

IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE

SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHUR, JM

ITA No. 194/PUN/2021 : A.Y. 2016-17

Optiva India Technologies Pvt. Ltd.
Building A flat 1205
Kumar Surbhi,
Opp. Saibaba Mandir, Parvati,
PUNE – 411 009
PAN; AACCR 7002A

Appellant

Vs.

Asstt. C.I.T. Cir. 3, Pune

Respondent

Appellant by : Shri Darpan Kirpalani
Respondent by : Shri Shishir Srivastava

Date of Hearing : 14-07-2022
Date of Pronouncement : 21-07-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JM

This Appeal preferred by the Assessee emanates from the order of the learned D.R.P.-3, Mumbai dated 29-10-2020 for the A.Y. 2016-17 as per the following grounds of appeal.

1. *On the facts and circumstances of the case, the learned AO / TPO erred in law and in fact in making a transfer pricing adjustment to the value of international transactions amounting to INR 17,93,46,830 by rejecting the analysis conducted by the Appellant determining the arm's length price of the international transactions.*
Functionality
2. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating E-Infochips ltd as functionally similar to the Appellant.*
3. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Dun & Bradstreet Technologies & Data Services Pvt.as functionally similar to the Appellant.*
4. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating for R S Software (India) Limited as functionally similar to the Appellant.*
5. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Cybage Software Pvt. Ltd.as functionally similar to the Appellant.*
6. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Thirdware Solution Ltd.as functionally similar to the Appellant.*
7. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Infobeans Technologies Ltd.as functionally similar to the Appellant.*
8. *On the fact and circumstances of the case, the learned AO / TPO have erred*

in law and in fact by treating Aspire Systems (India) Pvt. as functionally similar to the Appellant.

9. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Persistent Systems Ltd.as functionally similar to the Appellant.*
10. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Nihilent Ltd.as functionally similar to the Appellant.*
11. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Harbinger Systems Pvt as functionally similar to the Appellant.*
12. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Bhilwara Info technology Ltd- Seg as functionally similar to the Appellant.*
13. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Puresoftware Pvt. Ltd. as functionally similar to the Appellant.*
14. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Explant Technologies Pvt. as functionally similar to the Appellant.*
15. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Ingenuity Gaming Pvt. Ltd. Ltd. as functionally similar to the Appellant.*
16. *On the fact and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Great Software Laboratory Pvt. Ltd. as functionally similar to the Appellant.*
17. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating Cigniti Technologies Ltd. as functionally different from the Appellant.*
18. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by treating SQS India BFSI Ltd. as functionally different from the Appellant.*

Filter Application

19. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by application of certain search filters for the sole purpose of rejection of comparable companies selected by the Appellant or inclusion of certain companies as comparable companies.*
20. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by incorrectly applying the data sufficiency filter.*
21. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by application of 75% service income filter.*
22. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by application of turnover filter.*
23. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by application of 75% export filter to the set of comparable companies and rejecting Appellant's 25% export filter.*
24. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by application of 75% forex spending filter.*
25. *On the facts and circumstances of the case, the learned AO / TPO have erred*

in law and in fact by incorrectly applying peculiar and extra ordinary economic circumstances filter.

26. *On the facts and circumstances of the case, the learned AD / TPO have erred in law and in fact by application of 50% gross intangible to sales filter.*
27. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by incorrect application of different accounting year filter.*
28. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact inappropriate application of employee cost filter.*

Comparable Specific

29. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by rejecting the KALS Information Systems Ltd only on the basis of turnover filter, despite it being functionally comparable to the Appellant.*
30. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by rejecting the CG-VAK Software & Exports Limited only on the basis of turnover filter, despite it being functionally comparable to the Appellant.*
31. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by rejecting T V S Infotech Ltd on the ground of export filter.*
32. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by selection of Bhilwara Infotechnology Ltd. since the same fails the export filter.*
33. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by rejecting the Akshay Software Technologies Ltd. only on the basis of forex spending filter, despite it being functionally comparable to the Appellant.*
34. *The learned AO / TPO despite applying the extraordinary event filter, on the fact and circumstances of the case, have erred in law and in fact in selection of E-Infochips ltd as a comparable company by disregarding the extraordinary event.*
35. *The learned AO / TPO despite applying the extraordinary event filter, on the fact and circumstances of the case, have erred in law and in fact in selection of Aspire Systems (India) Pvt as a comparable company by disregarding the extraordinary event.*
36. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by rejecting R Systems International Ltd. under different accounting year filter.*
37. *On the facts and drcumstances of the case, the learned AO / TPO have erred in law and in fact in computation of margin for Sasken Communication Technologies Ltd.*
38. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact in computation of margin for R S Software (India) Limited.*

Working Capital Adjustment

39. *On the facts and circumstance of the case, the learned AO / TPO have erred in law and in fact in applying and performing the working capital adjustment.*

Risk Adjustment

40. *Based on the facts and circumstance of the case, the learned AO / TPO have erred in law and in fact by not granting the risk adjustment requested by the Appellant.*

Lack of Information

41. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by not providing the details pertaining to the yearly margin computations for the companies selected as comparable to arrive at three year weighted average margins.*
42. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by not providing the unadjusted and working capital adjusted margin computations for the companies selected as comparable.*

Opportunity of being Heard

43. *On the facts and circumstances of the case, the learned AO / TPO have erred in law and in fact by not providing the computations in relation various search filters applied for companies selected as comparable and thereby depriving the Appellant of any opportunity of being heard in case of any factual error as to such computations, if any.*

levy of penalty

44. *The learned AO has erred in law and in fact by issuing notice for levy of penalty under section 270A of the Act for under reporting of income.*

Prayer

The Appellant craves leave to add, alter, supplement, amend, vary, withdraw, or otherwise modify the ground mentioned herein above at or before the time of hearing.

All the aforesaid grounds of appeal are independent, in the alternative and without prejudice to one another.

2. The brief facts of the case are as under:

“Optiva India Technologies Pvt. Ltd. (formerly known as Redknee (India) Technologies Pvt. Ltd.) was incorporated as a subsidiary of Optiva Inc. in March 2004. The company is working to support the global operations of Optiva Group in the field of software development and support services. Optiva India acts as a captive service provide, which renders services to AE as well as third parties as per the agreement with the AE and the remuneration is fixed accordingly.”

3. At the outset, the Id. A.R submitted that the disputes are with regard to comparables. The T.P.O at para 4 page 2 of his order has given the details of disputed international transactions and these transactions pertain to AEs and deemed AEs. The same is reproduced as follows:

- “4. The international transactions undertaken by the assessee during F.Y. 2015-16 are as follows:

Sr. No.	Nature of transaction	Amount (Rs)	Method used
	Provision of software research and development and technical support services	1315492169	TNMM
	Provision of development support and maintenance support and	471681985	

	technical support services to other parties (Deemed AEs)		
	Provision of Laptops and computers on loan basis	NIL	
	Write off of earlier year payables	2331357	
	Total	178,95,05,511	

4. The Id. A.R thereafter brought to our notice various agreements of international transactions which are annexed at paper book at page 267 and the definition of services that are given at page 269. The Id. A.R also submitted the grounds in the appeal memo pertain to the disputes relating to these transactions. Therefore, we would be taking up the comparables and once that is adjudicated it would cover all the grounds of appeal in the appeal memo filed by the assessee.

PERSISTENT SYSTEMS

5.1 The T.P.O has discussed this comparable at page 59 para 14.7 of his order. The assessee made following submissions.

“The main contentions of the assessee regarding this comparable are as follows:

Functionally different (Software Products Licences and Software Development Services mix)

High Margin Company

Adequate judicial guidance against inclusion

Fails on turn over filter.”

5.2 The T.P.O did not accede to these submissions made by the assessee and he held that this company was engaged in software services. Further, the T.P.O observed that even the Id. D.R.P has included this company in assessee’s case for A.Y. 2014-15. Before the D.R.P the assessee made detailed submissions which are at page 69 of the D.R.P’s order. The D.R.P has given their findings at page 93 para (f) upholding the order of the T.P.O.

5.3 The Id. A.R at the time of hearing on this issue placed heavy reliance on the decision of the Co-ordinate Bench Pune in assessee's own case for A.Y. 2014-15 in ITA No. 15/PUN/2019 dated 23-09-2021 and submitted that he is referring to this judgment though pertaining to the A.Y. 2014-15 but it contains absolutely identical facts as that with relevant assessment year 2016-17. Referring to paper book page 1128 Vol. II, the Id. A.R demonstrated that there has been an acquisition by this company which is as follows:

"Acquisitions:

In October 2015, your Company, through Accelerite, acquired assets of Aeopana IoT platform from Intel and in February 2016, the CloudPlatform assets from Citrix. As part of the Aeopana acquisition, your Company acquired development centers in Belfast, UK and in Colombo, Sri Lanka."

The same facts were considered by the Tribunal in the above referred judgment for A.Y. 2014-15. The Id. A.R referred to para 5 of the said order, where the Tribunal has analysed the facts involving international transactions in respect of the assessee which are absolutely identical and similar for the present assessment year also. The Id. D.R fairly conceded to these submissions.

5.4 The Tribunal in the A.Y. 2014-15 (supra) observed as follows:

"5. Before embarking upon the comparability or otherwise of the companies challenged in appeal, it would be befitting to first understand the nature of activity carried on by the assessee. The TPO has recorded that the assessee is engaged in the business of rendering Software support services. We have gone through the Agreement dated 01-04-2013 between the assessee and its Associated Enterprise (AE) namely, Redknee, Inc, and (RI) Canada, whose copy has been provided at page 394 onwards of the paper book. The Agreement provides that the RI (i.e. the assessee's AE) is a global provider of OSS/BSS software products solutions and services to the telecommunication industry and is the owner of all applicable rights, titles and interest in the Technology (entire Technology platform owned by RI, as existing on the Effective Day, comprising of the Products and RI Intellectual Property). On the other hand, the assessee is a Subsidiary and is in the business of performing, among other things, contract research and development (R&D) services. The term 'Services' has been defined in the Agreement under clause 1.10 to mean the R&D services performed by Subsidiary for and on behalf of RI and includes, but is not limited to, updates, process improvements, enhancements, modifications, and customizations. Clause 3 of the Agreement states that the AE granted licenses to the assessee to use the Technology for the sole purpose of performing the Service. There is a bar on the licensee to make available, transfer or otherwise disclose the Technology to third parties. Clause 4 of the Agreement deals with Ownership of the work done by the assessee in the course of providing the Services. It states that all the related information, including any derivative works, Improvements or Modifications created by Subsidiary in the course of providing the Services, is proprietary to RI (i.e. the AE) and that all rights thereto, including all Intellectual Property Rights will vest in RI. On-going through the above clauses of the Agreement, it becomes clear that the nature of the international transaction is that of provision of contract research and development services to its AE, which are utilized by the latter in its business of software products and solutions. With the above backdrop of the

nature of activity carried on by the assessee, we now proceed to determine the comparability or otherwise of the companies challenged before us ad seriatim.

5.5 Regarding Persistent Systems Ltd., the Bench held as follows:

“(1) **PERSISTENT SYSTEMS LTD. :**

6. *The TPO included this company in the list of comparables. The assessee’s objections about the functional dissimilarity did not weigh with the TPO. The assessee remained unsuccessful before the DRP as well.*

7. *Having heard both the sides and gone through the relevant material on record, we observe from the Annual report of this company, a copy of which has been placed at page 77 of the paper book, that it acquired a company called CloudSquads, Inc through stock acquisition in February, 2014. Without examining the functional similarity or dissimilarity of this company, we find that the extraordinary financial event of acquisition of another company taking place during the year under consideration has rendered it noncomparable.*

8. *The Hon’ble jurisdictional High Court in Pr. CIT Vs. Aptara Technology Pvt. Ltd. (2019) 410 ITR 100 (Bom.) has upheld the decision of the Tribunal in excluding an otherwise functionally comparable company due to extraordinary events like merger etc. The Mumbai Bench of the Tribunal in Petro Araldite P. Ltd. Vs. DCIT (2013) 154 TTJ 176 (Mum) has also held that a company cannot be considered as comparable because of exceptional financial results due to merger/demerger etc. The Hon’ble Delhi High Court in Ameriprise India Pvt Ltd [TS-875-HC-2016(DEL)-TP] has dismissed the Revenue’s appeal against the order passed by the Tribunal in which certain companies were excluded on account of extraordinary events. In view of the foregoing discussion, it is palpable that a company with extraordinary financial events of acquisition and merger/demerger occurring during the year, cannot be considered as comparable. Since Persistent Systems Ltd. underwent such extraordinary financial event during the year due to acquisition of CloudSquad Inc., we direct to exclude it from the list of comparables.”*

5.6 Respectfully following the aforesaid judgment on the same parity of reasoning, facts and circumstances, we direct the A.O/T.P.O to exclude this company from the list of comparables.

E-Infochips Ltd.

6.1 The T.P.O has discussed this company at page 53 para 14.1 of his order. The assessee submitted before the Department as follows:

Functionally Different (filter duly applied by your goodself);

Guidance based on judicial precedents including for assessee’s own case.

Company having peculiar and extraordinary circumstances (even merger took place)”

6.2 The contention of the assessee that this company is not functionally comparable did not find favour with the T.P.O and per contra the Id. T.P.O has observed that major part of revenue of this company are from sale of services and the revenue from the sale of product is very negligible. Therefore, this company is predominantly software service company. The

D.R.P has dealt with this issue at page 85 para 8.2(a) onwards where they have upheld the findings of the T.P.O.

6.3 At the time of hearing, the Id. A.R took us through the Annual Report of this company which is annexed at paper book page 2295 and demonstrated that for this company also during the relevant assessment year, there was an extraordinary event in respect of amalgamation. The Hon'ble High Court of Gujarat vide its order dated 29-03-2016 sanctioned the scheme of amalgamation of Smart Guard Systems Pvt. Ltd. (SGSPL) and nGin Technologies Pvt. Ltd. (NTPL) with e-Infochips Ltd. (the transferee company) w.e.f. 01-04-2015 i.e. F.Y. 2015-16 relevant to A.Y. 2016-17. The Id. D.R also conceded to these facts on record.

6.4 Having heard the parties, we observe that there has been an extraordinary event by way of amalgamation in respect of this company during the year. Taking the same view as with regard to M/s. Persistent Systems Ltd., which has been excluded due to acquisition, similarly in this case of e-Infochips since there was an amalgamation, it cannot be comparable company with respect to the assessee. We therefore, direct the A.O/T.P.O to exclude this company from the final set of comparables.

Thirdware Solutions Ltd.

7. The Id. A.R submitted that they are not pressing this comparable. Hence this issue is dismissed as not pressed.

Aspire Systems :

8.1 The assessee submitted that this company is functionally different and they are into onsite project development. The assessee also submitted that this company is involved in diversified activities and therefore, should not be excluded as comparable. However, the learned T.P.O did not agree with the submissions of the assessee and he held that

this company is a service company primarily rendering software services and that the revenue from operation is revenue earned from software services. Accordingly, the T.P.O retained this company as comparable. The Id. D.R.P has dealt with this issue comparable at page 92 of their findings and had upheld the decision arrived at by the T.P.O.

8.2 At the time of hearing, the Id. A.R submitted that for this company also there have been extra ordinary events of amalgamation during the year. In this regard, he demonstrated the Annual Report at page 1543 para 31 where it is clearly mentioned that during the year a scheme of amalgamation was approved by the Hon'ble Madras High Court dated 16th December 2016 issued on 4th January 2017 w.e.f. 01-04-2015. With this scheme of amalgamation Applied Development Software (India) Pvt. Ltd. (Transferor Company-1) and PureApps Consulting Services Pvt. Ltd. (Transferor Company-2) (collectively referred as "Transferor Companies") have been amalgamated with Aspire Systems (India) Pvt. Ltd. The Id. D.R conceded to the facts on record. That with the happening with these extra ordinary events amalgamation, we direct the A.O/T.P.O to exclude this company from the final set of comparables.

R.S. Software

9.1 The assessee submitted that this company is functionally different since this is into payment service provider and R & D company. However, the T.P.O observed that as per the extract of Annual Report the main product/service condition of the company is software development. The company has derived 100% of its revenue from its software development service. Therefore, the entire revenue is from sale of software service and hence was considered as comparable to the assessee. The D.R.P while upholding the order of the T.P.O at page 96 of their order heavily relied on assessment year 2014-15 decision. In that year also, this comparable was included by the T.P.O and the D.R.P approved the said inclusion in case of

the assessee. The Id. A.R., for exclusion of this comparable also placed heavy reliance on the decision of the Tribunal in assessee's own case for A.Y. 2014-15 (supra) wherein in respect of R.S. Software Ltd., it was held as follows:

11. *This company was included by the assessee itself in the list of comparables. However, during the course of the proceedings before the authorities it was claimed that the company was not comparable. Both the authorities jettisoned the assessee's contention.*

12. *As regards the preliminary objection of the Id. DR that the assessee cannot unchoose a company during the course of proceedings which was suo motu chosen as comparable in its Transfer pricing study report, we find enough judicial precedents permitting an assessee to claim withdrawal of company from the list of comparables which was inadvertently included by it in the list of comparables. The Hon'ble jurisdictional High Court in CIT Vs. Tata Power Solar Systems Ltd. (2017) 298 CTR 197 (Bom.) has reiterated this view which was also taken by the Hon'ble Punjab & Haryana High Court in CIT Vs. Quartz Systems India (P) Ltd. (2011) 244 CTR 542 (P&H). Thus, in principle, there can be no quarrel over the proposition that an assessee can claim removal of a non-comparable company from the list of comparables drawn by it which was wrongly included.*

13. *On merits, we find from the Annual report of this company, a copy of which has been placed at page 508 onwards of the paper book, that it is engaged in providing software solutions in various facets of industrial needs as under:*

Switching and authorisation:

Solution: RS Software assists leading brands in the global payments business address the challenges of switching and authorization in a competitive 24x7 marketplace, improving availability, scalability and security. We have worked for more than 20 years to enable the speed of a transaction throughout to grow from 500 transactions as per second to more than 20,000 transactions per second today.

Clearing and settlement:

Solution: RS Software provides clearing and settlement solutions that handle large transactions in an environment marked by cross-border activity, regulatory changes and payment diversity.

Risk and fraud:

Solution: RS Software helps leading global payment brands integrate their fraud prevention and detection solutions into high-performance processing environments.

Dispute and chargeback: Solution:

RS Software has more than a decade of experience in providing proven dispute and chargeback solutions to customers all across the world. We have repeatedly delivered end-to-end solutions that include on-going testing, enhancements and support to keep our clients current with the dynamic landscape in the payments industry.

Merchant management: Solution:

RS Software provides acquirers with a comprehensive set of merchant management solutions that reduce complexity, minimise costs and deliver a competitive advantage. Today, we serve some of the best-known brands in the acquiring space with more than two decades of merchant management expertise.

Business analytics and tools:

Solution: RS Software supports the needs of its clients across four key areas (technology, governance, analytics and strategy). We offer a complete set of data analytic services that include assessment, consulting, establishing migration methodologies, implementing, testing and production support.

14. *It is further borne out from the Annual report of the company that: "RS software is a Technology service provider with rich domain ITA No.15/PUN/2019 Optiva India Technologies Private Limited 10 experience in payments and a significant pedigree in dispute management. Our competence has been built around a comprehensive understanding of the dispute lifecycle from the perspective of the network, issuer and acquirer. RS Software uses a proprietary set of tools to accelerate development and integration of the dispute management system. This comprises of the following. *A reference architecture created for dispute/chargeback processing. *A requirements and features checklist for dispute/chargeback solutions.*

**Business test cases for the comprehensive testing of a dispute/chargeback system.*

**Industry-best practices for managing disputes/chargebacks."*

15. *When we compare the nature of work carried out by R.S. Software Ltd. with the contractual R&D of software activity carried on by the assessee, we find both to be poles apart. In view of such functional dissimilarity, we order to exclude this company from the list of comparables."*

9.2 Respectfully following the same, we direct the A.O/T.P.O to exclude this company from the final list of comparables.

Nihilent Limited.

10.1 The submissions of the assessee were that this company is functionally different and they are into R & D, onsite services, integrated business consulting. Per contra, the A.O./T.P.O observed from the extract of the Annual Report that this company was primarily earning revenue from rendering software services activities and the company is a service company rendering software services. It was held to be a comparable. The D.R.P has upheld the findings of the A.O/T.P.O at page 94 onwards of their findings.

10.2 At the time of hearing, the learned A.R brought to our notice the Annual Report at page 959 of the paper book which reveals acquisition. It is mentioned therein as follows:

"The Company derived a majority of revenues from South Africa where we have long standing relations with corporate clients. As a part of our global strategy, we are expanding our operations in other geographies such as United States, United Kingdom, Australia, Ireland, India, Nigeria and Tanzania. Towards this, we acquired GNet Group LLC a business intelligence and analytics company in USA and also acquired 51 percent shareholding of Intellect Bizare Services Pvt. Ltd.

(Mumbai, India) specializing in ERP and enterprise innovations based on SAP and HANA to develop and strengthen our presence in the ERP space.

10.3 We observe that even in respect M/s. Persistent Systems Ltd., there was acquisition and we had already held that because of that extra ordinary event of acquisition, the said company has to be excluded from the final set of comparables . Similarly with the factual scenario being the same in resect of Nihilent Ltd., also where lot of acquisition has taken place during the year, we direct the A.OP/T.P.O to exclude this company from the final set of comparables. Even the Id. D.R could not bring on record any facts to suggest anything contrary which is already there on record in the Annual Report as demonstrated hereinabove.

Dun & Bradstreet Technologies & Data Services Pvt. Ltd.

11.1 The main contention of the assessee regarding this comparable was that this is functionally different and that no break of revenue from services was available regarding its various activities and non-availability of segmental data. However, the T.P.O observed that this company is into providing predictive analysis, software development and related technology services and solutions. The principal business from which this company earns its revenue is from sale of services which is 100%. Therefore, the sale of products for this year is NIL. The company is dominantly engaged in providing software development services to its clients. Hence, the objections were rejected and the company was held to be comparable.

11.2 The Id. D.R.P has upheld the decision of the A.O/T.P.O at para 8.2(b) at page 87 of their order. The Id. A.R at the time of hearing brought to our notice the Annual Report of this company at page 1986 of the Paper Book it is totally functionally different with regard to the assessee. He even took us through the related party schedule at page 2104 of the paper book. He further submitted

on functionality difference that the Co-ordinate Bench Bombay for the same assessment year 2016-17 has held that this company should be excluded from the list of comparables. The Co-ordinate Bench Bombay in ITA No. 1379/Mum/2021 for A.Y. 2016-17 dated 25-02-2022 on this issue observed and held as follows:

47. The assessee sought to exclude Dun & Bradstreet as a comparable on the ground that it is functionally dissimilar being into providing predictive analysis, software development and related technology services and solution and on the ground that this company earns abnormally high margin of 58.19% during the relevant year. This objection was raised by the assessee both before the Ld. TPO as well as Ld. DRP but they have rejected the contention of the assessee by simply recording that "the company is engaged in technology based solution and analytic sales, hence it is functionally similar and as such assessee's contention is rejected."

48. We have perused a transfer pricing study of the assessee available at page A305, A412 & A413 of the paper book supported with relevant financials. Dun & Bradstreet is into providing wide area of sources such as D&B analytic services, risk management solutions, sales and marketing solution services, supply management solution etc. It has also come on record that the assessee has earned abnormally high margin of 58.19% as is evident from the annual report of Dun & Bradstreet and as such is not a valid comparable vis-à-vis assessee who is a routine software development service provider to its AE working on cost + mark-up model, hence order to be excluded.

11.3 Respectfully following the aforesaid decision on the same parity of reasoning, we direct the A.O/T.P.O to exclude this company from final set of comparables.

Puresoftware Pvt. Ltd.

12.1 In respect of this company, the main contention of the assessee has been that this is functionally different since it is a testing company. The T.P.O per contra observed that this company derives 100% revenue from design and development services of software applications including customized and packaged software which is the main business stream of the assessee. That also 98.82% of the revenue earned from software services thus held to be varied comparable. The D.R.P has dealt with this comparable at page 98 onwards in clause (k) of their finding and had upheld the order of the T.P.O.

12.2 The Id. A.R at the time of hearing demanding exclusion of this company referred to the Annual Report at page 594 where P & L a/c has been given. He

showed that there was stock in trade/ inventory. Furthermore at page 595 of Annual Report the company was also into software services and software development and therefore, in totality, this company was into a varied activity of software service and software development and there was also stock-in-trade/inventory. The further contentions of the learned A.R that the T.P.O himself at page 11 of his order has rejected as not functionally comparables viz. (i) SQS India BFSI Ltd. and (ii) Cigniti Technologies Ltd. These were rejected since their main business was software testing. Similarly, even Puresoftware also into software testing. Therefore, this should also have been excluded.

12.3 We observe from the Annual Report and the other related documents that Puresoftware Ltd., is into varied activities of software services and software development and from the P & L a/c of the company they have stock-in-trade and inventory also. Furthermore though this company is a testing company has been retained by the T.P.O while on the other hand he has excluded Cigniti Technologies Ltd., and SQS India BFSI Ltd., who are also into the business of software testing. Hence we find that there has been inconsistency an in the approach of the T.P.O. We therefore, direct the A.O/T.P.O to exclude this company from the final set of comparables.

Exilant Technologies Pvt. Ltd.

13.1 The assessee submitted that this company is not comparable since it is into development of new intellectual property and it is substantially a product company. The T.P.O however held that this company is into technology software and other related services and the company derives revenue from software development services, thus held to be valid comparable.

13.2 The D.R.P has given their findings at page 99 at para (I) upholding the findings of the T.P.O. The learned A.R demonstrated from the Annual Report at page 470 of the paper book that this company is into development of new

intellectual property. Further at page 565 regarding functionality of Exilant Technologies, it is demonstrated that this company is a product company doing varied services. The Id. D.R could not bring on record any evidences/documents to prove any facts contrary to what is already there in the annual report of this company.

13.3 Having heard the parties and on examination of the relevant documents, we find that this company is into intellectual property development and is a product company having varied services. We direct the A.O/T.P.O to exclude this company from the list of comparables.

TVS InfoTech Ltd. (TVS InfoTech)

14.1 This company was taken as a comparable by the assessee in its T.P study report which was rejected by the T.P.O. The T.P.O has dealt with this issue from page 48 onwards at para 13(6) of his order. The T.P.O has held as follows:

“The assessee’s objection is considered. The detailed comments on export filter have been given above in disposal of common grounds of assessee. The assessee itself has calculated ratio of export income to total income as 54% which exactly matches with the ratio calculated by the undersigned. Thus, the comparable fails on export filter applied by this office. Hence, the objection of the assessee is rejected.”

14.2 The Id. A.R reiterated the submissions raised before the subordinate authorities and in support of his submission that this company should be taken as a comparable, placed reliance on the decision of Pune Tribunal in ITA No. 1788/PUN/2013 where forex filter has been relaxed to 50% from 75% by stating that there is no strict basis/guidelines on the matter and thus is subjective and furthermore therein the T.P.O had applied this forex filter of 75% without demonstrating the same on the basis of any study/analysis. In this regard, therefore the assessee advocated that selection of 75% export sales filter was not appropriate in itself and filter of 50% was more logical. In this year, the assessee has applied forex filter at 54%.

14.3 Per contra, the Id. D.R strongly supported the view of the T.P.O.

14.4 Having heard the parties and examining the relevant documents on record, firstly, there are no guidelines to relax the forex filter to 50% from 75% and in what scenario the selection of filter of 54% is more logical was not explained by the assessee. Thus, we are in conformity with the view taken by the T.P.O rejecting the objection of the assessee and this company as rejected by the T.P.O from the final list of comparables is upheld.

Infobeans Technologies Ltd.

15.1 The assessee contends that this company is functionally different and that it has got no segmental data.

15.2 Per contra, the Id. T.P.O held that this is a service company primarily rendering software services and it does not hold any specific inventory. Further, as per the annual report of this company, 99.20% of its revenue are from software services, therefore, no segmental data is required. The company is thus held to be comparable.

15.3 The D.R.P has dealt with this comparable at page 90 clause (d) and given its finding at page 92 of their order. The Id. A.R submitted that this company should be excluded for functionality difference and in support thereof placed reliance on the decision of Bombay Bench of the Tribunal in ITA No. 1379/Mum/2021 for .Y. 2016-17 dated 25-02-2022 in the case of Red Hat India Pvt. Ltd. Vs. ACIT wherein it was observed and held as follows:

:Infobeans Technologies Ltd. (Infobeans) 49. The assessee sought exclusion of Infobeans on the ground that it is also functionally dissimilar being into providing business IT services (CAD) (application development and maintenance, Big Data, UX and UI, Automation engineering services, including product engineering and lifestyle solutions and business process management) in verticals of storage and virtualization, media and publishing, HR and Payroll and e-commerce. It is also providing software engineering services primarily in Custom Application Development (CAM), enterprise mobility and Big Data Analytics (BDA). 50. Perusal of financials available at page A303, A418 to A421, Infobeans shows that it is into diversified services but its segmental financials are not available without which it is difficult to compute the correct profit margin of the relevant segment. So Infobeans is also ordered to be excluded as a comparable being not a comparable to the assessee."

15.4 We find that this decision pertains to the same assessment year viz. 2016-17 and respectfully following the aforesaid decision on the same parity of reasoning, we direct the A.O/T.P.O to exclude this company from the list of comparables.

Ingenuity Gaming Pvt. Ltd.

16.1 At the time of hearing, the Id. A.R submitted that this is a product company. However, for the purposes of verification, this issue may be remitted back to the file of the A.O/T.P.O for re-adjudication as per law.

16.2 The Id. D.R did not raise any objection.

16.3 In view thereof, we remit this issue to the file of the A.O/T.P.O to re-adjudicate the comparability while complying with the principles of natural justice.

Cybage Software

17.1 The assessee contends that this company is mainly Onsite service provider whereas the assessee is offsite service provider and therefore, functionally different. Further, there is incorrect reporting figures which are unreliable. This company is product development as well as R & D Intensive Company. The arguments of the assessee were not accepted by the A.O/T.P.O and the company was held to be comparable. The Id. A.R demonstrated through Annual Report at page 1804, as per the description of the business of this company that it is onsite service provider. Furthermore at page 1796 of the Annual Report this company is doing other computer related activities but nowhere software services are mentioned. On the other hand, the assessee is offsite provider and thus functionally different. We direct the A.O/T.P.O to exclude this company from the list of comparables.

18. Therefore, all the grounds of appeal of the assessee are decided as appearing hereinabove.

19. In the combined result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on this 21st day of July 2022.

Sd/-

sd/-

(R.S. SYAL)
VICE PRESIDENT

(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, this 21st day of July 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. the D.R.P – 1, Bangalore
4. The D.R. ITAT C' Bench, Pune.
5. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

		Date	
1	Draft dictated on	12-07-2022	Sr.PS
2	Draft placed before author	14-07-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS		Sr.PS
6	Kept for pronouncement on		Sr.PS
7	Date of uploading of order		Sr.PS
8	File sent to Bench Clerk		Sr.PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		