software Systems Ltd. : The learned TPO has considered this company as a comparable based on

133(6) reply wherein this company reflected its software development services revenues to be more than 75% of the "software products and services" segment revenues. Flextronics has a hybrid revenue model and hence should be rejected as functionally different. Based on the information provided under "Revenue recognition" in its annual report, it can be inferred that the software services revenues are earned on a hybrid revenue model, and the same is not similar to the regular models adopted by other software service providers. The learned representative pleaded that a regular software services provider could not be compared to a company having such a unique revenue model, wherein the revenues of the company from software/product development services depends on the success of the products sold by its clients in the marketplace. Hence, it would be inappropriate to compare the business operations of the assessee with that of a company following hybrid business model comprising of royalty income as well as regular software services income, for which revenue break-up is not available. He finally submitted that this was a good reason to exclude this company also from the list of comparables.

20. On the other hand, the learned DR supported the order of the lower authorities regarding the inclusion of Tata Elxsi and Flextronics Software Systems Ltd., in the list of comparables. He reiterated the contents of para 14.2.25 of the TPO's order. He also read out the following portion from the TPO's order :

"Thus as stated above by the company, the following facts emerge :

1. The company's software development and services segment constitutes three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs.

2. The product design services sub-segment is into embedded software development. Thus this segment is into software development services.

3. The contribution of the embedded services segment is to the tune of Rs.230 crores in the total segment revenue of Rs.263 crores. Even if we consider the other two sub-segments pertain to IT enabled services, the 87.45% (75%) of the segment's revenues is from software development services.

4. This segment qualifies all the filters applied by the TPO." Regarding Flextronics Software Systems, the following extract from page 143 of TPO's order was read out by him as his submissions :

"It is very pertinent to mention here that the company was considered by the taxpayer as a comparable for the preceding assessment year i.e., AY 2006-07. When the same was accepted by the TPO as a comparable, the same was not objected to it by the taxpayer. As the facts mentioned by the taxpayer are the same and these were there in the earlier FY 2005-06, there is no reason why the taxpayer is objecting to it. How the company is functionally similar in the earlier FY 2005-06 but the same is not functionally similar for the subsequent FY 2006-07 even when no facts have been changed from the preceding year. Thus the taxpayer is arguing against this comparable as the company was not considered as a comparable by the taxpayer for the present FY 2006-07."

21. We have heard the rival submissions and considered the facts and materials on record. After considering the submissions, we find that Tata Elxsi and Flextronics are functionally different from that of the assessee and hence they deserve to be deleted from the list of six comparables and hence there remains only four companies as comparables, as listed below:"

26.5. Following the aforesaid decision of the Tribunal, we hold that M/S.Tata Elxsi Ltd. should not be regarded as a comparable".

15. Since ld. DR of the revenue could not point out any difference in facts, respectfully following these Tribunal orders, we direct the AO/TPO to exclude this company also from the list of final comparables.

4. Persistent Systems Ltd., For exclusion of this company, reliance has been placed on the Tribunal order rendered in the case of M/s Unisys India Pvt.Ltd., in IT(TP)A No.67(Bang)/2015, copy available on pages 210 to 246 of case law compendium and in particular, our attention was drawn to para 36 to 37 of the Tribunal order. These paras are reproduced as under:-

"36. As far as Persistent Systems Ltd. a comparable by the assessee in his TP study but was objected by the assessee before the TPO as not comparable, this Tribunal in the case of IT(TP)A No.108(Bang)/21014 order dated 12-12-2014 in the case of Yodlee Infotech Pvt. Ltd. Vs ITO held as follows:

"5.12..... This Tribunal in the case of 3DPLM Software Solutions Ltd., Vs DCIT (IT(TP)A No. 1303(Bang)/2012 dated 28-11-2013) has also held that Persistent Systems Pvt.Ltd., was in product designing services and into software product development. In the same decision it was also held that M/s Infosys Technologies Ltd., had considerable intangibles like IPR,

and was also into software product development. It was also held that M/s Tata Elxsi Ltd., was developing niche products and into product designing services. Hence, these companies would in any case have to be excluded from the comparables being functionally different".

37. Following the said decision, we direct that Persistent Systems Ltd., be excluded from the final list of comparable companies chosen by the TPO".

The ld. DR of the revenue supported the orders of the authorities below;

16. We have considered the rival submissions.

We find that in this case, the Tribunal has followed another Tribunal order rendered in the case of M/s Yodlee Infotech Ltd., Vs ITO in IT(TP)A No.108(Bang)/2014. The relevant portion of that Tribunal order is reproduced above and as per the same, this company i.e. M/s Persistent Systems Ltd., was in product designing services and into software product development. Since the present assessee company is only providing software development services to the AE, this company cannot be considered as a comparable in the present case. Since the ld. DR of the revenue could not point out any difference in facts, by respectfully following this Tribunal order, we direct the AO/TPO for exclusion of this company from the final list of comparable.

5. M/s Infosys Technologies Ltd., For exclusion of this company, reliance has been placed on the judgment of the Hon'ble Delhi High Court rendered in the case of M/s Aginity India Technologies Pvt.Ltd., in ITA No.1204/2011 dated 10-07-2013 and in particular, our attention was drawn to para-6 of the judgment as available in page-386 of the case law compendium and the same is reproduced hereunder:-

" 6. Learned counsel for the revenue has submitted that the Tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the Tribunal has stated that Infosys Technologies Ltd., should be excluded from the list of comparables for the reason latter was giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent- assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been

able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted".

17. From the above para of the judgment of the Hon'ble Delhi High Court, it is seen that this company is a giant company in the area of software and it assumed all risks leading to higher profits, whereas the assessee company was a captive unit of the parent company and assumed only a limited risk. In the present case also, the assessee company is providing services to the parent company and therefore, assuming only limited risk and hence, respectfully following this judgment of the Hon'ble Delhi High Court, we direct the AO/TPO to exclude this company also from the list of final comparables. As per the TPO's order Annexure-B, 11 companies have been considered as final comparables with arms length mean margin of 24.32%. As per the above discussion, we have held that 5 companies should be excluded from the list of final comparables.

i.e.....

- 1 M/s Kals Information Systems Ltd.,*
- 2. M/s Bodhtree Consulting Ltd.,*
- 3. M/ Tata Elxsi Ltd.,*
- 4. M/s Persistent systems Ltd.,*
- 5. M/s Infosys Tech. Ltd.,”*

In respect of Sasken we place reliance on the decision of Coordinate Bench of this Tribunal in case of VMware Software India Pvt.Ltd v. DCIT (supra) as under:

“Sasken Communication Technology Limited.

17. 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 co-ordinate bench of this Tribunal in the case of Novell Software Development India Pvt. Ltd. Vs. DCIT vide order dt.31.8.2015 in IT(TP)A No.1287/Bang/2011 has considered the comparability of this company in paras 25 & 30 as under:

" 25. As for Sasken Communication Technologies Ltd (seg), findings of this Tribunal as appearing in para 13 of its order mentioned supra is given hereunder :

13) Sasken Communication Technologies Ltd.:

"109. Ld TPO noticed that the company was rejected in the TP document on the ground that the company fails its filter of business review and R&D to sales was more

than 3%. However, no reasons were given for the business review.

109.1 Ld. TPO pointed out that R&D to sales being more than 3% is not acceptable for which detailed discussion has already been made earlier. He further noticed that the company has software services segment and segmental results are available for software services. He further pointed out that on the basis of information obtained u/s 133(6), the company qualifies onsite revenue filter (onsite revenues were to the extent 27.27% of its export revenues). After considering the assessee's reply, Id. TPO included this company in the list of comparables. Ld. counsel pointed out that this company has incurred significant expenditure on research and development activity the same being 6.07% of sales. He further submitted that the company had significant intangible inasmuch as it develops siskin branded products. The company owns 1PR Further it was pointed out before TPO that during the year the company had acquired Botnia Hightech F. and its two subsidiaries and thus, it had undergone significant restructuring. However, ld. TPO ignored these facts He relied on the following decisions:

- IQ Information System (I) Pvt. Ltd., ITA No. 1961/Hyd./2012 (paw no. 11 & 23, page 25);
- Amerson Process Management India Pvt. Ltd., ITA No. 8118/Mum./2010 (para 16 page 15).

110. Ld. DR relied on the order of TPO and submitted that TPO considered the companies software services segment details only. We have considered the rival submissions and have perused the record of the case.

111. Ld. TPO has completely ignored the extraordinary business circumstances pointed out by assessee for which necessary adjustment was required to be made in accordance with Rule 108(3) of Income Tax Rules.

However, since this adjustment was not possible, therefore, this company should not have been included in the list of comparables. Further, we find that the company owns /PR and has branded products which also distinguishes it from the assessee and, therefore, keeping in view the decision of Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd.(supra), we direct the Id. TPO to exclude this comparable from the list of comparables.

If we follow the coordinate bench decision in the case of Motorola Solution (India) P. Ltd, Sasken Communication Technologies Ltd needs to be excluded. However, as

mentioned by us at para 24 above, where the contested comparable formed part of assessee's own study, then the AO / TPO has to be given a chance for verification, in view of judgment of Hon'ble Pun jab & Haryana High Court in the case of Quark Systems India P. Ltd (supra). Accordingly we remit the issue of comparability of Sasken Communication Technologies Ltd back to the AO / TPO for consideration afresh as per law. Ordered accordingly."

" 30. Accordingly we direct the AO to exclude Accel Transmatic Ltd (seg), Avani Cimcon Technologies Ltd, Celestial Labs Ltd, E-Zest Solutions Ltd, Flextronics Software Systems Ltd (seg), Helios & Matheson Information Technology Ltd, Infosys Technologies Ltd, Ishir Infotech Ltd, Kals Information Systems Ltd (seg), Lucid software Ltd, Persistent Systems Ltd, Sasken Communication Technologies Ltd (seg), Tata Elxsi Ltd (seg), Thirdware Solutions Ltd (seg) and Wipro Ltd (seg) from the list of comparables considered by him."

Following the earlier order of this Tribunal, we direct the A.O./TPO to exclude this company from the list of comparables.

There is nothing placed on record by the revenue to take a different view. Respectfully following the above view, we do not find any infirmity in the view taken by the Ld.CIT(A).

Accordingly this ground raised by the revenue stands dismissed.

Cross Objection by Assessee:

The Ld.AR submitted that Grounds 3-5 are only pressed by the assessee.

Accordingly the remaining Grounds are dismissed as not pressed.

Ground No.3-4

The Ld.AR submitted that two companies, namely, Thinksoft Global Services Ltd. and FCS Software Solutions Ltd., were initially proposed as comparables by the Ld.TPO in his show cause notice, but subsequently not included in the

list of comparables on the sole ground that the impact of their working capital on profit is more than 4%. She also submitted that the action of the TPO in not including these companies was challenged by the Assessee in its appeal, the Ld.CIT(A), however the Ld.CIT(A) did not adjudicate upon its contentions and, accordingly, their exclusion was not interfered with by the CIT(A).

The Ld.DR relied on orders passed by the Ld.CIT(A).

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

We note that the Ld.TPO even though he accepted that the said companies are functionally similar to the Assessee, on the sole ground that when their respective working capitals are considered, the impact of the same on their respective profit margins is more than 4%.

In the interest of justice we remand these comparables to the Ld.AO/TPO to verify the details. In the event these comparables satisfy all the filters applied, the same may be included in the final list.

Accordingly, these grounds raised by the assessee in its cross objection stands allowed for statistical purposes.

Ground No. 5 the Assessee is seeking the exclusion of Bodhtree Consulting Ltd. from the list of comparables.

The Ld.AR submitted that Bodhtree follows a revenue recognition method, which is not comparable to the fixed price project model followed by the Assessee. Consequently, Bodhtree's profit margin fluctuates significantly on a year-on-

year basis, with the result that it cannot be considered as comparable to the Appellant. She Further submitted that Bodhtree is also engaged in the provision of software solutions developed in-house by the company. E.g. MIDAS, ShareTree, TeleTree, SecureTree, AppsScale. Whereas, the Assessee is only a captive software development service provider that does not design/develop/sell software products and does not own IPs. She placed reliance on the decision of coordinate bench of this Tribunal in case of *Autodesk India P. Ltd v. DCIT by Order dated 13.05.2016* in *IT(TP)A No.1369/Bang/2014* and *Infinera India P. Ltd v. ITO reported in (2016) 72 taxmann.com 68*.

The Ld.DR relied on the decision of the Ld.CIT(A).

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

We note that in similarly placed circumstances, this *Tribunal* in case of *Infinera India (P.) Ltd. v. ITO (supra)* excluded these comparables, by observing as under:

2) M/s Bodhtree Consulting Ltd., For exclusion of this company also, reliance has been placed on the same Tribunal order rendered in the case of M/s Cisco Systems (Ind.) Pvt.Ltd.,(Supra) and in particular, our attention was drawn to para-26.1 available on page no.98 to 99 of Case Law Compendium. In this case, it is noted by the Tribunal that this company is in the business of software product and was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore, the same cannot be considered as a comparable in the case of companies rendering software development services, as in the present case. Therefore, by respectfully following this Tribunal order, we hold that this company is also excluded from the list of final comparables.

There is nothing placed on record by the revenue to take a different view. Respectfully following the above view, we direct exclusion of Bodhtree from the final list.

In the result, appeal of the revenue stands dismissed and the cross objection of assessee stands partly allowed.

Order pronounced in the open court on 28th February, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 28th February, 2022.
/MS /

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

By order

Assistant Registrar,
ITAT, Bangalore