

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH: BANGALORE**

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

IT(TP)A No.249/Bang/2021
Assessment Year: 2016-17

M/s. Meritor CVS India Pvt. Ltd. Tower 1, IT Sector SEZ, Mylasandra Kengeri Hobli, RVCE Post Bangalore 560 059 <b>PAN NO : AAFCM7571E</b>	<b>Vs.</b>	Deputy Commissioner of Income-tax Circle 4(1)(2) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri C. Ramesh, A.R.
<b>Respondent by</b>	:	Shri Praveen Karanth, D.R.

<b>Date of Hearing</b>	:	27.07.2022
<b>Date of Pronouncement</b>	:	29.07.2022

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against the final order of DCIT Circle 4(1)(2), Bengaluru NES Centre, Delhi passed u/s 143(3) r.w.s. 144C(13) r.w.s. 143(3A) & 143(3B) of the Act dated 15.4.2021. the assessee has raised following grounds of appeal:-

*“These Revised Grounds are being filed only to update grounds in respect of Ground 1 (iii) and (xi) by mentioning specific comparable in the respective grounds. Apart from this there is no change compared to original grounds filed earlier.*

1. **GROUND ON DETERMINATION OF ARMS LENGTH PRICE & ADJUSTMENT MADE THEREON**

*The learned Assessing Officer has erred in;*

- i) *making an adjustment to the extent of Rs.5,22,13,394/- towards the arms length price on the basis of the order of the Transfer Pricing Officer U/s.92CA of the Act, dated 30.10.2019, the direction of the Dispute Resolution Panel, dated 16.02.2021 and the consequential order giving effect passed by the TPO on 24.03.2021.*
- ii) *not appreciating the fact that, the DRP has erroneously upheld rejection of TP study of the appellant by the TPO despite the fact that, the alleged defects relied upon by the TPO to reject the TP study did not exist and therefore the DRP also could not have rejected the TP study and under the circumstances, the question of a fresh search process and selection of comparable did not arise.*
- iii) *not appreciating the fact that, the DRP has not accepted the specific objection of the appellant that, the turnover of the company should also be a criteria and ignoring the ratios laid down by various tribunals and high courts has retained the giants in the field such as **M/s.Larson & Toubro Infotek Ltd, M/s.Infosys Ltd, Cybage Software Ltd, Nihilent Ltd, Persistent Systems ltd, Thirdware Solutions Ltd, Aspire systems (India) Pvt Ltd AND Tata Elxsi Ltd** as a part of the final list of comparables.*
- iv) *not appreciating the fact that, if not on the size of turnover but on the ground that, the companies M/s.Larson & Toubro Infotek Ltd and M/s.Infosys Ltd were functionally different to the appellant in as much as the companies were substantially involved in the activity of software development, were in possession of intangibles such as IPR, were incurring substantial expenditure on research & development activities and under the circumstances, could not have been selected as comparable at all to the appellant company, since the appellant company is only a captive service provider, providing services only to its AE.*
- v) *not appreciating the fact that, the DRP has ignored the position of law laid down by the Hon'ble Tribunal in the case of the appellant for the A.Ys.2011-12 & 2012-13 in its orders in ITA Nos.IT(TP)A No.314/Bang/2016 & IT(TP)A No.1842/Bang/2016 that, the volume of turnover has to be a criteria in selecting comparables and for the said years has deleted companies of extra ordinarily high turnover from the list of comparables.*
- vi) *not appreciating the fact that, the DRP has not considered the objection that, out of the sixteen comparable selected by the TPO in his order U/s.92CA(3) of the act, furnished details collected U/s.133(6) of the act, only in respect of the following comparable and hence, the other comparable could not have been a*

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*part of the final list of comparable, since there is no opportunity of hearing and hence selecting such comparable would be against the principals of natural justice.*

- (1) Tata Elxsi Ltd*
- (2) Persistant Systems Ltd*
- (3) Infobeans Technologies Ltd*
- (4) Thirdware Solution Ltd*
- (5) Cybage Software Ltd*

- vii) not appreciating the fact that, the DRP has ignored the objection that the, TPO before passing the order U/s.92CA(3) of the act, did not furnish the working of PLI in respect of M/s.Tata Elxsi Ltd and hence, there was no opportunity to rebut and under the circumstances, the said comparable could not have been a part of final comparables.*
- viii) not appreciating the fact that, the DRP could not have rejected the comparable M/s.Sagar Soft India Ltd for the alleged reason that, there was persistent loss ignoring the fact that, for the F.Y.2015-16 the said company had reported profits and hence, there is no issue of persistent loss.*
- ix) not appreciating the fact that, the DRP could not have rejected the comparable M/s.8k Miles Software Solutions Ltd for the alleged reason that, no segmental data was available ignoring the fact that, it was within the powers of the TPO to call for such information under the provisions of section 133(6) of the act, before rejection and in the absence of any such effort the comparable could not have been rejected.*
- x) not appreciating the fact that, in the case of the comparable M/s.ASM Technologies Ltd the DRP has given specific directions to verify the claim of the appellant that the company does not fail the export turnover criteria and the TPO has passed the final order on 24.03.2021 without any verification and rejecting the comparable, thereby the order of the TPO is bad in law and not as per the directions of the DRP.*
- xi) not appreciating the fact that, the DRP has not considered specific objections in regard to the issues such as functionality, diversified activity, presence of intangibles, peculiar economic circumstances etc., in respect of each of the comparables selected by the TPO including **Integ Software Pvt Ltd and Infobeans Technologies Ltd** and rejecting objections with general unsubstantiated remarks. Details of company wise objections included in the Annexure A.*
- xii) not appreciating the fact that, the DRP has issued directions that, no working capital adjustment be allowed and the justification for such directions are improper and not tenable under law.*

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- xiii) *making an adjustment to the extent of Rs.14,79,713/- towards the arms length price on the basis of the order of the Transfer Pricing Officer U/s.92CA(3) of the Act, in the order dated 24.03.2021 giving effect to the directions of the DRP in the order dated 16.02.2021, towards the interest receivable on alleged delay in recovery of receivables ignoring the fact that, there was no such delay in recovery.*
- xiv) *making an adjustment to the extent of Rs.14,79,713/- towards interest receivable on alleged delay in recovery of receivables ignoring the fact that, the DRP specifically directed that, the details of realization with reference to each of the invoices were to be produced before the Assessing Officer/Transfer Pricing Officer who were directed to compute interest for the period of delay and in the absence of any such opportunity provided to produce the details as directed no adjustment could have been made and hence the adjustments are against a directions of the DRP.*
- xv) *making an adjustment to the extent of Rs.14,79,713/- towards interest receivable on average of net receivables at an arbitrary interest rate of 5.39% with an alleged period of delay of 335 days ignoring the fact that, the receivables as on the last day of the accounting year were bills of the last of the months and hence there was no delay in recovery and therefore no interest could have been charged.*

## **2. GROUNDS RELATING TO NATURAL JUSTICE**

- i) *The learned TPO and also the DRP erred in passing an order without considering all the submissions made by the appellant and determining an adjustment towards arms length price without furnishing any justification as to why the submissions in regard to some of the comparables were not considered and rejected.*
- ii) *The learned Dispute Resolution Panel erred in ignoring the fact that, in respect of many of the comparables proposed by the TPO in the order U/s.92CA(3) of the act, the information stated to have been collected U/s.133(6) of the act, were not furnished to the appellant and under the circumstances, the order passed is bad in law and against the principles of natural justice.*
- iii) *The learned TPO has erred in passing an order U/s.92CA(3) of the act, on the basis of the results of a faulty search process in as much as information U/s.133(6) of the act, have been called for from the proposed comparables in an arbitrary manner wherein the comparables have been selected first and the information U/s.133(6) of the act, has been called for only from such comparables to justify a selection which was already concluded and the DRP has erred in confirming such search process. “*

1.1. Facts of the case are that the assessee M/s. Meritor CVS India (P) Ltd is in the business of computer radiated designing and development of commercial vehicle systems. The company is developing specific software for Associate Enterprise, which is also subsidiary of the ultimate holding company. The software developed is used in house, integrating the same with the main product. Finally, what is being marketed is the final product by the ultimate holding company. The role of the company has been that it is a contract software development support service provider.

1.2 The assessee company filed return of income for the A.Y. 2016-17 on 28.11.2016 declaring total income of **Rs.2,34,69,700/-**. The company is eligible for exemption U/s.10AA of the Act and for the A.Y.2016-17 being the seventh year of claim, the eligibility is restricted to 50% of the profit on export turnover. The assessee has claimed an amount of Rs.1,63,47,895/- as exempt U/s.10AA of the act.

1.3 The company has entered into International Transactions as contemplated under the provisions of Income Tax Act and the following transactions reported:-

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(i) M/s.Meritor Heavy Vehicle Systems LLC. USA (Export of software)	317191714/-
(ii) M/s. Meritor HVS Cameri SPA (Export of Software)	68,86,622/-
(iii) M/s.Meritor Heavy Vehicle Braking Systems (UK) Ltd (Export of Software)	64,24,600/-
(iv) M/s.Meritor Heavy Vehicle Systems (Export of Software)	22,77,609/-
(v) M/s.Meritor HVS India Ltd (Computer aided designing & Development Services)	3,89,09,897/-
(vi) M/s.Meritor Inc (Management Consultancy Charges)	1,41,71,646/-
(vii) M/s.Meritor Holdings (Barbados) Ltd 28,711/- (Interest on borrowings)	
( ) M/s.Meritor Inc (Reimbursement of expenses paid)	1,28,80,083/-

1.4 The assessee adopted TNMM method to justify that the transactions are at Arm's Length.

1.5 The case was referred to TPO for determining the adjustments towards arm's length price. The TPO did not disturb the method adopted. The TPO rejected some of the comparables of the assessee and selected certain other comparables on his own and determined the following adjustments under the provisions of section 92CA(3) of the Act vide order dated 30 10.2019.

i) Revenue from software services	5,48,12,375/-
ii) Interest on alleged delay in recovery on receivables	<u>15,67,527/-</u>
	<u>5,63,79,902/-</u>

2. At the time of hearing, the assessee has not pressed ground Nos.1(i), 1(ii), 1(iv) & 1(v). Accordingly, these grounds are dismissed as not pressed.

3. Ground No.1(iii) is reproduced below:-

*“I(iii) not appreciating the fact that, the DRP has not accepted the specific objection of the appellant that, the turnover of the company should also be a criteria and ignoring the ratios laid down by various tribunals and high courts has retained the giants in the field such as **M/s.Larson & Toubro Infotek Ltd, M/s.Infosys Ltd, Cybage Software Ltd, Nihilent Ltd, Persistent Systems ltd, Thirdware Solutions Ltd, Aspire systems (India) Pvt Ltd AND Tata Elxsi Ltd** as a part of the final list of comparables.”*

3.1 In this ground, the assessee wants exclusion of the following comparables was only pressed.

- (i) L&T Infotech Ltd.
- (ii) Infosys Ltd.
- (iii) Tata Elxi Ltd.

3.2 The Ld. A.R. submitted that the turnover of assessee is only Rs.37.17 Crores, however, the turnover of these companies are as follows:-

- |                       |                    |
|-----------------------|--------------------|
| (i) L&T Infotech Ltd. | Rs.5568.05 crores  |
| (ii) Infosys Ltd.     | Rs.54,035 crores   |
| (iii) Tata Elxi Ltd.  | Rs.1041.46 crores. |

3.3 Thus, he submitted that high amount of turnover companies cannot be compared to the assessee company as assessee's turnover is very low compared to those companies. He relied on the various decisions specifically Barracuda Networks India Pvt. Ltd. in IT(TP)A No.229/Bang/2021 dated 25.10.2021.

*“12. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon’ble Delhi High Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):*

*“41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010, relying on Dun and Bradstreet’s analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-*

*“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which are (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also 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, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range*

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*and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study.”*

*42. The Assessee’s turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon’ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of comparable companies is held to correct and such action does not call for any interference.”*

*13. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:*

*17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdictional High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the*

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*order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.*

*17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).*

*14. In view of the aforesaid decision, we hold that companies listed in Sl.No.(a) to (g) of Grd.No.4 raised by the Assessee whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.”*

3.4 In view of the above order of the Tribunal, we direct the AO to exclude those high turnover companies from the list of comparables.

4. Ground No.1(vi) is reproduced below:-

*“1(vi) not appreciating the fact that, the DRP has not considered the objection that, out of the sixteen comparable selected by the TPO in his order U/s.92CA(3) of the act, furnished details collected U/s.133(6) of the act, only in respect of the following comparable and hence, the other comparable could not have been a part of the final list of comparable, since there is no opportunity of hearing and hence selecting such comparable would be against the principals of natural justice.*

- (1) Tata Elxsi Ltd*
- (2) Persistent Systems Ltd*
- (3) Infobeans Technologies Ltd*
- (4) Thirdware Solution Ltd*
- (5) Cybage Software Ltd”*

4.1 In this ground of appeal, assessee wants exclusion of following comparables on the basis of functionality:-

- (i) Tata Elxi Ltd.
- (ii) Persistent Systems Ltd.
- (iii) Infobeans Technologies Ltd.
- (iv) Thirdware Solutions Ltd.
- (v) Cybage Software Ltd.

**Tata Elxi Ltd.**

4.2 This comparable is not required to be adjudicated as we have already directed the AO/TPO to exclude this comparable from the list of comparables on the basis of turnover filter while adjudication in ground No.1(iii).

**Persistent Systems Ltd.**

4.3 The Ld. A.R. submitted that this company is functionally different with the diverged business and lack of segmental results and it is also engaged in R&D activities and existence of high brand value.

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4.8 We have heard the rival submissions and perused the materials available on record. In this case, assessee's turnover was Rs.37.17 crores as against the turnover of Persistent Systems Ltd. At Rs.147.64 crores. This company having less than turnover 10 times of the assessee's turnover and has to be considered as a comparable company. Hence, turnover filter cannot be applied to exclude this company.

4.9 On the other hand, assessee also submitted that the functionality of Persistent Systems Ltd. Is different from the assessee's company. On going through the Ld. DRP's order, we observe that M/s. Persistent Systems Ltd. was engaged in rendering product development services i.e. providing services to business enterprises to develop software products. It reported income from software services of Rs.14,232 millions and software license of Rs.238.8 millions aggregating to Rs.14,471.36 millions. Thus, the income from software license constitutes 1.65% of operating revenue. In other words, this company is predominantly engaged in the business of providing outsourced software product development services to customers across the Globe from following industries verticals, infrastructure and systems, telecom and wireless, Life Science and Health care and finance services. However, the present assessee before us is in the business of computer radiated designing and development of commercial vehicle systems. The company is developing specific software for associated enterprises. It is also subsidiary of the ultimate holding company. The software development is used enhanced integrating the same with the main produce. Finally, what is being marketed is a final product by the ultimate holding company. The role of company has been that it is a contract software development support services provider. Being so, it cannot be considered as functionally comparable to assessee.

Accordingly, on the basis of functionality, we direct the AO/TPO to exclude this company from the list of comparables.

**'Infobeans Technologies Ltd.:-**

4.10 The Ld. A.R. submitted that this company is functionally different from assessee company and the Tribunal Hyderabad bench has considered this comparable as not comparable in the case of ADP Private Ltd. In ITA Nos.227 & 228/Hyd/2021 vide order dated 3.2.2022.

4.11 On the other hand, Ld. D.R. relied on the order of Ld. DRP and submitted that the main revenue of M/s. Infobeans Technologies Ltd. was from provisions of software services and it satisfies all the filters adopted by TPO and it has to be considered as comparable.

4.12 We have heard the rival submissions and perused the materials available on record. We have carefully gone through the order cited by the Ld. A.R. in case of M/s. ADP Pvt. Ltd. cited (supra) wherein held as under:-

**7. “*Infobeans Technologies Ltd.:***

*The Id. AR of the assessee submitted that company is functionally different for the following reasons:*

- 1. It is engaged in diversified activities in the nature of custom application development, content management systems, enterprise mobility, big data analytics,*
- 2. No change in the business as compared to last year*
- 3. Leading provider of consulting technology & next generation service.*

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4. *There is abnormal increase in percentage of revenue from 35.35 crore to 62.06 crore.*
5. *It is also into IT enabled services i.e. business process management, HR and Payroll, commerce*
6. *No segmental details are available.*
- 7.1 *He relied on various decisions of ITAT including the decision in ITA No. 2233/Hyd/2018 for AY 2014-15 wherein this company is excluded as comparable.*
- 7.2 *The Ld. DR, on the other hand, submitted that this company is engaged in rendering of software services and, hence, functionally comparable to assessee company.*
- 7.3 *We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The coordinate bench of this Tribunal in ITA No. 2233/Hyd/2018 for AY 2014-15, directed the AO/TPO to exclude this company from the list of comparables for determining ALP by observing as under:*

*21. Having regard to the rival contentions and the material on record, we find that the Coordinate Bench of the Tribunal in the following case has considered similar objections of the assessee therein to direct exclusion of this company from the final list of comparables. For the purpose of ready reference, the relevant paragraph is reproduced below:*

*"18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly **reflect that** in addition to providing 'software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its*

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*associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee".*

*22. Respectfully following the same, we direct that Infobeans be excluded from the final list of comparables in this case also.*

*7.4 On perusal of the order of the coordinate bench of this Tribunal and on perusal of the financial statements of Infobeans Technologies Ltd., we observe that the company is functionally not comparable and no segmental details are available. Therefore, the coordinate bench did not consider this company as comparable in assessee's own case for AYs 2014-15 & 2015-16. Respectfully following the decision of the coordinate bench, we direct the AO/TPO to exclude this company from the final list of comparables.*

4.13 Further, the Tribunal in the case of Global Logic India Pvt. Ltd. Vs. DCIT 134 Taxmann.com 35 wherein held as under:-

*"INFOBEANS TECHNOLOGIES LTD. (INFOBEANS)*

*44. The taxpayer sought exclusion of Infobeans as a comparable again on ground of functional dissimilarity, it also being into providing services viz. software engineering services primarily in Custom Application Development (CAD), Content Management Systems, Enterprise Mobility, Big Data Analytics, UX & UI, Automation Engineering Services, as is evident from its financials, available on page 123 of the annual report paper book.*

*45. The taxpayer also brought on record profile of the Infobeans at pages 58 to 60 of the appeal memo wherein it is claimed by the Infobeans that it is providing wide range of services under four verticals i.e. services, automation, enterprise and industries and under the automation services verticals, the company is providing advanced robotic process automation services. Since Infobeans is into diversified activities it cannot be a suitable comparable vis-à-vis the taxpayer which is a routine software development services provider. Infobeans has been excluded as a comparable on account of functional dissimilarity vis-*

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*à-vis routine software development service provider by the coordinate Bench of the Tribunal in case of Pub Matic India (P) Ltd. (supra). So, in view of the matter, we order to exclude Infobeans from the final set of comparables.*

4.14 In view of the above orders of the Tribunal, we direct the AO/TPO to exclude this company from the list of comparables.

**Thirdware Solutions:-**

4.15 The Ld. A.R. submitted that margin as per order do not match margin as provided in software development PLI computation. He relied on the order of Tribunal in the case of Barracuda Networks India Pvt. Ltd. and also order of the Tribunal in the case of BORQS Software Solutions Ltd. ACIT (2021) 135 Taxmann.com 37 (Bang Trib.)

4.16 We have carefully gone through the above order of the Tribunal, wherein this comparable has been excluded on the basis of turnover filter but before us the assessee stated that it has to be excluded on the basis of non-matching of margin. In our opinion, this has to be examined by the AO/TPO. Accordingly, we remit this issue to the file of AO/TPO for fresh consideration.

**Cybage Software Ltd.**

4.17 The Ld. A.R. submitted that this company is functionally different engaged in the diversifying business activities and having super profits which cannot be compared to the assessee's case.

4.18 On the other hand, Ld. D.R. relied on the order of Ld. DRP. Ld DRP in his findings observed that on perusal of the annual

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report, as per information at page- 1,11, and 48 of the annual report, the principal business activity of the company is stated to be software development services and computer related activities. The Revenue Recognition Statement also discussed about the accounting principle adopted in recognizing revenue from software development services and not as to product sales. There is no discussion about any other revenue stream in its annual and financial statements. Further, in the various notes of the annual report, it is mentioned that the company had entire earnings from software development services. Under Segment Reporting, at p-147 of the annual report, it is mentioned that 'the company operates in a single business segment namely software development services.' The independent Audit Report specifies that the company is engaged in software services and does not hold any inventory. There is no reference in the annual report to indicate that this company is engaged in ITES services or any other activity. The assessor also could not point to any such information in the annual report. In view of the categorical information in the annual report that the company is engaged in software development services, hold that this company is software service provider and functionally comparable to the assessee.

4.19 It was contended that the company is engaged in functionally dissimilar activities and ITES activities with reference to certain information said to be available in the company's website. As already discussed at part 2.9.2 above, we note that the information put in website cannot be given much credence, as they are merely toward looking statements with the motive of advertisement and other promotion. Besides, such information pertains to the activities of the entire group. Further,

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the information in website arc dynamic and cannot be related to a particular period. The information in the website in the-year 2018-19 or 2019-20 will show the functionality for the current period, which may be very much different from that existing in 2015-16, the year scrutiny. There is no way to verify whether the said information have relevance for the year under scrutiny. Therefore, as a principle. this [Act strictly goes by the information in the annual report, which is based on audited financial statements, which categorical mentions that the. company is engaged in software services. Therefore, we reject the pleas raised arid uphold the selection of this company as functionally comparable to the assessee.

4.20 Ld. DRP was of the view that high profitability as such cannot be criteria for exclusion of companies, when it is found to be functionally comparable in terms of Rule 10B. The Hon'ble ITAT Spl. Branch Mumbai in the case of Maersk Global Centres (India) Private Limited held that comparables with high profit margins cannot be discarded per se and it has to be examined whether the profit margin was on account of normal business conditions or not. Such a view was earlier taken by the Bangalore ITAT in the case of 24/7 Customer.com Private Limited holding that high profit companies need not be excluded as the Indian TP regulations adopt the Arithmetic mean, for determining the ALP.

4.21 We have heard the rival submissions and perused the materials available on record. The main contention of the Ld. A.R. is that this assessee is having super profit in immediate two financial years and also having huge turnover of Rs.722.25 crores in the assessment year under consideration. In our opinion, these facts to be examined at the end of AO/TPO. Accordingly, the issue remitted to the AO. If the functionality of the Cybage Software Pvt. Ltd. is not

similar to the assessee and if the turnover was Rs.722.25 crores in the assessment year under consideration, it has to be excluded on any one of the above reasons. The issue is remitted back to the file of AO/TPO for fresh consideration.

5. Ground No.1(vii) is reproduced as under:-

*“I(vii) not appreciating the fact that, the DRP has ignored the objection that the, TPO before passing the order U/s.92CA(3) of the act, did not furnish the working of PLI in respect of M/s.Tata Elxsi Ltd and hence, there was no opportunity to rebut and under the circumstances, the said comparable could not have been a part of final comparables.”*

5.1 Ground No.1(vii) is infructuous in view of our finding in earlier grounds on these comparables.

6. Ground No.1(viii) is reproduced as under:-

*“I(viii) not appreciating the fact that, the DRP could not have rejected the comparable M/s.Sagar Soft India Ltd for the alleged reason that, there was persistent loss ignoring the fact that, for the F.Y.2015-16 the said company had reported profits and hence, there is no issue of persistent loss. “*

6.1 In this ground assessee seeks exclusion of Sagar Soft India Ltd. According to the Ld. A.R., this company is having persistent loss and only in assessment year 2016-17, it was declared profit.

6.2. We have heard the rival submissions and perused the materials available on record. If there is loss consistently in immediate previous 3 years then only it would have excluded. On the other hand, if the loss is only in one assessment year out of 3 immediate previous assessment years, this company is to be considered as comparable. Accordingly, this issue is remitted to the AO/TPO for fresh consideration.

7. Ground No.1(ix) is reproduced as under:-

*“I(ix) not appreciating the fact that, the DRP could not have rejected the comparable M/s.8k Miles Software Solutions Ltd for the alleged reason that, no segmental data was available ignoring the fact that, it was within the powers of the TPO to call for such information under the provisions of section 133(6) of the act, before rejection and in the absence of any such effort the comparable could not have been rejected.”*

7.1 The Ld. A.R. wants to include M/s. S.K. Mile Software Solutions Pvt. Ltd. and stated that the segmental data may be obtained by TPO after calling information u/s 133(6) of the Act. We accede to the request of assessee’s counsel and set aside the matter to the file of AO/TPO to procure the relevant data by issuing notice u/s 133(6) of the Act and decide it afresh. Ordered accordingly.

8.. Ground No.1(x)is reproduced as under:-

*“I(x) not appreciating the fact that, in the case of the comparable M/s.ASM Technologies Ltd the DRP has given specific directions to verify the claim of the appellant that the company does not fail the export turnover criteria and the TPO has passed the final order on 24.03.2021 without any verification and rejecting the comparable, thereby the order of the TPO is bad in law and not as per the directions of the DRP.”*

8.1 In this ground, with regard to the non-following the direction of Ld. DRP regarding comparable company, M/s. ASM Technology Ltd., wherein Ld. DRP has given specific direction to verify the claim of the assessee that company does not fail in export turnover criteria and the TPO has passed the final order dated 24.3.2021 without any verification rejecting the comparable. Hence, in our opinion, the issue has to be reconsidered by TPO in accordance with the direction given by the Ld. DRP. Ordered accordingly.

9. Ground No.1(xi)is reproduced as under:-

*“I(xi) not appreciating the fact that, the DRP has not considered specific objections in regard to the issues such as functionality, diversified activity, presence of intangibles, peculiar economic circumstances etc.,*

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*in respect of each of the comparables selected by the TPO including **Integ Software Pvt Ltd and Infobeans Technologies Ltd** and rejecting objections with general unsubstantiated remarks. Details of company wise objections included in the Annexure A.”*

9.1 The grievance of the Ld. A.R. is with regard to not considering submission of assessee by Ld. DRP with regard to these comparables though they are functionally different. This ground is general in nature which do not require any adjudication.

10. Ground Nos. 1(xii), (xiii), (xiv) & (xv) are inter-related which are reproduced as under:-

*I(xii) not appreciating the fact that, the DRP has issued directions that, no working capital adjustment be allowed and the justification for such directions are improper and not tenable under law.*

*I(xiii) making an adjustment to the extent of Rs.14,79,713/- towards the arms length price on the basis of the order of the Transfer Pricing Officer U/s.92CA(3) of the Act, in the order dated 24.03.2021 giving effect to the directions of the DRP in the order dated 16.02.2021, towards the interest receivable on alleged delay in recovery of receivables ignoring the fact that, there was no such delay in recovery.*

*I(xiv) making an adjustment to the extent of Rs.14,79,713/- towards interest receivable on alleged delay in recovery of receivables ignoring the fact that, the DRP specifically directed that, the details of realization with reference to each of the invoices were to be produced before the Assessing Officer/Transfer Pricing Officer who were directed to compute interest for the period of delay and in the absence of any such opportunity provided to produce the details as directed no adjustment could have been made and hence the adjustments are against a directions of the DRP.*

*I(xv) making an adjustment to the extent of Rs.14,79,713/- towards interest receivable on average of net receivables at an arbitrary interest rate of 5.39% with an alleged period of delay of 335 days ignoring the fact that, the receivables as on the last day of the accounting year were bills of the last of the months and hence there was no delay in recovery and therefore no interest could have been charged.*

10.1 After hearing both the parties, we are of the opinion that similar issue came up for consideration in the case of MetricStream Infotech (India) Pvt. Ltd. In IT(TP)A No.2347/Bang/2019 for the assessment year 2015-16 dated 24.4.2020, wherein it was observed as under:

*17. Ground No.7 alleged by assessee against adjustment of notional interest on outstanding receivables.*

*From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their respective customers. Further Ld.AR submitted that working capital adjustment undertaken by assessee includes the adjustment regarding the receivables and thus receivables arising out of such transaction have already been accounted for. Alternatively, he submitted that working capital subsumes sundry creditors and therefore separate addition is not called for.*

*17.1. Ld.TPO computed interest on outstanding receivables at the rate equal to 4.3087% on receivables that exceeded **60 days**. It has been argued by Ld.AR that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.*

*17.2. Ld.AR placed reliance on decision of Delhi Tribunal in Kusum Healthcare Pvt.Ltd vs. ACIT reported in (2015) 62 [Taxmann.com](#) 79, deleted addition by considering the above principle, and subsequently Hon'ble Delhi High Court in Pr. CIT vs. Kusum Health Care Pvt. Ltd. (2017) 398 ITR 66 (Del), held that no interest could have been charged as it cannot be considered as international transaction. He also placed reliance upon decision of Delhi Tribunal in case of Bechtel India vs DCIT reported in (2016) 66 [taxman.com](#) 6 which subsequently upheld by Hon'able Delhi High Court vide order dated 21/07/16 in ITA No. 379/2016, also upheld by Hon'ble Supreme Court vide order dated 21/07/17, in CC No. 4956/2017.*

*17.3. It has been submitted by Ld.AR that outstanding receivables are closely linked to main transaction and so the same cannot be considered as separate international transaction. He also submitted that into company agreements provides for extending credit period with mutual consent and it does not provide any interest clause in case of delay. He also argued that the working capital adjustment takes into account the factors related to delayed receivables and no separate adjustment is required in such circumstances.*

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17.4. On the contrary Ld.CIT.DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of the contentions, he placed reliance on decision of Delhi Tribunal order in *Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 inserted Explanation to Section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

(i) the expression "international transaction" shall include—  
.....(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;....’ .

17.5. Ld.CIT DR submitted that expression ‘debt arising during the course of business’ refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of Explanation with retrospective effect covers assessment year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to decision of Delhi Tribunal in *Ameriprise (supra)*, in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to discussion in said order, it was stated that Hon’ble Delhi Bench in this case noted a decision of the Hon’ble Bombay High Court in the case of *CIT vs. Patni Computer Systems Ltd., (2013) 215 Taxmann 108 (Bom.)*, which dealt with question of law:

“(c) `Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?’”

17.6. Ld.CIT DR submitted that, while answering above question, Hon’ble Bombay High Court referred to amendment to section 92B by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside view taken by Tribunal, Hon’ble Bombay High Court restored the issue to file of Tribunal for fresh decision in light of legislative amendment. It

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*was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has to be determined by Ld.TPO. In so far as charging of rate of interest is concerned, he relied on decision of the Hon'ble Delhi High Court in CIT vs. Cotton Naturals (I) Pvt. Ltd (2015) 276 CTR 445 (Del) holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.*

*17.7. We have perused the submissions advanced by both the sides in the light of the records placed before us. This Bench referred to decision of Special Bench of this Tribunal in case of Special Bench of ITAT in case of Instrumentation Corpn. Ltd. v. Asstt. DIT in ITA No. 1548 and 1549 (Kol.) of 2009, dated 15-7-2016, held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per explanation to section 92 B of the Act. We also perused decision relied upon by Ld.AR. In our considered opinion, these are factually distinguishable and thus, we reject argument advanced by Ld.AR.*

*17.8. Alternatively, it has been argued that in TNMM, working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and lones and advances to associated enterprise would amount to double taxation. Hon'ble Delhi Tribunal in case of Orange Business Services India Solutions Pvt. Ltd. vs. DCIT in ITA No. 6570/Del/2016 vide its order dated 15.2.2018 has observed that: "There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon'ble Delhi High Court in Avenue Asia Advisors Pvt. Ltd. vs. DCIT (2017) 398 ITR 120 (Del). Following the earlier decision in Kusum Healthcare (supra), it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working capital of the assessee. Applying the decision in Kusum Health Care (supra), the Hon'ble High Court directed the TPO to study the impact of the receivables appearing in the accounts of the assessee; looking into the various factors as to the reasons why the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions."*

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*17.9. In view of the above, we deem it appropriate to set aside this issue to Ld.AO/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in accordance with law.*

*Accordingly these ground raised by assessee stands allowed for statistical purposes.*

10.2 In view of the above order of the Tribunal, we remit the issue to the file of AO/TPO on similar lines. This issue is allowed for statistical purposes.

11. Ground Nos.2 & 3 are general in nature which does not require any adjudication.

12. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 29<sup>th</sup> Jul, 2022

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 29<sup>th</sup> Jul, 2022.  
VG/SPS

Copy to:

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

By order

**Asst. Registrar,  
ITAT, Bangalore.**