

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

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

Appeal No.	Appellant	Respondent	Assessment Year
IT(TP)A No. 606/Bang/2021	M/s. SAP Labs India Pvt. Ltd., No. 138, Export Promotion Industrial Park, Whitefield, Bangalore – 560 066. PAN: AAFCS3649P	The Joint Commissioner of Income Tax, Special Range – 6, Bangalore.	2008-09
IT(TP)A No. 2510/Bang/2019	M/s. SAP Labs India Pvt. Ltd. (Successor to M/s. Success Factors Business Solutions India Pvt. Ltd.), No. 138, Export Promotion Industrial Park, Whitefield, Bangalore – 560 066. PAN: AAFCS3649P		2015-16

Assessee by	:	Shri Aliasger Rampurwala, CA
Revenue by	:	Dr. Manjunath Karkihalli, CIT DR

Date of Hearing	:	15-06-2022
Date of Pronouncement	:	21-07-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeals has been filed by assessee against the order of Ld.CIT(A) dated 10/12/2019 for A.Y. 2008-09 and final assessment order dated 17/10/2019 passed by Ld.JCIT, Special Range – 6 for A.Y. 2015-16 on following grounds of appeal.

Assessment Year 2008-09:

The grounds mentioned herein by the Appellant independent and without prejudice to one another.

1. On the facts and in circumstances of the case and in law, the order framed under section 250 of the Income-tax Act, 1961 ('the Act') passed by the learned Commissioner of Income Tax (Appeals) ['CIT(A)'] dated December 10, 2019, to the extent prejudicial to the Appellant, is bad in law, contrary to the facts and circumstances of the case and is liable to be quashed.
2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the order dated November 14, 2018 passed by the Joint Commissioner of Income Tax, Special Range - 6, Bengaluru ('learned AO') incorporating the transfer pricing adjustment made vide order dated June 11, 2018 passed by Deputy Commissioner of Income Tax (TP), Circle - 2(2)(1), Bengaluru ('learned TPO'). In doing so, learned CIT(A):
  - 2.1. erred in upholding the learned AO/TPO's approach to include Celestial Biolabs Ltd. as a comparable even when the erstwhile learned CIT(A) had rejected Celestial Biolabs Ltd. on account of abnormally high profits.

The Appellant pleads to exclude Celestial Biolabs Ltd. from the final list of comparable companies.

- 2.2. erred in upholding the learned AO/TPO's approach in computing incorrect margin of the following comparable companies:

- (i) R S Software Limited; and
- (ii) Mindtree Limited

The Appellant pleads to accept correct margin of comparable companies R S Software Limited and Mindtree Limited while calculating arm's length margin.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) and the learned AO have erred in levying interest under section 234B and 234C of the Act.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.



**Assessment Year 2015-16:**

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

1. On the facts and in circumstances of the case and in law, the order of the Joint Commissioner of Income- Tax Special Range-6, Bengaluru ('learned AO') to the extent prejudicial to the Appellant, is bad in law, contrary to the facts and circumstances of the case and is liable to be quashed.
2. On the facts and in circumstances of the case and in law, the Dispute Resolution Panel ('learned DRP') erred in not appreciating that the order of the learned Assistant Commissioner of Income-tax (Transfer Pricing) – 1(3)(1), Bangalore ('learned TPO') passed under Section 92CA of the Income-tax Act, 1961 ('the Act') is contrary to law and thus liable to be quashed.
3. That on facts and in the circumstances of the case, the learned DRP / AO/ TPO erred in making an upward adjustment of INR 95,500,417 to the transfer price of the Appellant's international transactions of INR in respect of software development services.

**Grounds for software development services**

4. On the fact and in the circumstances of the case and in law, with respect to adjustment to the transfer price of the software development services, the learned DRP/ AO/ TPO erred in:
  - 4.1. Rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant under Section 92D of the Act, in good faith and with due diligence.
  - 4.2. Rejecting the comparability analysis carried out by the Appellant in the TP documentation and in conducting a fresh comparability analysis for the software development services based on the application of additional filters in determining the arm's length price.
  - 4.3. Using data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation.
  - 4.4. Not considering the multiple year/prior year data of comparable companies while determining the arm's length price in relation to the Appellant's international transactions with its AEs.
  - 4.5. Using information under section 133(6) of the Act, which tantamount to choosing secret comparable companies whose information was not available in public domain while preparing the transfer pricing documentation for the relevant financial year.
  - 4.6. Disregarding certain filters applied by the Appellant in selection of the comparable companies at the time of TP documentation.
  - 4.7. Applying/ modifying the following filters while undertaking comparability analysis:
    - a) Rejection of companies whose employee cost is less than 25% of operating revenue;

- b) Rejection of companies having income from core services less than 75% of the total sales;  
c) Rejection of companies having export sales less than 75% of the total sales; and  
d) Companies of different financial year ending or data of the company do not fall within 12 month period.
- 4.8. Including the following companies even though they are functionally different from operational profile of the Appellant:
- a) Tata Elxsi Limited (Seg);
  - b) Rheal Software Private Limited;
  - c) Mindtree Limited ✓
  - d) Larsen & Tubro Infotech Limited; ✓
  - e) R S Software (India) Limited;
  - f) Infobeans Technologies Limited; ✓
  - g) Persistent Systems Limited; ✓
  - h) Nihilent Technologies Limited;
  - i) Aspire Systems (India) Private Limited;
  - j) Inteq Software Private Limited;
  - k) Infosys Limited; and ✓
  - l) Cybage Software Private Limited.
- 4.9. Excluding the following companies even though they are functionally comparable to the Appellant and passes all the filters applied by the learned TPO in its order:
- a) Akshay Software Technologies Limited;
  - b) Celstream Technologies Limited;
  - c) I2T2 India Limited; and
  - d) Infomile Technologies Limited.
- 4.10. Not considering certain expenses such as provision for doubtful debts/bad debts/expenses and liabilities written back, as operating in nature on the premise that these are not the routine operating costs in determining the operating mark-up of the comparable companies.
- 4.11. Not providing an adjustment for the differences in working capital of the Appellant and the comparable companies.
- 4.12. Not providing suitable adjustment to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies. ✓
- 4.13. Computing incorrect operating mark-up of certain comparable companies:
- a) Kals Information Systems Limited;
  - b) E-Zest Solutions Limited;
  - c) CG-VAK Software & Exports Limited; and
  - d) Tata Elxsi Limited (Seg).

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

### Assessment Year 2008-09:

2. At the outset, the Ld.AR submitted that there is delay of about 600 days in filing appeal for A.Y. 2008-09 before this *Tribunal*. It is submitted that the due date of filing the present appeal was 08/02/2020 however the appeal has been filed on 06/11/2021.

2.1 The Ld.AR submitted that, due to Covid-19 pandemic, the consultant's office was closed, thereby causing the delay. It is submitted that, the last date of filing the appeal falls during the period covered by the provision of section 3(1)(b) of the Taxation and Other Laws (Relaxation and Amendment to certain provisions) Act, 2020, read with the order of *Hon'ble Supreme Court dated 23/03/2020* was effective.

2.2 The Ld.DR, could not controvert the submissions and prayer by the Ld.AR.

2.3 We note that the last date of filing the present appeal falls during the Covid -19 Pandemic. During the relevant period, the limitation stood automatically extended by virtue of order passed by *Hon'ble Supreme Court (supra)*. Therefore, the delay in filing the present appeal stands condoned.

2.4 The extension of limitation period due to COVID-19 second wave was withdrawn by *Hon'ble Supreme Court* vide order dated 23.03.2020, with effect from 15/03/2020 till further order.

2.5 *Hon'ble Supreme Court* vide order dated 23.03.2020 has excluded limitation period expiring on or after 15.03.2020.

Therefore the actual delay in filing present appeal by assessee is 36 days.

2.6 No delay can be attributed due to covid on assessee. Insofar as the period from 08/02/2020 to 14/03/2020, it is submitted that assessee was under tremendous pressure due to the chaos caused of covid 19 and therefore could not file the appeal within time. The Ld.AR prayed for the delay to be condoned in the interest of justice.

2.7 We have considered the submissions as explained by the Ld.AR. We are of the opinion that there is a reasonable cause in the delay caused in filing the present appeal before this *Tribunal* and the same deserves to be condoned.

**Accordingly, the appeal filed by the assessee for A.Y. 2008-09 is admitted to be disposed of on merits.**

2.8 The Ld.AR while giving the brief facts, submitted that, this is the second round of appeal and assessee is seeking exclusion of Celestial Biolabs Ltd. raised.

3. **Ground no. 2.1** before this *Tribunal*, he submitted that, in the first round of appeal this comparable was excluded by the Ld.CIT(A), himself by observing as under:

*“(viii) Turnover and Abnormal Profits Filter*

*122. It was submitted that the TPO has excluded companies with segmental revenues of less than Rs. 1 crore on the ground that consideration of such companies might not lead to proper comparability, as they had low cost base, their data were either not available or were unreliable, did not have export earnings, and also suffered consistent losses. However, while considering this lower limit to turnover, the TPO has not considered any upper limit, which has led to the selection of much larger companies than the appellant. Similarly, certain companies with abnormal profits (above 50%) and negative margins (losses) have also been considered, leading to inappropriate comparisons.*

*123. Even while holding that companies whose turnover was less than Rs. 1 crore did not represent the industry trend as their low cost to sales ratios made their results unreliable, the TPO has selected certain companies for comparison, holding that higher turnover does not have a bearing on profitability. This is contrary to his own argument for excluding from the comparison matrix companies whose turnover was below Rs. 1 crore. A transaction entered into by a Rs 1,000 crore company cannot be compared with that entered into by a Rs. 10 crore company, as the size of the two companies and the relative economies of scale*

*under which they operate make a significant difference to their businesses.*

*124. I am of the view that while the TPO is justified in applying the turnover filter, he ought to apply the same objectively both for low and high turnover companies, as a one sided application of the turnover filter would render the analysis unreliable. In this context, I place reliance on the decision of the hon'ble jurisdictional Bench of ITAT in the case of Genisys Integrating Systems (India) CP.? Ltd. v. DCIT [20121 53 SOT 159 (Bang) where it has been held that when there is a limit for the lower end for identifying the comparables, there is no reason why there should not be an upper limit also, as size matters in business.*

*125. The hon'ble ITAT's observation in the above case is also true in the appellant's case. While a big company would be in a position to bargain the price, attract more customers and have a broad base of skilled employees who are able to give better output, a small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, companies which are loss making and the super profit making companies should Also be excluded. The hon'ble ITAT has suggested that the classification made by Dun & Bradstreet should be taken into consideration for the purpose of making the TP study.*

*126. The Hon'ble Delhi Bench of ITAT has in the case of Sony India (P.) Ltd. v. DCIT [2008] 114 ITD 448 (Del) upheld the objection of assessee on inclusion of a comparable when the distinctive differences like size and turnover, materially affect performance or prices of products. It has been held in E-Gain Communication Private Limited (2008-TIOL-282-ITAT-Pune) that there is no justification for considering oversized companies and the Commissioner (Appeals) was in error in considering turnover as the only relevant factor needed to be considered for a proper analysis. It has been held in Deloitte Consulting India Pvt. Ltd. v. DCIT (ITA No 1082/11yd/2014) that in the event of use of the TPO's filter of a turnover of less than Rs. i crore, it would be appropriate to reject companies having higher sales turnover as well to neutralise the impact of both low and high turnover companies and to provide a more reliable result.*

*127. For these reasons and following the decisions cited above and considering that the appellant company's turnover was RI no.io crore during the relevant FY, I direct*

*the AO to apply. for computing die arithmetic mean of net margins. the turnover filter at both the lower and upper ends of Rs. 200 crore to R.S. 2000 crore and exclude from the final se of comparables the following companies falling outside that range of turnover and companies that had abnormally high Profits:*

Sl. No.	Comparable company	Turnover (Rs. Crore)	OP/TC (%)
1	Avani Cimcon Technologies Ltd.	2.93	25.62
2	Bodhtree Consulting Ltd.	10.37	18.72
3	Celestial Biolabs Ltd.	20.21	87.94
4	e-Zest Solutions Ltd.	7.66	29.81
5	Infosys Technologies Ltd.	15,672.00	40.37
6	Kals Information Systems Ltd. (segment)	2.05	41.94
7	LGS Global Ltd.	136.52	27.52
8	Lucid Software Ltd.	2.35	16.50
9	Quintegra Solution Ltd.	89.88	21.74
10	R Systems International (segment)	144.56	15.30
11	RS Software (India) Ltd.	100.36	07.41
12	Softsol India Ltd.	18.99	17.89
13	Thirdware Solutions Ltd.	52.28	19.35
14	Wipro Ltd. (segment)	11,955.56	28.45

3.1 The Ld.AR submitted that, revenue preferred appeal before this *Tribunal* against the order of the Ld.CIT(A), wherein this comparable was not challenged for having excluded. The Ld.AR placed reliance on page 405 of the paper book wherein the relevant ground no. 6 raised by revenue challenging the exclusion of the comparables by the Ld.CIT(A) are alleged before this *Tribunal* in the 1<sup>st</sup> round.

*“1. The order of the learned CIT(A) is opposed to law and facts of the case.*

*2. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to exclude the reimbursement of expenses incurred in foreign currency both from the export turnover as well as from total turnover for the purpose of computation of deduction*

*u/s 10A without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section 10A and the total turnover has not been defined in this Section.*

*3. On the facts and in the circumstances of the case the learned CIT(A) erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.*

*4. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the assessee company is eligible for deduction u/s 80JJAA in respect of additional wages paid to software engineers employed in non 10A units without appreciating the fact that the software engineers cannot be equated with 'workmen' as envisaged under Rule 2(s) of Industrial Disputes Act 1947.*

*5. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the assessee company is entitled to claim deduction u/s 10A in respect of profits derived from the units acquired under slump sale without appreciating the fact that there is split up in the existing business of the assessee on account of such slump sale.*

*6. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Avani Cimcom technologies Ltd, M/s Bodhtree Consulting Ltd., M/s e-Zest Solutions Ltd. M/s Infosys Technologies Ltd., M/s Kals Information Systems Ltd., M./s LGS Global Ltd., M/s Lucid Software Ltd., M/s Quintegra Solution Ltd, M/s R Systems International Ltd., M/s RS Software (I) Ltd., M/s Softsol I Ltd., M/s Thirdware Solutions Ltd. and M/s Wipro Ltd., in Software development segment as comparables.*

*7. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that the TPO was not justified in applying the employee cost filter and directed to include M/s Indus Networks Ltd which was excluded in*

*the software development services segment by using this filter.*

*8. On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting the diminishing revenue filter used by the TPO to exclude companies that do not reflect the normal industry trend.*

*9. On the facts and in the circumstances of the case the learned CIT(A) failed to appreciate that the different year ending filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.*

*10. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that foreign exchange loss/gain is operating in nature when, such loss/gain though linked to the operating activity is not derived from operating activity.*

*11. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that domestic transaction should be excluded from the TP adjustments, in view an aggregate approach is adopted by the TPO wherein the transactions are so inextricably intermixed that the segregation of revenue and appropriate costs are impossible and the approach of the assessee to allocate costs on a ration would provide only distorted results.*

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

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

3.2 We note that this Tribunal in the 1<sup>st</sup> round adjudicated the comparables alleged by the revenue by order dated 06/04/2018 in IT(TP)A Nos. 981 & 1070/Bang/2013 by observing as under:

*“19. Ground No.6 challenges the direction of the ld.CIT(A) excluding the following companies applying the turnover range for Rs.200 to Rs.2000 cr.:*

- i. M/s. Avani Cimcom Technologies,*
- ii. M/s. Bodhtree Consulting Limited,*
- iii. M/s. E-zest Solutions Limited,*
- iv. M/s. Infosys Technologies Ltd.,*

- v. *M/s. Kals Information Systems Limited (Seg.)*,
- vi. *M/s. LGS Global Ltd.*,
- vii. *M/s. Lucid Software Limited*,
- viii. *M/s. Quintegra Solution Limited*,
- ix. *M/s. R Sytems International Ltd.*,
- x. *M/s. R.S. Software (I) Ltd.*,
- xi. *M/s. Softsol India Ltd.*,
- xii. *M/s. Thirdware Solution Limited and*
- xiii. *M/s. Wipro Ltd. (Seg.)*.”

3.3 The Ld.AR submits that, while giving order effect to the order of this *Tribunal* in the first round of appeal, the Ld.AO/TPO included Celestial Biolabs Ltd. The Ld.AR submitted that, the assessee filed rectification application on 02/01/2019, seeking the exclusion of Celestial Biolabs Ltd., from the final set of comparables. A copy of the said application is placed at pages 467-469 of paper book. The Ld.TPO after considering the submissions of the assessee excluded the comparable, Celestial Biolabs Ltd. by order dated 16/01/2019.

3.4 Against the said order giving effect, the assessee again preferred appeal before the Ld.CIT(A), since the Ld.AO did not allow certain credit for the required assessment tax paid. The assessee alleged non-exclusion of Celestial Biolabs Ltd. from the final list of comparables with respect to software development service segment rendered by assessee to its AE.

3.5 Against the said order, the Ld.CIT(A) while passing the impugned order included the comparable Celestial Biolabs Ltd. The assessee is therefore in appeal before this *Tribunal* in the second round of appeal seeking exclusion of Celestial Biolabs Ltd. We have perused the submissions advanced by both sides in the light of records placed before us.

3.6 It is submitted that, this comparable was not part of transfer pricing order for A.Y. 2007-08 and any of the preceding assessment year. Placing reliance on the rectification order passed by the Ld.AO dated 14/11/2018, the Ld.AR submitted that, this comparable stood already excluded and the Ld.CIT(A) erred in considering this comparable again, which is not in accordance with the decision of this *Tribunal* in the first round passed on 06/04/2018.

3.7 Even otherwise, the Ld.AR submitted that this comparable is functionally not similar to that of the assessee, and further has employee cost, less than 25% of the turnover which is not a filter applied by the Ld.TPO.

3.8 Functions of Celestial Biolabs Ltd. for A.Y. 2008-09 as revealed in the annual report:

It is submitted that even functionally this comparable is not comparable with the assessee.

3.9 The Ld.AR submitted that the information provided by this company u/s. 133(6) reveals that, it is providing customized services to Biopharma companies, medical centres by using the tools & package developed through in-house research and development efforts. The company has also specified that it is engaged in undertaking R&D activities for development of the tools. It is not akin to the services rendered by the assessee to its AE.

3.10 Referring to page 303, we observe that this company is also engaged in in-house development of products for which there is no separate segmental results.

3.11 Based on the above, extracts placed at paper book pages 302-307, we are of the opinion that, this comparable cannot be compared with that of the assessee which is a captive service provider, as observed by this *Tribunal* vide order dated 06/04/2018.

3.12 It is also recorded by this *Tribunal* that, the assessee before us is engaged in the business of providing software development and other related support services to the SAP AG Group companies and conducts its operations from various undertakings registered under STPI scheme. Based on the above analysis, we hold that this comparable is not a fit company to be included in the list of comparables to compute the ALP of the transaction.

**Accordingly, this ground raised by assessee stands allowed.**

4. In **Ground no. 2.2**, assessee is seeking correction of margin in respect of R S Software Ltd. and Mindtree Ltd. We direct the Ld.AO/TPO to compute the margin correctly in accordance with law.

**Accordingly, this ground raised by assessee stands allowed.**

**5. Ground no. 1** is general in nature and Ground no. 3 is consequential and therefore do not require adjudication.

**In the result, the appeal filed by assessee for A.Y. 2008-09 stands allowed as indicated hereinabove.**

**Assessment Year 2015-16****6. Brief facts of the case are as under:**

6.1 Assessee is in the business of software development and filed its return of income on 28/02/2017 declaring total income of Rs.26,62,09,080/-. The return was processed u/s. 143(1) of the Act and the case was selected for scrutiny and notice u/s. 143(2) of the Act and 142(1) was issued to assessee. In response to the statutory notices, representative of assessee appeared before the Ld.AO and filed requisite details as called for. The Ld.AO noted that the assessee for the year under consideration entered into international transaction with its associated enterprise exceeding Rs. 15 crores, and accordingly reference was made to the transfer pricing officer under 92CA of the Act.

6.2 On receipt of reference under 92CA, the Ld.TPO called upon the assessee to file economic details of the international transaction, with the associated enterprise. Upon receipt of the details, the Ld.TPO observed that, following were the international transaction between the assessee and its AE:

International Transactions	Amount (INR)
Provision of Software Development and support services	866776017
Payment towards software welfare, legal & professional and IT Support charges	81029605

6.3 Assessee computed its margin at 11.88% by using OP/OC as PLI and TNMM as the most appropriate method. The assessee used 12 comparables in respect of SWD segment, with an average margin of 15.24%. The assessee treated the foreign exchange loss or gain, is operating in nature following the view of this

*Tribunal* in assessee's own case for preceding assessment years for computing the PLI. The Ld.TPO dissatisfied with the comparables considered by assessee conducted fresh search by applying various filters and it remained set of following 16 comparables with an average margin at 20.55% considering the preceding 3 assessment years. The details of the comparables are as under:

<u>SWD Segment</u>					
S.No.	Company Name	Financial Year wise OP/OC (%)			
		2014-15	2013-14	2012-13	Average
1	Kals Information Systems Ltd	5.77	16.94	13.51	11.88
2	E-Zest Solutions Ltd	12.59	15.80	Fails Export Filter	14.05
3	CG-VAK Software & Exports Ltd.	19.87	13.81	22.07	18.50
4	Tata Elxsi Ltd. (Seg)	23.33	22.02	11.24	19.34
5	Rheal Software Pvt. Ltd.	2.76	36.64	No data in Public Domain	19.88
6	Mindtree Ltd.	20.55	21.18	19.75	20.55
7	Larsen & Toubro Infotech Ltd.	24.22	23.54	25.10	24.21
8	R S Software (India) Ltd.	32.66	24.14	17.44	24.82
9	Infobeans Technologies Ltd.	20.70	41.95	29.22	29.91
10	Persistent Systems Ltd.	31.11	35.44	28.20	31.69
11	Nihilent Technologies Ltd.	29.19	35.72	No data in Public Domain	32.21
12	Aspire Systems (India) Pvt. Ltd.	30.98	38.04	No data in Public Domain	34.18
13	Inteq Software Pvt. Ltd.	31.16	45.00	Fails Employee cost filter	37.90
14	Infosys Ltd.	40.29	36.28	39.25	38.59
15	Thirdware Solution Ltd.	43.69	44.68	32.65	41.12
16	Cybage Software Pvt. Ltd.	68.17	68.82	60.81	66.27
	35th Percentile				20.55%
	Median				27.37%
	65th Percentile				37.90%

6.4 The Ld.TPO thus proposed adjustment of Rs. 11,99,81,486/- to be the shortfall.

6.5 On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order by incorporating the transfer pricing adjustment.

6.6 On receipt of the draft assessment order dated 10/12/2018, assessee filed objections before the DRP.

6.7 The DRP upheld the proposed adjustment by the Ld.TPO however, reject the Thirdware Solutions Ltd. from the list of comparables. On receipt of the DRP directions, the Ld.AO recomputed the addition in the hands of the assessee at Rs.9,55,00,417/-.

6.8 Aggrieved by the impugned order, the assessee filed the present appeal before this *Tribunal*. At the outset, the Ld.AR submits that

**7. Ground nos. 1 to 3** are general in nature and do not require adjudication.

**8. Ground nos. 4 to 4.7, 4.10 & 4.12** are not pressed by assessee and therefore stands dismissed as not pressed.

9. In **Ground no. 4.8**, it is submitted that assessee seeks exclusion of following 5 comparables only:

1. Mindtree Ltd.
2. Persistent Systems Ltd.
3. Infobeans Technologies Ltd.
4. Larsen & Tubro Infotech Ltd.
5. Infosys Ltd.

**10. Ground nos. 4.11 & 4.13** are in respect of adopting correct margin and to grant working capital adjustment.

11. Before we undertake the comparability analysis, it is necessary to examine the functions, assets owned and risks assumed by the assessee for performing software development services.

## **2. Functional Analysis of the Taxpayer:**

### **The functions of the Taxpayer:**

#### **2.1 As per the agreement**

SAP Labs agrees to provide SAP AG with assistance services in the fields of design, development and support of software products as explicitly requested by SAP AG on a case by case basis comprising:

- The assistance in research on and design and development of new software products;
- The creation of enhancements and modifications to existing SAP AG software modules;
- The offering of support services for SAP AG software modules.

#### **2.2 As per the TP document**

SAP Labs India is a research and development and product support centre for SAP AG services. SAP Labs India researches, designs and delivers leading-edge software applications that enhance and extend SAP solution and is recognized within the SAP global organization as one of the prime contributors of innovation, quality and service. SAP India provides software development and related services to SAP AG and focuses on key areas like ERP, CRM, SRM, Netweaver, Globalization, Emerging Solutions, Custom Development, Active Global Support and Installed Base Maintenance.

#### **2.3 Analysis of the functions performed by the Taxpayer:**

SAP India provides software development and related services and focuses on key areas like ERP, CRM, SRM, NetWeaver, globalization, Emerging Solutions, Custom Development, Active Global Support and Installed Base Maintenance.

##### **a. Software Development Services**

SAP Labs India carries out software design, development and testing for SAP AG at its facility in Bangalore based on the R & D agreement with SAP AG. SAP Labs India assists in the development of new software products, enhancements and modification of existing software modules, related support services and consultancy services. An understanding of SAP India's participation in the various stages of the work undertaken and development process will determine the quantum of inputs that SAP Labs India undertakes in the value chain of the Group.

##### **b. General Management Functions**

- i. Corporate Strategy Determination
- ii. Finance Accounting, Treasury and Legal Function
- iii. Human Resource Management

**Assets owned:**

In the transfer pricing study report at page 91 of paper book, it has been submitted that assessee does not own any intangibles and neither does it undertake any research and development on its own account that leads to the development of nonroutine intangibles. It has been mentioned that assessee uses the trademark, processes, know-how, technical Tata software, operating/quality standards etc their blend/owned by the AE. It has been submitted that this assessee does not own any nonroutine intangibles. Other assets owned by assessee are in respect of land, buildings, computer equipments, office equipment furniture fixtures etc which are used to carry out day to day business activities.

**Risk assumed:** in the TP study report reveals that assessee is a risk insulated company for SWD services to its AE and their affiliates. Except for foreign exchange risk, assessee do not undertake any other risk as compared to its AE.

**Characterisation:** based on the above assessee has been characterised as a risk insulated company providing services only to the AE and its affiliate.

Based on the above, the comparables sought for exclusion by assessee are considered as under:

**12. Ground no. 4.8:**

12.1 In assessee's own case for A.Y. 2012-13 in *ITA No. 684/Bang/2017 by order dated 23/07/2021, Coordinate Bench of this Tribunal* had excluded Infobeans Technologies Ltd., L&T Infotech Ltd. and Persistent Systems Ltd. by observing as under:

*"6.1 At the outset, the Ld.AR submitted that, above comparables have been considered by coordinate bench of this Tribunal in case of NXP India Pvt.ltd. vs DCIT in ITA*

No. 692/B/2017 by order dated 27/04/2020. It has been submitted that NXP India Pvt.Ltd., was also characterised to be a captive software service provider to its AE.

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

7. We have perused submissions advanced by both sides in light of records placed before us. We note that the functional profile of this assessee and the assessee in the decision cited by the Ld.AR are same. Above comparables have been dealt with by this Tribunal as under:

**PERSISTENT SYSTEMS LIMITED**

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

6.1 We have carefully gone through the order of the co-ordinate Bench in the case of NXP Semiconductor India Pvt. Ltd. (supra) for the assessment year 2009-2010, wherein it was observed that Persystent Systems Limited 'was engaged in product development and product design and analysis services is functionally different from a pure software service provider and therefore, excluded it from the list of comparables for software development services. The same view was taken in the case of Saxo India Pvt. Ltd. in ITA No.6148/Del/2015 — order dated 05th February, 2016, by observing that Persystent Systems Limited is engaged in running software development services as well as sale of software products. Albeit the percentage of software products in the total revenue is less, as has been noted by the TPO, and also there is no precise information about the contribution made by such small sale of software products to the total profits of the company. As no segmental information is available in respect of this company and the figures have been adopted by the TPO at entity level, it was directed to exclude Persystent Systems Limited from the list of

*comparables. In the present case also, it is noticed that Persysent Systems Limited is engaged in software products development. There is a difference between the outsourced software product development and IT services, which is evident from page nos. 973 and 974 of the paper book, as under:-*

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

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

*OPD and outsourced IT services: the difference.*

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

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

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

case. We, therefore, direct the TPO to exclude Persysent Systems Limited from the list of comparables.

**LARSEN & TOUBRO INFOTECH LIMITED**

7. The learned AR relied on the order of the ITAT Bangalore Benches in the case of CGI Information Systems and Management Consultants Private Limited in IT(TP)A No.586/Bang/2015 - order dated 11.04.2018 and submitted that it was excluded from the list of comparables for the reason that Larsen & Toubro Infotech Limited was a software product company and segmental information on SWD services was not available. In the present case, Larsen & Toubro Infotech Limited engaged in development of software onsite and its overseas revenue for the financial year 2011-2012 was Rs.27,838,752,995 and domestic revenue was Rs.1,756,792,454. Further in the case of Huawei Technologies India Put. Ltd. in IT(TP)A No.1939/Bang/2017 for assessment year 2012-2013 — order dated 31.10.2018 has taken the same view that it cannot be a comparable with that of the assessee. Being so, we direct the TPO to exclude the same from the list of comparables.

**INFOSYS LIMITED**

8. The argument of the learned AR is that Infosys Limited is functionally different from the assessee. It owns intangible and undertakes research and development. The learned AR also submitted that it has high brand value and turnover. On the contrary, the learned DR submitted that the nature of services remains the same irrespective of whether it is engaged in providing onsite / offsite services.

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

"10.4.1 We have heard both parties and perused and carefully considered the material on record; including the judicial decisions cited and placed reliance upon. We find that a coordinate bench of the Tribunal in the case of Cisco Systems Services B.V., India Branch (supra). for Assessment Year 2009-10 had held that this company be excluded from the final set of comparables on the ground that it is functionally dissimilar and different from a purely software service provider and at Para 20 of the order has held as under :-

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

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

"11.0 Infosys Technologies Ltd.

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

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

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive

*service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee*

*(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/201() at pars i2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;*

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

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

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

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

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

*(i) the co-ordinate bench of this Tribunal in the case of 24/7 Custonter.Com Pvt. Ltd. in ITA No.227/Bang/2010*

*has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;*

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

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

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

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

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

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

*11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is*

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

*10.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of Cisco Systems Services BE, India Branch (supra). we direct the Assessing Officer/11<sup>10</sup> to omit this company from the final set of comparables as it is functionally different from the assessee in the case on hand, who is purely a software service provider."*

*8.2 In the present case also, Infosys Limited is engaged in a leading global technology services corporation. The company provides business consulting, technology, engineering and outsourcing services to help clients build tomorrows enterprise. In addition, the company offers software products for the banking industry. It owns high brand value at Rs.56,286 crore in the year 2012 and percentage of brand value to revenue is 1.67% and brand value as a percentage of market capitalization is 34.2%, and also incur huge amount for research and development at Rs.5 crore as a capital expenditure and Rs.655 crore as a revenue expenditure for the year ended 31st March, 2012. Therefore, it cannot be said to be a comparable. We, therefore, direct the TPO to exclude Infosys Limited from the list of comparables."*

12.2 Further we note that *Coordinate Bench of this Tribunal in case of LG Soft India Pvt. Ltd. vs. DCIT in IT(TP)A No. 2412/Bang/2019 dated 31/05/2022* observed as under:

**I. Mind Tree Limited:**

5. The Ld. A.R. submitted that this company is not functionally comparable as it is engaged in providing service in diverse areas such as analytics, information management, application development business process management, business technology consulting, infrastructure management services, product engineering & SAP services. It was also contended that this company is engaged in sale of product and also engaged in outsourcing IT services in banking and financial services and insurance sector and also as R&D operations and patents and hence not functionally comparable. However, Ld. Dispute Resolution Panel ("DRP") observed that this company is only engaged in software development and related services as seen from its financials. Therefore, the plea of the assessee that company performs different and diverse activities and hence functionally different was rejected by Ld. DRP. Further, it was observed by Ld. DRP that provision of data analytic services is not functionally different from software development activity. Data analytic services also used only in certain software and tools, writes codes task. Like in other software application, these tools also facilitate and enable business of enterprises for enough management and decisions. Therefore, the Ld. DRP observed that there cannot be any distinction between high end software activity and low-end activity so long as it falls within the purview of software development services. It was observed that under TNMM, such differences are tolerable and there is no requirement that services for activities performed are identical. It is informed that the services are similar and fall within the same domain of software development. Accordingly, Mind Tree Ltd. was included in the list of comparables while determining the ALP of international transactions with A.Es. Against this assessee is in appeal before us.

5.1. We have heard the rival submissions and perused the materials available on record. This company Mind Tree Ltd. was considered as not comparable in the case of Yahoo Software Development India Pvt. Ltd. in IT(TP)A No.2657/Bang/2018 & 2365/Bang/2019 dated 28.2.2020 by Bangalore Bench of Tribunal, wherein it was held as under:-

*“41. The next company sought to be excluded is Mindtree Ltd. The submissions made before us were as follows:-*

*“Functionally dissimilar, diversified operation, significant R&D*

*spend, ownership of intangibles.*

*- Also engaged in business of rendering IP-Led revenue, infrastructure management, package implementation, consultancy services, etc. constituting 45% of overall revenue during FY 2014- 15.*

*- Diversified operation i.e. engaged in infrastructure management services, business process management, technology consulting, product engineering and SAP services. Also lacks segmental data*

*- Significant research & development activity. By incurring R&D expenses, it was able to deliver IP based video surveillance management, recording and analytic products and solutions. It has filed 4 patents in India and US so far in the area of Video analysis.*

*- Ownership of intangibles in the form of intangible property.*

*Significant onsite activity:*

*- 46% of revenue earned under Onsite model.*

*- Incurred overseas branch office expenses amounting to INR 1582 crores - Receives incentives from State of Florida in relation to the development center located overseas. Lack of segmental data*

*- Does not maintain segmental information in respect of profitability reported from business activities in the nature of infrastructure management services, technology consulting and SAP services. -*

*Acquisition of subsidiary – Discoverture Solutions LLC*

*42. The DRP while dealing with the aforesaid objections has merely taken the view that the presence of IPR revenue was insignificant and so also expenses of brand value, R&D & intangibles. More importantly, the DRP did not dispute the presence of 46% of revenue from onsite model, but went on to hold that the presence of revenue is not sufficient to exclude a company, when it is otherwise functionally comparable. On this aspect, we have already referred to the decision of the ITAT Bangalore Bench in the case of Trilogy e-business Software India P. Ltd. (supra) and in the light of this decision and the admitted factual position regarding presence of onsite revenue over and above the threshold limit of 25% of total revenue, we are of the view that this company should be excluded from the list of comparable companies. We hold and direct accordingly.”*

5.2. *In view of the above order of the Tribunal, we are inclined to direct the AO/TPO to exclude this company from the list of comparables. Directed accordingly.”*

Respectfully following the same, we direct the Ld.AO to exclude this comparable.

**“III. Infosys Ltd.:-**

7.The Ld. A.R. submitted that this company has to be excluded

from the list of comparables on the following reasons:-

- *Infosys is functionally dissimilar and ought to be rejected.*
- *No segmental details are available in the annual report and hence the company should be rejected.*
- *The company also derives income from licensing of software products.*
- *Infosys is engaged in R&D activities.*
- *Infosys has presence of brand.*
- *Infosys has invested in IP.*
- *Infosys fails upper turnover filter.*

7.1 Ld. DRP in his report observed that after having considered the submissions, and on perusal of the annual report of the company, this company is engaged in providing IT technology services comprising Application developing and maintenance Independent validation, testing services, Business service management, consulting and systems integration services. All these activities fall within the gamut of 'software services', though performed in five different business verticals. As per the P&L account, the company has revenue from 'software services' of Rs.45,658/- crores and from software products of Rs.1642/-crores (refer page 61 of the annual report), and that the product revenue constitute meagre 3.6% of total operating revenue. Therefore, taking into consideration the various information available in the annual report, and the fact that the company is predominantly having revenue from software services, Ld. DRP was of the considered view that this company can be considered as functionally comparable to the assessee. Accordingly, the plea that the company is engaged in diversified activities was rejected by Ld. DRP.

7.2 A plea was raised before Ld. DRP by the assessee that this company also provides data analytic services which is high end and hence, cannot be compared to the assessee. Ld. DRP did not find merit in the plea, as undoubtedly, provision of data analytic services is not functionally different from software development activity. The data

*analytic services also use only certain software and tools, write codes to perform certain tasks. Like any other software application, these tools also facilitate and enables business enterprises for informed management and decision. Therefore, Ld. DRP did not find merit in the plea. Further, there cannot be any distinction between high end software activity and low end activity, so long as it falls within the purview of software development services. Besides, under the TNMM, such differences are tolerable and there is no requirement that the services / activities performed are identical. It is enough that that the services are similar and fall within the same domain of software development. Accordingly, the pleas raised were rejected by the Ld. DRP.*

*7.3 It was pleaded by assessee that this company has a huge brand which has contributed to its growth in revenue and hence not comparable. A perusal of the annual report show that the growth in revenue was on account of various business initiatives taken to accelerate growth such as — internal re-organization, implementing cost effectiveness through reducing cost of operation, improving utilization percentage of employee, restricting the organization for agility by creating smaller and nimbler sales regions, redesigning supply chain functions, reducing attrition rate, increasing the offshore mix, improving delivery expertise etc., As per information in page 14 of annual report, 97.8%' of revenues was from repeat business. At page 67 of the annual report, it is discussed, "Clients often cite our industry expertise, comprehensive end-to-end solutions, ability to scale, superior quality and process execution, global delivery model, experienced management team, talented professionals, track record and competitive pricing as reasons for awarding contracts'. Thus, the growth in revenue is not on account of its brand or any exceptional event, and hence cannot be a reason for rejecting this company, which is otherwise found to be functionally comparable.*

*7.4The perusal of the details in the annual report by Ld. DRP showed that the company has incurred R & D expenditure to the tune of Rs.605 crores, which constitute meagre 1.3% of its total operating revenue, and which is much less than the generally acceptable tolerable limit of 3% of the total revenue. It was also noted that out of this, only Rs.15 crore was capital in nature and the remaining Rs.590 crore represented revenue expenditure, which go to show that the R&D initiative are substantially routine for immediate business purposes for developing expertise and improved process execution. It was also pleaded that the*

company has significant intangibles. However, on perusal of the information at page 86 of the annual report, Ld. DRP noted that the value of intangible assets as on 31.03.2015 was Nil and as on 31.03.2014 was Rs.13 crore, which is insignificant considering its turnover of Rs.47,300 crore and Asset portfolio of Rs.7347 crore. Ld. DRP noted that, the assessee has failed to establish that such differences, if any, on account of brand and intangibles have material effect on the margin of the above company, in terms of clause (i) of sub-rule (3) of Rule 10B, which provides that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between enterprises entering into business transactions or likely to materially affect the profit arising from such transactions in the open market. Further, as discussed in para 2.6.2.3 above, the assessee also performs R&D functions. Hence, these pleas were rejected by Ld. DRP.

7.5 On the plea as to difference in the scale & size of operations and consequent abnormal profits, Ld. DRP noted that turnover does not influence the margins in the service sector: Ld. DRP already held that turnover cannot be a criteria for selection of comparables. In this regard it is relevant to note that the coordinate bench of Bangalore in the case *Advice America Software Development Centre Private Limited* (in ITA (TP) No. 2531/Bang/2017 dated 23.05.2018 relating to A.Y. 2013-14) rejected the plea of the assessee to exclude a company comparable on the ground of size and level of operations. Hence, these pleas were rejected by the Ld. DRP.

7.6 In view of the above, Ld. DRP upheld this company as comparable to the assessee.

7.7 Against this assessee is in appeal before us.

7.8 We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. This comparable is considered as no comparable in the case of *Yahoo Software Development India Pvt. Ltd.* cited (*supra*) wherein it was held as under:

“39. The next company which the assessee seeks to exclude is *Infosys Ltd.* As far as this company is concerned, it is seen that the following are the functional dissimilarities brought to our notice:-

“Functionally dissimilar - owns intellectual properties, incurs significant R&D costs & onsite activity.

- Engaged in diversified business activities.

- Involved in development of software products in addition to software services. - Owns intellectual property rights.

- Incurs significant research and development costs.

- Carries out significant activities based on onsite business.

- Owns products such as Finacle, Edge Verve and other product based solutions.

*Extra-ordinary event of merger with Infosys Consulting India Ltd.*

*Segmental profit & loss account not available.*

*Commands substantial brand value*

*40. The DRP, however, has not thought it fit to exclude this company by observing that this company has substantial pre-dominant revenue from software services and the growth was not attributable to any brand value. Presence of onsite activity and the expenses on R&D have all been brushed aside. In our view, the difference pointed out by the ld. counsel for the assessee before us show that this company cannot be compared with that of the assessee basically because of its business model, presence of onsite revenue generation and other reasons cited before us. Besides, the reason that turnover of this company is huge and more than 10 times that of the assessee.”*

*7.9 In view of the above order of the Tribunal cited (supra) we direct the AO/TPO to exclude this company from the list of comparables.”*

### **12.3 Infobeans Technologies Ltd.**

We note that this comparable has been considered by Coordinate Bench of this Tribunal in case of *EIT Services India Pvt. Ltd. vs. ACIT in IT(TP)A No. 2498/Bang/2019* by order dated 03.09.2021 for A.Y. 2015-16 observed as under:

*“8. We notice that M/s. Infobeans Technologies Ltd. have been directed to be excluded by the coordinate bench in the case of Metric Stream Infotech (India) Pvt. Ltd. with the following observations:*

*"14.3. Infobeans Technologies Ltd., Ld.AR submitted that this comparable was selected by authorities below as it passes all filters, based upon response received from this company under section 133 (6) of the act. He submitted that this observation is contrary to the facts and figures appearing in annual report. Referring to page 1015 Ld.AR submitted that this company is operating at CMMI Level 3 and-is a software service company specialising in business application development for web and mobile. In the company overview this company has been stated to be primarily engaged in providing custom developed services*

*to offshore clients and it provides software engineering services primarily in custom application development, content management systems, enterprise mobility, Big Data analytics. Ld.AR thus submitted that this company is functionally not at all similar with a captive service provider like assessee that this providing Ltd services to its associated enterprises.*

*14.3.1. On the contrary Ld. CIT DR, referring observations of DRP in para 3.6.1 submitted that the activities of company fall under the gamut of software development has categorised by company itself and that the information obtained under section 133 (6) is sufficient enough to come to such conclusions. However he submitted that this comparable also may be sent back to learnt AO/TPO for verification.*

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

*It is observed that the annual report of this company categorises the diversify services provided by this company under software development segment. We also note that this company is basically into application development for web and mobile and provides customised services to its offshore clients comprising. Entire revenue received by this comparable ease under one single segment of sale of software. This company also owns software licenses.*

*14.3.3. In our considered opinion this comparable cannot be considered to be functioning in 100% risk mitigated environment and is a full-fledged enterprise. Such a comparable cannot be compared with a captive service provider like assessee.*

*Accordingly we direct this comparable to be excluded from finalist.""*

12.4 The Ld.DR has not brought any distinguishing facts or any contrary decision in order to take a different view.

Therefore respectfully following the above view, we direct the Ld.AO/TPO to exclude the following comparables.

- a) Mindtree Ltd.
- b) Persistent Systems Ltd.
- c) Infobeans Technologies Ltd.
- d) Larsen & Tubro Infotech Ltd.
- e) Infosys Ltd.

**Accordingly ground no. 4.8 raised by assessee stands partly allowed.**

13. In **Ground no. 4.9**, assessee is seeking inclusion of only two comparables viz., I2T2 India Ltd. and Infomile Technologies Ltd.

13.1 We note that these comparables have been remanded by *Coordinate Bench of this Tribunal* in case of *Cypress Semiconductor Technology India Pvt. Ltd. vs. DCIT in IT(TP)A No. 2427/Bang/2019 by order dated 24/03/2022* for A.Y. 2015-16 observed as under:

**“(c) I2T2 India Limited and Infomile Technologies Limited:**

*(i) The companies came to be rejected by the TPO for the reason that information regarding its related party transactions was not available in the annual report. The DRP further upheld the exclusion.*

*(ii) It was submitted that if there is no disclosure with respect to the RPT made in the annual report, the presumption out to be that there is no RPT transaction. Further, it was submitted that these companies render SWD services and are functionally comparable to the assessee. This company also passes all the filters applied by the TPO. It was submitted that in cases of similar placed companies, this company is included in the final list of comparables. Reliance in this regard was placed on the decision of this Hon'ble Tribunal in the case of LG Soft India Pvt. Ltd. v. DCIT (Order dated 28.05.2019 passed by this Hon'ble Tribunal in IT(TP)A No. 3122/Bang/2018 for the assessment year 2014-15).*

*(iii) We have considered the submission. We find that on identical submissions, this Tribunal in the case cited by the learned Counsel for assessee directed inclusion of I2T2 Company in the list of comparable companies with the following observations:*

*“12. We find force in the contentions of Ld A.R. If the Annual report of this company does not mention about Related Party transactions, then the assessee cannot be held responsible to prove a fact relating to a third party, which may or may not exist. We notice from the Auditors Report of M/s T2T2 India Ltd that the auditor in para 5(b) of Annexure to the Auditors' report has mentioned as under:-*

*"There are no transactions that are made at prices exceeding Rs.5 lakhs in respect of any party who is covered under section 301 of the Act during the financial year."*

*Hence, in the absence of any specific information, there is merit in the contentions of the assessee that the above said company might not have had related party transactions during the year under consideration. Accordingly we do not agree with the reasoning given by Ld. DRP for excluding this company as a comparable. Accordingly we direct the AO/TPO to include this company."*

*20. Following the said decision, we direct inclusion of this company in the list of comparable companies. As far as Infomile is concerned, the company was rejected for the reason that the RPT details were not available. The reasoning contained in the decision rendered in the case of LG Soft (I) Pvt. Ltd., (supra) will apply and therefore this company should be included as a comparable company as otherwise this company is comparable. We hold and direct accordingly."*

13.2 The Ld.DR has not brought any contrary decision or facts in order to take a different view in respect of the above comparables. Respectfully following the same, we direct the Ld.TPO to include I2T2 India Ltd. Infomile Technologies Ltd.

**Accordingly this ground raised by assessee stands partly allowed.**

14. Except for the above comparables, no other comparables have been argued by the Ld.AR. It is has been submitted that assessee same has been not argued at the instruction of the assessee.

**15. Ground nos. 4.11 & 4.13** assessee is seeking appropriate Working Capital Adjustment in respect of the comparables. We direct the Ld.AO to consider the claim of assessee by granting the Working Capital Adjustment on actual.

16. In **Ground no. 4.13** assessee is seeking correction in the operating margin of certain comparables. We direct the assessee to provide correct details and the Ld.AO shall verify the same and consider the claim in accordance with law.

**Accordingly these grounds raised by assessee stands allowed.**

**In the result, the appeal filed by the assessee stands partly allowed.**

**In the result, both the appeals filed by the assessee stands partly allowed.**

Order pronounced in open court on 21<sup>st</sup> July, 2022.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 21<sup>st</sup> July, 2022.  
/MS /

**Copy to:**

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

By order

Assistant Registrar,  
ITAT, Bangalore