

आयकर अपीलीय अधिकरण “सी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, PUNE
BEFORE SHRI R.S.SYAL, VICE PRESIDENT
AND SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

PHYSICAL COURT OF HEARING

आयकरअपीलसं. / ITA No.1959/PUN/2018
निर्धारण वर्ष / Assessment Year : 2014-15

SAS Research and Development (India) Private Limited, Level1, 2A and 3, Tower 5, Cybercity, Magarpatta City, Hadapsar, Pune – 411 0103 PAN: AA ECS 8099 L	Vs	The Asst. Commissioner of Income Tax, Circle-6, Pune.
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Rajendra Agiwal– AR
Revenue by	Shri Piyush Kumar Singh Yadav - DR
Date of hearing	11/04/2022
Date of pronouncement	19/04/2022

आदेश / ORDER

PER SS VISWANETHRA RAVI, JM :

This is an appeal filed by the Assessee directed against the order of Id.Assistant Commissioner of Income Tax, Circle-6, Pune dated 31.10.2018 for the Assessment Year 2014-15. The Assessee raised following grounds of appeal:

- “1. *Inappropriate transfer pricing adjustment even though the pricing of all international transactions of the Appellant was at arm’s length***

Erred on the facts and in circumstances of the case and in law by making/confirming transfer pricing adjustment by rejecting the analysis undertaken by the Appellant to determine arm’s length price of its international transactions pertaining to rendering of software development support, consultancy and training services to the AEs.

- 2. *Inappropriate rejection of the transfer pricing documentation appropriately maintained by the Appellant***

Erred on the facts and in circumstances of the case and in law by inappropriately rejecting the transfer pricing documentation appropriately maintained by the Appellant and by inappropriately conducting a fresh search for benchmarking the Appellant’s international transactions.

3. *Inappropriate use of single year and non-contemporaneous financial data of comparable companies for transfer pricing analysis*

Erred on the facts and in circumstances of the case and in law by considering the operating profit margins on operating cost of the comparable companies based on the financial data pertaining only to financial year ended 31 March 2014 and rejecting use of financial data of comparable companies for multiple years i.e. including 31 March 2013 and 31 March 2012.

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

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

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

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

Erred in inappropriately rejecting the turnover filter of Rs 1 crore to Rs 200 crores applied by the Appellant while conducting its transfer pricing study for FY 2013-14 and inappropriately applying a turnover filter of Rs 10.07 crores to Rs 1007.70 crores.

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

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

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

Erred on the facts and in circumstances of the case and in law by rejecting certain companies identified by the Appellant in its transfer pricing study report for benchmarking its international transaction pertaining to rendering of software development support, consultancy and training services even though these

companies satisfied all the comparability criteria/filters applied while conducting the transfer pricing study.

- 8. *Inappropriately accepting certain companies as comparable which were initially considered as comparable by the Appellant on a multiple year basis but rejected during transfer pricing assessment proceedings on single year basis***

Erred on the facts and in circumstances of the case and in law by accepting certain companies as comparable which were initially considered as comparable by the Appellant in its transfer pricing study report on a multiple year basis but rejected during transfer pricing assessment proceedings on a single year basis.

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

Erred on the facts and in circumstances of the case and in law by identifying additional non-comparable companies as comparable to the Appellant.

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

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

- 11. *Inappropriately rejecting the lower 3 percent variation from the price at which the international transaction has actually been undertaken***

Erred on the facts and in circumstances of the case and in law by rejecting the lower 3 percent variation from the price at which the international transaction has actually been undertaken, as available to the Appellant while computing the amount of transfer pricing adjustment, if any.

Other Grounds of appeal:

- 12. *Inappropriate levy of interest and initiation of penalty proceedings***

Erred in levying interest under Section 234A and Section 234B of the Act and initiating penalty proceedings under Section 27(1)(c) of the Act.

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

1.1 The appellant assessee vide written submission date 31.12.2021 submitted that the Ground No.1 and 2 are general in nature and does not need any adjudication. It was further submitted that Ground No.3, 4, 5, 6, 10 and 11 are not pressed. It was further submitted that Ground No.12 is consequential and pre-mature in nature.

1.2 Therefore, the effective grounds in no.7, 8 and 9 for adjudication are related to rejection/acceptance of following comparables:

1. Lucid Software Limited ('Lucid')
2. Cigniti Technologies Limited ('Cigniti')
3. Thirdware Solutions Limited ('Thirdware')

2. Brief facts of the case are that the assessee (SAS R&D) is a wholly owned subsidiary of SAS Institute Inc ('SAS US'). SAS R&D was established on 28 July 2000 as a private limited company under the Indian Companies Act, 1956. During the year under consideration, SAS R&D is primarily engaged in providing software development and software consultancy services to AEs. These services have been collectively referred as 'software services'.

The International Transactions undertaken by the assessee during F.Y. 2013-14 are as follows:

	Nature of Transaction	Amount(Rs.)	Method Used
1	Software Development support Consultancy and training services	99,27,85,277	TNMM
2	Payment of postage & courier expenses	92,573	TNMM
3	Reimbursement of Expenses received	1,28,06,489	-
	Total	1,00,56,84,339	

2.1 The company's total revenue viz. revenue from operations and other income, for the year ended 31.03.2014 was Rs.100.77 crores, as against Rs.90.19 crores for the year ended 31.03.2013. Profit before tax was at Rs.11.21 crores, as against profit of Rs.9.25 crores during last year.

2.2 The assessee had submitted the Transfer Pricing Study Report (TPSR) before the TPO and DRP. As per the TPSR, assessee had selected following set of comparables as functionally comparable to assessee:

S.No	Name of the company	Three Years Weighted average of operating profits on operating cost (%)
1	Akshay Software Technologies Limited	5.97%
2	Blue Star Infotech Limited (Consolidated)	4.43%
3	Caliber Point Business Solutions Limited (Segmental)	4.19%
4	Cat Technologies Limited	-11.91%
5	CG-VAK Software & Exports Limited (Segmental)	3.39%
6	Cigniti Technologies Ltd.	19.81%
7	Evoke Technologies Private Limited	11.60%
8	Goldstone Technologies Limited	11.01%
9	Kellton Tech Solutions Ltd.	24.19%
10	Lucid Software Limited	7.08%
11	Maveric Systems Limited	9.96%
12	R S Software (India) Limited	19.56%
13	R Systems International Limited (Segmental)	13.88%
14	Spry Resources India Private Ltd	7.45%
15	Thinksoft Global Services Limited	20.70%
	Arithmetic Mean	10.09%

In the TPSR it is further mentioned that since, SAS R & D's operating margin of 11.05 percent on operating cost is higher than the arithmetic mean of the margins of the comparable companies of 10.09 percent, the software services transaction between SAS R&D and its AE(s) can be considered to be at arm' length.

2.2.1 As per Transfer Pricing Study Report functions performed by the assessee i.e. SAS R&D are as under:

- *SAS R&D, in discussion with the AEs, confirms its understanding of the design, on the basis of which the development work is carried out.*
- *In case of manufacturing and certain other solutions, SAS R&D, under the guidance, review and sign off from AE, undertakes the design and other services in the entire software development life cycle.*
- *SAS R&D under the guidance, review and sign off carries out design and other services in the entire software development life cycle.*
- *SA R&D has a product management team reporting to the primary product management team of the AE.*
- *SA R&D undertakes the software coding according to the functional specifications provided by the AEs.*
- *SAS R&D undertakes the initial testing during the development process and also on completion of the development ensures that the code generated the specifications/requirements provided by the AEs.*
- *Certain product documentation may be maintained/developed by SAS R&D.*
- *As mentioned above, SAS R&D is engaged in supporting SAS US on consulting projects i.e., installations, writing of routines/codes, ETL, data management, data warehousing/business intelligence and analytics etc. PSCC team of SAS R&D works closely with the Professional Services team of SAS US. This team primarily provides offshore software delivery and support to SAS US in relation to SAS solutions/tools. Majority work of this team is writing software to collect and manage large volumes of data to enable variety of analysis that drive business decisions.*
- *SAS R&D is engaged in providing trainings to the customers of SAS software products and employees of SAS Group in relation to the functionalities of the SAS Software products.*

2.3 During the transfer pricing proceedings, the Transfer Pricing Officer(TPO) had asked the assessee to submit profit level indicator (OP/OC) of the comparables using data for Financial Year 2013-14. Accordingly, the

assessee submitted that the comparable chart during the transfer pricing proceedings as under:

S.No	Name of the company	Three Years Weighted average of profits on operating cost (%)	Three Years Operating profit on operating cost for F.Y. 2013-14(%)
1	Akshay Software Technologies Limited	5.97%	1.84%
2	Blue Star Infotech Limited (Consolidated)	4.43%	NC
3	Caliber Point Business Solutions Limited (Segmental)	4.19%	3.45%
4	Cat Technologies Limited	-11.91%	-29.13%
5	CG-VAK Software & Exports Limited (Segmental)	3.39%	9.55%
6	Cigniti Technologies Ltd.	19.81%	NC
7	Evoke Technologies Private Limited	11.60%	NA
8	Goldstone Technologies Limited	11.01%	3.52%
9	Kellton Tech Solutions Ltd.	24.19%	19.72%
10	Lucid Software Limited	7.08%	-1.92%
11	Maveric Systems Limited	9.96%	7.64%
12	R S Software (India) Limited	19.56%	NC
13	R Systems International Limited (Segmental)	13.88%	NC
14	Spry Resources India Private Ltd	7.45%	NA
15	Thinksoft Global Services Limited	20.70%	NC
	Arithmetic Mean	10.09%	1.83%

(NC means Not Comparable and NA means Not Available)

2.4 During the transfer pricing proceedings, the TPO carried out TNMM analysis. The TPO applied minimum export filter of 75%. The TPO applied turnover filter of 10.07 crores to 1007.07 crores which was 1 to 10 times band width of assessee's turnover of 100.77 crores. The TPO arrived at following comparables. The TPO also provided for working capital adjustments:

Sr.No	Name of the company	WC adjusted margins (%)
1	Thinksoft global services ltd.,	15.55
2	Cigniti Technologies Ltd.,	23.18

3	Sasken Communication Technologies Ltd.	6.63
4	Thirdware Solutions Limited	48.61
5	R S Software (India) Limited	22.39
	Average	23.27%
	Tested Party Margin	11.01%

Regarding the risk adjustments, the TPO has mentioned following in the TPO order:

“The assessee has requested for risk adjustment. This issue is also considered. With great respect and regards, it is observed that there is no unanimity of the judicial opinion on granting risk adjustment. This is because, firstly, by applying qualitative and quantitative filters, the impact of risk factors between the taxpayers and comparable can be neutralized. It is fundamental in transfer pricing that risk follows function. Therefore, if the functions are compared, risk also would automatically get compared negating the need for this adjustment.

Further, it is not yet clear as to how to work out the risk adjustment mainly because it is not possible to quantify risk and numerically establish relationship of risk with the profit margin. Till date, neither the OECD nor the UN nor any other agency has published even discussion paper or study report on how to work out risk adjustment, leave alone laying down Guidelines for granting risk adjustment. The Transfer Pricing Guidelines provide fundamental principle that the adjustment made should be reasonably accurate. None of the workings on the risk adjustment can be considered reasonably accurate.

The assessee has requested for risk adjustment. This issue is also considered.

“Thus, there is no unanimity on the issue of granting risk adjustment, leave alone prescribing of sound methodology to grant risk adjustment. In such circumstances, therefore, in absence of the scientific method to quantify risk adjustment, the assessee’s contention is disposed off.

2.5 Accordingly, the TPO arrived at the conclusion that assessee’s transaction are not at arm’s length as the margin of the comparables was 23.27% whereas the margin of assessee was 11.01%. Therefore, the TPO suggested following adjustments.

Particulars	As per assessee	As per ALP
<i>Operating Income</i>	<i>99,41,19,220</i>	<i>1,10,38,81,361</i>
<i>Operating Expenses</i>	<i>89,54,98,792</i>	<i>89,54,98,792</i>
<i>Operating margin</i>	<i>9,86,20,428</i>	<i>20,83,82,569</i>
<i>OP/OC</i>	<i>11.01%</i>	<i>23.27%</i>

1.03 *	1,02,39,42,797
0.97 *	96,42,95,643
<i>Adjustment</i>	10,97,62,141

3. Aggrieved by the TPO's order, the assessee filed appeal before the Dispute Resolution Panel(DRP). The DRP vide its order dated 04.09.2018 upheld the order of the TPO.

4. Aggrieved by the order of DRP, the assessee has filed appeal before this Tribunal.

5. The Id.Authorised Representative(Id.AR) of the assessee submitted that the order of the TPO and DRP is erroneous. The Id.AR made following written submissions regarding the comparables:

I. Lucid Software Limited:

- Lucid's expenditure in foreign currency is INR 35,45,642 crores and the total expenditure is IN 3,79,08,429. Accordingly, the foreign currency expenditure are 9.35%. Therefore it cannot be concluded that Lucid has revenue from onsite.
- Hon'ble DRP while rejecting Akshay software had considered both the aspects of earnings in foreign currency and expenditure in foreign currency which were substantial in case of Akshay Software. However, Lucid's expenditure in foreign currency are not substantial (refer para 4.2 on page 30 of DRP directions for finding on Akshay Software.
- Lucid is engaged in rendering software development services and 88% of the revenue is derived from software development services.
- Further, the learned TPO has mentioned that the CIT(A) in Assessee's own case for earlier years has upheld the TPO's decision to exclude the company. However, the CIT(A) has accepted Lucid as comparable in AY 2013-14 and accordingly, the finding of the TPO is incorrect.

Case Laws relied upon:

- Hon'ble ITAT in Assessee's own case of AY 2013-14 (ITA No.2284/PUN/2017) order dated 8 December 2021 has accepted Lucid Software as comparable (Refer para 19 of the order on page nos 869 and 870 of paperbook II)
- Computer Land UK Limited Vs ACIT (ITA No.2505) order dated 6 December 2021 for AY 2013-14. (Refer para 11 to 14 of the order on page nos 885 to 889 of paperbook II)
- Hon'ble CIT(A) in Assessee's own case of AY 2013-14 has accepted Lucid Software as comparable (Refer para 2.2.1.4.3 of the order on page no 922 of paperbook II)

II. Cigniti Technologies Limited:

- Cigniti has acquired Gallop Solutions Inc, USA during the year due to which, total revenue has increased by 72% by way of addition of 50 new clients (refer page 430 of revised paperbook I)
- Cigniti is engaged in software testing business, it has outgrown independently in software testing business, it has outgrown independently in software testing and awarded Automated Software testing Services by Frost & Sullivan (refer page 427 of revised paperbook I)
- Cigniti is a pioneer in software testing market catering to clients all over the world in different geographies. However the assessee provided various software development services in which testing is one small activity carried out for its AE.
- The company is listed on Bombay Stock Exchange and Madras Stock exchange (refer page 490 of Paperbook I)
- Considering the holistic approach having regards to the annual reports of this company and the specified services provided by the company to its own clients in field of software testing as against the captive service provider. Cigniti cannot be considered as comparable.

III. Thirdware Solutions Limited:

- The entire revenue is on INR 20,675.74 lakhs is from sale of product and sale of services was shown nil.
- The company has made purchase of stock which highlights that the company is engaged in purchase and sale of products.
- On perusal of website of Thirdware, it is observed that the company is engaged in offering comprehensive Application Implementation and Application Management Support Services

in Enterprise Application Space and implementation of high end ERP solutions for various companies which is a distinct activity from software development.

- The margins of the company fluctuates year on year due to different revenue recognition model which the company has adopted
- Only geographical segment data is available in the annual report and no data of business wise segment is available
- In Assessee's own case of AY 2012-13 and AY 2013-14, the Hon'ble ITAT has prima facie rejected the company as comparable. However, since the company was included by the assessee himself in the TP study the Hon'ble ITAT has remanded back the issue for verification purposes.

6. The Id.Departmental Representative(Id.DR) relied upon the orders of the TPO and DRP.

7. We have heard both the parties, perused the material available on record and have gone through the orders of Lower Authorities. We find that the entire dispute is related to acceptance/rejection of certain comparables. Accordingly, each comparable is discussed here under.

7.1 **Lucid Software:**

The Id.AR submitted that Hon'ble ITAT in assessee's own case for A.Y. 2013-14 vide order dated 08.12.2021 has accepted Lucid Software Limited as functionally comparable. The Id.DR has not pointed out any distinguishing factor.

It is observed that the Hon'ble ITAT in assessee's own case for A.Y. 2013-14 ITA No.2315/PUN/2017 in para 19 has held as under:

"19. The ld. AR submits that the TPO did not discuss any specific ground for non-acceptance of M/s. Lucid Software Limited in the list of comparable

companies. We note that it was submitted before the CIT(A) that the M/s. Lucid Software Limited is into software development services and on satisfaction on examination of annual report of the said company the CIT(A) held the same as functionally comparable to the assessee. He also observed that the TPO in assessee's own case for A.Y. 2012-13 accepted M/s. Lucid Software Limited as comparable to that of the assessee and without there being any discussion the TPO denied to have taken the said company as comparable. Before us, it was submitted by the ld. AR that the M/s. Lucid Software Limited engaged in rendering software development services and referred to Page No. 466 of the paper book and contended that 95% of operating revenues were derived from software services. The ld. AR argued that the M/s. Lucid Software Limited should be considered as comparable in view of the details as submitted by the assessee. The CIT(A), we note that discussed about M/s. Lucid Software Limited in the impugned order from Page Nos. 19 to 22 wherein we note that the CIT(A) on his satisfaction with the annual report of the said company held functionally comparable to the assessee. The ld. DR did not bring on record anything contrary to the material evidence against the view of CIT(A) and we uphold the direction of CIT(A) in directing the AO to include the M/s. Lucid Software Limited as comparable in the final list of comparable companies.”

7.1.1 Therefore, respectfully following the precedence, and no distinguishing factor has been brought out by the ld.DR, the Lucid Software Limited is held as functionally comparable. Therefore, the TPO is directed to include the Lucid Software Limited in the list of comparables.

7.2 **Cigniti Technologies Limited:**

The ld.AR of the assessee submitted that Cigniti has acquired GALLOP SOLUTIONS INC., during the year due to which total revenue has increased to 72% by way of addition of 50 new clients. We have gone through the annual report of the Cigniti Technologies Limited. The part of the Managing Director's message is reproduced here as under:

“Dear Shareholders,

It gives us great pleasure to share with you our performance, which has been fantastic during the year. We are excited to announce that one of our dreams has finally become a reality this year. With two new offices in Australia and U.K. we are now a truly global company with operations spanning across every time zone encompassing the globe from Australia to U.S. This has brought in new excitement, new experiences and most importantly new opportunities to your company.

The acquisition of Gallop Solutions Inc. during the year has added great value to your Company. With this acquisition, we have not only emerged as the world's third largest independent software testing services company but we have also enhanced our software testing capabilities.

On the financial front, we have performed significantly well despite a difficult macro environment. The total revenue for the year stood at Rs.2,591.0 million up by 72% from Rs.1,508.8 million in FY13. The key reasons of the growth in revenue have been the acquisition of Gallop Inc and the addition of more than 50 new clients.”

Thus, it is a fact that during the year under consideration, Cigniti Technologies Limited has acquired GALLOP SOLUTIONS INC. This is an abnormal event which has increased its turnover and profit margin. This kind of event is a one time event. No such event has taken place in the case of assessee. Therefore, Cigniti Technologies Ltd. cannot be considered as functionally comparable to the assessee. Hence, the AO/TPO is directed to exclude the said comparable from the list of selected comparables.

7.3 Thirdware Solutions Limited:

The Id.AR of the assessee submitted that Thirdware Solutions Ltd., is not functionally comparable. The Id.AR further submitted that entire revenue of Rs.20675 lakhs is from sale of products and sale of services is at NIL. The contention of the assessee has been considered, but it is observed that submissions are factually misleading. On perusal of the Annual Report for FY 2013-14, it is observed that though in the Profit and Loss Account the broad heading is revenue from sale of products, which is Rs.20675 lakhs, but at the end of the Profit and Loss account there is a footnote which is reproduced here as under:

“(a) Export of Software Services: 20194.37 Software Services from local unit : 414.07 Revenue from Subscription & Training : 59.32 Sale of Licence: 7.98.”

7.3.1 Thus, 99.6% of the revenue is from export of software services. Therefore, assessee's submission that Thirdware Solutions Ltd. is into sale of products is not correct. The (20194.37 + 414.07 = 20608.44) 99.6% of the revenue being from export of software services explains that Thirdware Solutions Ltd., is in the business of software services. The assessee is also in the business of software services, therefore, it is functionally comparable. The Id.AR submitted that segmental analysis is not available, however, when more than 99% of the sale is from software services, there is no need for segmental profit analysis. The another submission of the Id.AR is that this year Thirdware Solutions Ltd., had abnormal profit, however, on perusal of the profits for two years, it is observed that profit before tax for F.Y. 2013-14 was 34% and profit before tax for F.Y.2012-13 was 25.8% [page no.306 of the paper book]. The figures of the Profit and Loss Account of Thirdware Solutions Limited are as under:

Particulars	2013-14 (Rs in Lakhs)	2012-13 (Rs in Lakhs)
Income	20900.98	14548.2
Profit before Tax	7143.7	3761.88
Percentage(%)	34%	25.8%

7.3.2 The analysis of above two financial years show that there is a difference of 8% in profit before tax. This is a normal variation, therefore, assessee's claim that Thirdware Solutions Ltd. had abnormal profit in FY 2013-14 is incorrect.

7.3.3 The Id.AR has also relied on the Hon'ble ITAT's decision in assessee's own case for A.Y. 2013-14. Para 12 of the Hon'ble ITAT's order in ITA No.2315/PUN/2017 dated 08.12.2021 discusses about Thirdware Solutions

Ltd. The Hon'ble ITAT has merely set-aside the issue to the file of AO/TPO for detailed factual verification, because regarding the comparability of Thirdware Solutions Ltd., ground was not raised before the Id.CIT(A). Thus, Hon'ble ITAT has not given any finding regarding comparability of Thirdware Solutions Ltd. However, it is important to mention here that for AY 2013-14 assessee itself had included the comparable Thirdware Solutions Ltd., in the final list of comparables selected by the assessee. It means that in A.Y.2013-14, the assessee after conducting FAR analysis, had arrived at the conclusion that Thirdware Solutions Ltd., is functionally comparable to assessee.

7.3.4 The AR also relied on the decision of the Hon'ble ITAT in the case of Synechron Technologies Pvt Ltd in ITA No.1692/Pun/2018 AY 2014-15. The Hon'ble ITAT has discussed the issue related to Thirdware Solutions Ltd in para 28 to 31 of the said order. In the said decision, the emphasis is on that the Thirdware Solutions Ltd is engage in Product development and sale of license, also segmental data is not available.

“29. The Ld. Counsel for the assessee has placed reliance on the decision of the Pune Bench of the Tribunal in the case of Symantec Software India Private Limited Vs. DCIT (supra.), wherein on identical set of facts, Thirdware Solutions Limited was directed to be excluded from the final list of comparables with regard to its software development service segment. On this issue, the Pune Bench of the Tribunal has held as follows:

“16. We have perused the case records and heard the rival contentions. We observe that Thirdware Solutions Limited is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from sale of user licenses. Further, the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. We find in the case of M/s. EMC Software and Services India Pvt. Ltd. Vs. JCIT (supra.), the Co-ordinate Bench of the Tribunal, Bangalore exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“(iv) Thirdware Solutions Ltd. the company is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the

development of software products and earns revenue from sale of user licenses and purchase stock in trade during the year and has intangibles. Further the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. The above comparable was excluded in assessee's own case on functional dissimilarity in the Assessment Years 2005-06 and 2007-08 and learned Authorised Representative also relied on Lime Labs (India) Pvt. Ltd. Vs. ITO 101 Taxman.com 201 (Delhi Trib.). We found the co-ordinate Bench of the Tribunal in the case of LG Software India Pvt. Ltd. Vs. DCIT in IT(TP)A No.3122/Bang/2018 dt.28.05.2019 for the Assessment Year 2014-15 has excluded the comparable as observed at paras 8 & 8.1 at page 4 as under :

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

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

The comparable Thirdware Solutions Ltd. has to be excluded as it is predominant in activity and segmental details are not available. Accordingly we direct the TPO/A.O to exclude this comparable from the list of comparables for determining the ALP.”

17. We further find the same view has been taken by the Co-ordinate Bench of the Tribunal, Pune in the case of M/s. John Deere India Pvt. Ltd. Cybercity Vs. ACIT supra.) wherein the Co-ordinate Bench of the Tribunal has exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“10. We have heard the rival submissions and gone through the relevant material on record. The Annual report of this company is available at page 415 onwards of the paper book. Profit and loss account of this company shows `Sales" of Rs.67,56,06,505/-. Break-up of such sale has been given in Schedule 12, which records `Export from SEZ units" – Rs.47,58,40,447/-; `Export from STPI units" – Rs.11,20,90,633; `Revenue from subscription" – Rs.1,53,13,736/-; `Sale of licence" – Rs.1,51,38,618/-; and `Software Services" – Rs.5,72,23,072/-. This company has segments only on geographical basis and not on functional level. As such, there is no bifurcation of operating profit from Software Services and others including Sale of licence and Revenue from subscription etc. Even the first two major items of `Exports from SEZ units" and `Export from STPI units" do not show as to whether these were exports of Software products or Software Services. In the absence of the availability of any concrete information in respect of Software Services, we fail to comprehend as to how this company, also having software products in its portfolio, can be construed as comparable. The same is accordingly directed to be excluded.”

18. We also observed in the case of *M/s. ION Trading India Private Limited Vs. ITO (supra.)* wherein the Co-ordinate Bench of the Tribunal, Delhi has exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“56. We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the functions of Thirdware are in contrast with the assessee which only provides software development in the finance domain as per the instruction of its AE. Also, Thirdware has incurred expenses towards import of software services, evidencing outsourcing of software services unlike the assessee. Since it is also engaged in outsourcing its activities as it has incurred expenses towards imports of software services, evidencing outsourcing of software services unlike the appellant company. Hence, it is functionally not comparable and cannot be treated as a comparable to assessee. We order accordingly.”

Respectfully, following the plethora of decisions of various Tribunals as referred hereinabove, Thirdware Solutions Limited cannot be treated as comparable company and the AO/TPO is directed to exclude Thirdware Solutions Limited from final list of comparable companies with regard to its software development service segment.”

30. Similarly also, in the case of *M/s. FIS Solutions (India) Private Limited Vs. DCIT, ITA No.1695/PUN/2018* for the assessment year 2014- 15 which is the same assessment year as of the assessee in this case. The Pune Bench of the Tribunal has held that Thirdware Solutions Limited has to be excluded from the final list of comparables with respect to the assessee company. The Tribunal had decided this issue after considering its own decision in *Symantec Software India Private Limited Vs. DCIT (supra.)*. The relevant Para is extracted herein below:

“11. We observe again that our aforesaid finding pertains to the assessment year 2014-15 which is relevant assessment year under consideration before us at this present moment. It is therefore, natural that all parameters regarding this company would be same and respectfully, following our findings in *Symantec Software India Private Limited. Vs. DCIT (supra.)*, we direct the TPO/AO to exclude this company i.e. Thirdware Solutions Limited from the final list of comparables.”

The Ld. DR submitted that there is no change in facts and circumstances in respect to the assessee and also in respect to the comparable company i.e. Thirdware Solutions Limited in the present year also.

31. Considering the identical set of facts and circumstances, we respectfully follow our findings in the above mentioned cases and direct the TPO/AO to exclude this company i.e. Thirdware Solutions Limited from the final list of comparable in respect of the assessee. Thus, Ground No.6 raised in appeal by the assessee is allowed.”

7.3.5 We have already discussed, reproduced the turnover of the Thirdware Solutions Ltd, it has been shown that more than 99% of earnings are from export of Software services. Though repetition, the figures of Thirdware Solutions Limited are reproduced here as under:

Particulars	F.Y. 2013-14 (in Lakhs)	F.Y. 2012-13 (in Lakhs)
Export Software Services	20194.37	13532.8
Software Services from Local Unit	414.07	465.97
Revenue from Subscription and Training	59.35	112.89
Sale of License	7.98	114.18
Total Revenue as per P & L Account	20675.74	14225.84

The income from sale of licenses is minimal during the year. It has also been explained that when 99% of revenue is from one segment then separate segmental analysis is not required. We have reproduced the functions of the assessee, it can be seen that assessee is also developing software products for AE. Therefore, the case law relied by the assessee is of no help and it is distinguishable on facts.

7.3.6 Therefore, we are of the opinion that Thirdware Solutions Ltd., is functionally comparable.

8. At the outset, we hold that i) Lucid Software Limited is to be included in the list of comparables, ii) Cigniti Technologies Limited is to be excluded from the list of comparables and iii) Thirdware Solutions Limited is to be included in the list of comparables, thus, the Ground No.7, 8 and 9 raised by the assessee are allowed.

9. In the result, Ground No's.7, 8 and 9 raised by the assessee are allowed.

10. The Ground No.12 raised by the assessee regarding imposition of penalty under section 271(1)(c) of the Act, in our opinion it is consequential in nature, requires no adjudication, therefore, the ground no.12 is dismissed.

11. In the result, Ground No.12 of the assessee is dismissed.

12. The Additional Ground No.13 raised by the assessee is regarding deduction in respect of Education Cess. The Id.Authorised Representative of the assessee filed letter dated 11.04.2022 seeking permission of the Tribunal to withdraw the ground raised as Additional Ground No.13. The relevant portion of such letter is reproduced below:

“Considering the retrospective amendment to section 40 of the Income-Tax Act by Finance Act, 2022, clarifying ‘tax’ to also include ‘cess’ and deny its claim with effect from 1 April 2005, the Appellant wishes to withdraw the said claim made by it vide additional ground no 13.”

13. In view of the above, the additional ground no.13 raised by the assessee is dismissed as withdrawn.

14. In the result, Additional Ground No.13 raised by the assessee is dismissed.

15. To sum up, appeal of the Assessee is Partly Allowed.

Order pronounced on 19th April, 2022.

Sd/-
(R S SYAL)
VICE PRESIDENT

Sd/-
(SS VISWANETHRA RAVI)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 19th April, 2022/ SGR*

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The ACIT, Pune.
4. The Pr. CIT concerned, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “सी” बेंच, पुणे / DR, ITAT, “C” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.