

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-2', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member**

**Sh. Yogesh Kumar US, Judicial Member**

**ITA No. 2241/Del/2015 : Asstt. Year : 2010-11**

Serco India Pvt. Ltd., Plot No. 94-95, Udyog Vihar, Phase- IV, Gurgaon-122016 (APPELLANT)	Vs	DCIT, Circle-4(1), Gurgaon (RESPONDENT)
<b>PAN No. AAJCS6704P</b>		

**Assessee by : Sh. Suraj Bhan Nain, Adv.**

**Revenue by : Ms. Radha Katyal Narang, Sr. DR**

**Date of Hearing: 17.02.2022**

**Date of Pronouncement: 05.05.2022**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order passed by the AO dated 30.01.2015 u/s 143(3) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

*"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law.*

*2. That on facts and circumstances of the case and in law, the reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO did not record any reasons in the assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. Transfer Pricing Officer ("TPO") for computation of the arm's length price, as is required under section 92CA(1) of the Act.*

*3. That on the facts and circumstances of the case and in law, the Ld. AO erred in determining the arm's length price ("ALP") of the Appellant's international*

*transactions at Rs. 13,30,60,251 as against Rs. 11,64,16,935 determined by the Appellant and recommending an addition of Rs. 1,66,43,316 on that account to the Appellant's income by:-*

*3.1. modifying the comparability analysis conducted in the transfer pricing documentation of the Appellant on inappropriate and inadequate grounds;*

*3.2. rejecting the applicability of functional filter applied in the search process by the Appellant;*

*3.3. rejecting the comparable companies selected by the Appellant in the transfer pricing documentation without providing cogent and sufficient reasoning;*

*3.4. selecting companies which were not comparable to the Appellant on various grounds;*

*3.5. erred in computing the margins of comparable companies selected;*

*3.6. confirming the selection of current year (i.e. financial year 2009-10) data for comparability.*

*3.7. erred in not appreciating the fact that there is no motive on the part of the Appellant to shift the profits to any other jurisdiction since it claims tax holiday benefits as per the Software Technology Park of India.*

*4. That on the facts and circumstances of the case and in law the Ld. AO/ Ld. TPO/ Ld. DRP erred in not examining the validity of initiation of penalty proceedings u/s 271 (1) (c) of the Act.*

*5. That on the facts and circumstances of the case and in law, the Ld. AO erred in charging and computing interest under section 234 A, 234B & 234C of the Act."*

3. The appeal is against addition of Rs. 1,66,43,316/- on account of upward adjustment in arm's length price of the appellant's international transaction related to providing IT services to its AEs.

4. The assessee, Serco India Private Limited, is a subsidiary of Serco Group PLC, UK, incorporated in India on 27-02-2006. The company was established as a captive service center with

an objective to provide IT services to Serco Group. Serco India has entered into a Master Service Agreement (“MSA”) with Serco UK for providing IT services. MSA contains the broad framework (governance structure, operating model and commercial regime) for the provision of IT & IT enabled services. Serco India and Serco UK have entered into SOWs (“Statement of Work”), pursuant to the MSA, which contain the specific description of the IT services rendered by Serco India. The IT services rendered by Serco India to Serco UK and its clients are used for diverse applications. The IT services include the delivery of on-going and project specific work. Serco India is compensated on a cost-plus mark-up of 15 percent for the services rendered to Serco UK. The assessee company has entered into international transactions with its associated enterprises during the year and furnished Transfer Pricing Study for ALP. The details of the international transactions and the transfer pricing analysis in TP Study are summarized as under:

Type of international transaction	Transfer Pricing Method	Serco India			Comparables
		Profit Level Indicator [PLI]	Total value of transactions (Rs.)	Margin	Findings
					Arithmetic Mean
Provision of IT & IT enabled services	Transactional Net Margin Method (TNMM)	Operating Profit/Operating Cost [OP/OC]	11,00,98,019	14%	9.86%
Provision of management consultancy support services			63,18,96		
Availing of professional services			99,56,250		
Reimbursement of expenses to PE			60,77,086		

5. In the TP Study, the assessee has benchmarked its international transactions relating to IT & IT enabled services using TNMM as the most appropriate method with OP/OC as PLI. In the TP Report, a final set of 7 comparables had been taken with average PLI of 16.08% as under:

S. No	Name of the Company	FY2007-08	FY2008- 09	FY 2009- 10	Weighted Average
1.	Microland Limited	0.11%	6.14%	NA	3.21%
2.	Helios & Matheson Information Technology Ltd	33.40%	17.13%	NA	23.33%
3.	R S Software (India) Limited	6.08%	10.10%	NA	8.45%
4.	Informed Technologies India Ltd	3.63%	22.61%	NA	10.89%
5.	R Systems International Limited	9.53%	14.08%	7.07%	4.43%
6.	ICRA Management Consulting Services Limited	3.21%	-3.54%	0.86%	0.09%
7.	Cyber Media Research Limited	14.71%	10.79%	NA	12.65%
Average [Arithmetic Mean]					9.86%
Serco India Results					14.00%

6. Based on the above analysis, it was considered that international transactions between the assessee and its AEs were at arm's length.

7. During the proceedings before Id. TPO, as required by the Ld. TPO, the assessee has given updated margins for the current financial year 2009-10 resulting in average arithmetic mean at 12.09%. The Ld. TPO has not accepted these comparables, mainly on the reasons that the assessee has used multiple years data when current year data only should have been used, and the assessee has used inappropriate filters and some important filters have not been used. The Ld. TPO has used the following set of filters to select comparables:

- i. Use of current year data
- ii. Reject companies having different accounting year
- iii. Reject companies where turnover is less than Rs. 5 Crores
- iv. Select companies where the ratio of service income to total income is not at least 75%
- v. Select companies where income from exports is at least 75% of total income
- vi. Reject companies where related party transactions exceed 25% of sales
- vii. Reject companies that have employee cost less than 25% of total cost;
- viii. and
- ix. Reject companies that are affected by some peculiar economic circumstances.
- x. Exclude companies those are functionally different from the assessee.

8. The Ld. TPO has selected the following comparables for benchmarking the international transactions relating to IT & IT enabled services:

Sl. No.	Comparables	Adjusted GP/OC (%)
1	Akshay Software Technologies Limited	-1.05
2	Allgo Embedded	2.40
3	C T I L Ltd.	18.14
4	Cat Technologies Limited	13.45
5	E-Infochips Bangalore Ltd.	70.14
6	Evoke Tech	18.22
7	E-Zest Solutions	18.12
8	Infinite Data Systems Pvt. Ltd.[Merged]	87.45
9	Infosys Limited	48.25
10	Kuliza Tech	28.45

11	Larsen & Toubro Infotech Ltd.	20.05
12	Mindtree Limited	16.84
13	Persistent Systems & Solutions Ltd. [Merged]	15.35
14	Persistent Systems Limited	31.25
15	R S Software (India) Limited	9.12
16	Sankhya Infotech	10.48
17	Sasken Communication Technologies Ltd.	23.45
18	Tata Elxsi Limited	16.78
19	Thinksoft Global Services Ltd.	16.44
20	Thirdware Solutions	40.15
21	Wipro Technology Services Ltd.	74.39
<b>Average</b>		<b>27.52</b>

9. Accordingly, the arm's length price of the international transaction relating to IT & IT enabled services was computed by the Ld. TPO at Rs. 13,41,54,358/- as against Rs. 11,64,16,935/- shown by the assessee. Therefore, the Ld. TPO proposed upward adjustment of Rs. 1,77,37,423/- (Rs. 13,41,54,358 - Rs. 11,64,16,935) vide his order dated 30.01.2014.

10. Having regard to the order of TPO, the Assessing Officer passed draft assessment order dated 19-03-2014 proposing addition of Rs. 1,77,37,423/- on account of transfer pricing.

11. The assessee filed objections u/s 144C of the Act before Ld. Dispute Resolution Panel (DRP), Delhi in respect of the addition proposed to be made by Ld. TPO. The Ld. DRP has passed order u/s 144C(5) of the Act on 18.12.2014 directing to exclude one company 'Infosys Limited' from the list of comparables. The Assessing Officer calculated, as per the directions of Ld. DRP, the average margin of comparable as under:

<b>Sl. No.</b>	<b>Comparables</b>	<b>Adjusted GP/OC(%)</b>
1.	Akshay Software Technologies Limited	-1.05
2.	Allgo Embedded	2.40
3.	C T I L Ltd.	18.14
4.	Cat Technologies Limited	13.45
5.	E-Infochips Bangalore Ltd.	70.14
6.	Evoke Tech	18.22
7.	E-Zest Solutions	18.12
8.	Infinite Data Systems Pvt. Ltd.[Merged]	87.45
9.	Kuliza Tech	28.45
10.	Larsen & Toubro Infotech Ltd.	20.05
11.	Mindtree Limited	16.84
12.	Persistent Systems & Solutions Ltd.[Merged]	15.35
13.	Persistent Systems Limited	31.25
14.	R S Software (India) Limited	9.12
15.	Sankhya Infotech	10.48
16.	Sasken Communication Technologies Ltd.	23.45
17.	Tata Elxsi Limited	16.78
18.	Thinksoft Global Services Ltd.	16.44
19.	Thirdware Solutions	40.15
20.	Wipro Technology Services Ltd.	74.39
<b>Average</b>		<b>26.48</b>

12. Accordingly, the Assessing Officer calculated TP adjustment at Rs. 1,66,43,316/- as against adjustment of Rs. 1,77,37,423/- proposed by the Ld. TPO. The Assessing Officer passed the assessment order u/s 143(3)/144C dated 30.01.2015 determining total income Rs. 3,31,38,690/- by making an addition on account of TP adjustment of Rs. 1,66,43,316/-.

13. It is submitted that the assessee has taken many grounds of appeal against addition of Rs. 1,66,43,316/-. However, at present, it is pressing for ground regarding inclusion of six comparable companies as follows:

- (i) Wipro Technology Services Limited
- (ii) Persistent Systems Limited
- (iii) Sasken Communication Technologies Limited
- (iv) E-Infochips Bangalore Limited
- (v) Infinite Data Systems Private Limited [Merged]
- (vi) Thirdware Solutions Limited

14. If these six companies are excluded from the list of comparables, there will be no requirement of adjustment on account of arm's length price of international transaction related to provision of IT & IT enabled services.

15. Out of the six comparables which are in dispute before us, the three comparables namely,

- a. Persistent Systems Ltd.
- b. Sasken Communication Technologies Ltd.
- c. Thirdware Solutions Ltd.

have been examined in the case of the assessee for the A.Y. 2009-10 in ITA No. 1460/Del/2014 vide order dated 10.01.2022 and were directed to be deleted from the list of comparables. Hence, the same ratio applies in the instant year.

**Wipro Technology Services Limited:**

16. The Company, Wipro Technology Services Limited is not comparable with the assessee company. The chart of comparison of analysis between Wipro Technology Services Limited and the assessee company as under:

<b>Sr. No.</b>	<b>Particulars</b>	<b>Wipro Technology Services Limited</b>	<b>Serco India Private Limited</b>
1	Revenues (Turnover)	Rs.399.39 Crores <b>(PB-210)</b>	<b>Rs.13.11</b> Crores more than 30 times)
2	Fixed Assets	Rs. 23.46 Crores <b>(FB-190)</b>	<b>Rs.0.99</b> Crores more than 23 times)
3	Brand	WIPRO	<b>Nil</b>
4	Nature of Services	The company is functionally different from the Appellant. Activities comprise of software related support services primarily information technology software solutions/ maintenance and technology infrastructure support services. <b>(PB-196)</b>	Captive IT & ITES.

17. From the above, it can be seen that Wipro Technology Services Limited is functionally dissimilar, it is a larger company having sales/turnover of Rs. 399.39 Crores has employed substantial fixed assets, and immense brand value of WIPRO. Whereas, the assessee is a smaller company, having turnover from services of Rs. 13.11 Crores only and has no brand value. Therefore, Wipro Technology Services Limited is no match to the assessee and hence, it is not a comparable company for benchmarking international transactions of the assessee relating to provision of IT & IT enabled services. In several decisions, it has been held that a company having high brand value and huge turnover as compared to assessee-company could not be selected as comparable.

18. Keeping in view the judgment of Hon'ble jurisdictional High Court in the case of PCIT Vs. BC Management Services Pvt. Ltd. 89 Taxmann 68 and also failure to adhere to the filter of 25% of RPT by the TPO, we hold that Wipro Technologies Services Ltd. cannot be considered as a right comparable.

**E-Infochips Bangalore Ltd:**

19. This company is engaged in divergent activities showing income in page 59 of the Annual Report as under:

SCHEDULE: 7; INCOME FROM SOFTWARE SERVICES

Income from Software Services	371,388,107
Consultancy Charges	<u>59,078,374</u>
TOTAL	<u>430,466,481</u>

20. From the above, we find that e-Infochips Bangalore Limited is engaged in rendering software services as well as in consultancy. Segmental profitability details are not available. Therefore, the profitability from the activity of software services is not ascertainable. The assessee company is not rendering consultancy/advisory services. Hence, this company is functionally different from the assessee company. The business model of the company is different from the assessee's business of captive service provider as this company has engaged sub-contractors as is evident from Schedule-8 showing Technical Sub Contractors expenses of Rs. 18,03,588/-.

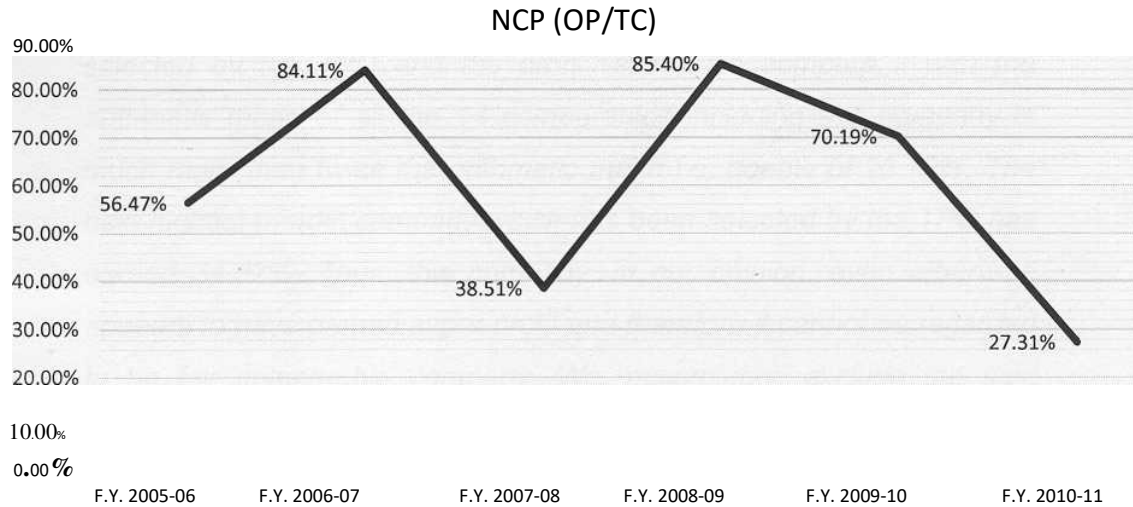
21. Further, item No. 9 of Notes to Accounts on page 62 of Annual Report reflects that this company is engaged in development and maintenance of computer software as well as production and sales of software. This item no. 9 reads as under:

"9. The Company is engaged in the development and maintenance of computer software. The production and sales of software cannot be expressed in any generic unit. Hence it is not possible to give the quantitative details of sales and certain other information as required under paragraph 3, 4C and 4D of part-II of Schedule VI to the Companies Act, 1956."

22. The company has incurred project development cost of Rs. 86,97,641/- which shows that this company is engaged in development of software product and sale thereof.

23. Further, 'E-Infochips Bangalore Limited' has been showing fluctuating results from year to year and has shown abnormal high margin in FY 2009-10. The results shown by this company in different years from F.Y. 2005-06 to F.Y. 2010-11 are summarized as under:

	<b>F.Y. 2005-06</b>	<b>F.Y. 2006-07</b>	<b>F.Y. 2007-08</b>	<b>F.Y. 2008-09</b>	<b>F.Y. 2009-10</b>	<b>F.Y. 2010-11</b>
Income from Software Services	8,34,76,781	20,94,62,057	30,18,55,711	50,36,58,971	43,04,66,481	45,11,81,724
Other Income	-	36,059	1,515	1,05,699	23,323	-
<b>Total Income</b>	<b>8,34,76,781</b>	<b>20,94,98,116</b>	<b>30,18,57,226</b>	<b>50,37,64,670</b>	<b>43,04,89,804</b>	<b>45,11,81,724</b>
Software Development Expenses	3,90,14,858	9,06,70,072	17,70,78,385	21,21,84,050	20,66,74,788	29,71,36,212
Administrative & Other Expenses	1,23,73,181	1,79,65,202	3,27,19,356	5,15,43,979	3,84,04,671	4,75,29,955
Depreciation	19,63,362	51,51,923	81,36,811	79,85,181	78,70,005	97,32,818
<b>Total Cost</b>	<b>5,33,51,401</b>	<b>11,37,87,197</b>	<b>21,79,34,552</b>	<b>27,17,13,210</b>	<b>25,29,49,464</b>	<b>35,43,98,985</b>
<b>Profit</b>	<b>3,01,25,380</b>	<b>9,57,10,919</b>	<b>8,39,22,674</b>	<b>23,20,51,460</b>	<b>17,75,40,340</b>	<b>9,67,82,739</b>
<b>NCP (OP/TC)</b>	<b>56.47%</b>	<b>84.11%</b>	<b>38.51%</b>	<b>85.40%</b>	<b>70.19%</b>	<b>27.31%</b>



24. From the above, it is evidently clear that this company has volatile results in different years and has abnormal high profit during the year and therefore, this company cannot be considered as a representative of similar industry for comparable. Hence, we hold that this company cannot be taken as a right comparable.

**Infinite Data Systems Pvt. Ltd:**

25. The Company 'Infinite Data Systems Pvt. Ltd.' is not comparable with the assessee due to functional difference, and also failing the related party transaction (RPT) filter and having abnormal/fluctuating results in different years.

26. The Company M/s Infinite Data Systems Private Limited was incorporated on 26<sup>th</sup> September, 2006. The company is wholly owned subsidiary of M/s Infinite Computer Solutions (India) Limited.

**Related Party Transaction (RPT):**

27. The company 'Infinite Data Systems Private Limited' is a wholly owned subsidiary of Infinite Computer Solutions (India) Limited. The holding company entered into an agreement (Build Operate and Transfer model) with Fujitsu Services Limited to set up Global Delivery Center(s) in India to provide offshore delivery capabilities to Fujitsu and Fujitsu's associate companies. This company 'Infinite Data Systems Private Limited' in performance/execution of such contract (as mentioned in Directors' Report 2009 - Contract with Fujitsu Services), has commenced its business w.e.f. 1<sup>st</sup> January 2009. The company has earned revenue by rendering services to its sole customer viz. Fujitsu Services Limited. All the transactions of the company M/s Infinite Data Systems Private Limited was in furtherance of execution of the said contract/agreement entered into by its holding company with M/s Fujitsu Services Limited.

28. This agreement between Holding Company and Fujitsu Services Limited would make the transaction of rendering services by the company 'Infinite Data Systems Private Limited' to Fujitsu Services Limited as deemed International Transaction between two associated enterprises u/s 92B(2) of the Income-tax Act, 1961.

29. In terms of section 92B(2) of the Income-tax Act, 1961, entering of a transaction by an enterprise (Infinite Data Systems Pvt. Ltd.) with a non-associated enterprise (Fujitsu Services Limited) as part of an agreement between the associate enterprise (Infinite Computer Solutions (India) Limited) and the non-associate enterprise (Fujitsu Services Limited) would be treated as deemed International Transaction

entered into between two associated enterprises. In this case, the company Infinite Data Systems Private Limited has only rendered services to Fujitsu Services Limited as per the prior agreement/contract entered between its holding company M/s Infinite Computer Solutions (India) Limited and Fujitsu Services Limited and therefore the entire revenue of this comparable is on the account of related party transactions. Hence, this company fails the filter criteria of 25% of the Related Party Transaction (RPT) as applied by the TPO and hence cannot be considered as a comparable.

30. Further, as per Rule 10A(ab) of Income Tax Rules, 1962 'Uncontrolled Transaction' means a transaction between enterprises other than associate enterprises, whether resident or non-resident. Thus, the transactions of M/s Infinite Data Systems Pvt. Ltd. cannot be treated as 'Comparable Uncontrolled Transaction' in view of section 92B(2) of the Act being transactions deemed to be entered between two associated enterprises. Hence, the company 'Infinite Data Systems Private Limited' cannot be considered as a comparable for computation of Arm's Length Price.

31. In the result, the appeal of the assessee is allowed.  
Order Pronounced in the Open Court on 05/05/2022.

Sd/-

**(Yogesh Kumar US)**  
**Judicial Member**

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 05/05/2022**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**