

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, PUNE**

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER  
AND  
G.D. PADMAHALI, ACCOUNTANT MEMBER**

**ITA No.553/PUN/2020**

With Cross Objection **CO No. 18/Pun/2022**

(Assessment Year:2010-11)

The Income Tax Officer-2(4)  
4th Floor, B-Wing, PMT Bldg.  
Shankarsheth Road  
Swargate, Pune 411037

M/s. Nethawk Networks  
India P. Ltd.  
Vs. 604, Tower S-4, Cyber City  
Magarpatta City, Hadapsar  
Pune 411013

PAN –AACCN0994P

**Appellant**

**Respondent**

Assessee by: Shri Nikhil Patakh  
Revenueby:Shri Piyush Kumar Singh Yadav

Date of Hearing: 23.08.2022  
Date of Pronouncement: 29.08.2022

**ORDER**

**Per S.S. Godara, JM**

This Revenue’s appeal ITA 553/Pun/2020 and assessee’s cross objection CO No. 18/Pun/2020 for AY 2010-11 arise against the CIT(A) 13, Pune’s order dated 20.08.2017 passed in case No. PN/CIT (A)-13/DCIT(OSD)-3(2), Mumbai/10014/2018-19/55, involving proceedings under Section 143(3) r.w.s. 92CA(3) of the Income Tax Act, 1961 (in short the Act).

2. To be precise enough, we note at the outset that the Revenue’s substantive grounds raised in its appeal ITA No. 553/Pun/2020 challenge correctness of the lower appellate findings inter-alia excluding M/s. Bodhtree Consulting Ltd. and Kals Information Systems Ltd. and including M/s. Quintegra Solutions Pvt. Ltd. and CG-VAK Software & Exports Ltd.; respectively, from the array of comparables thereby rejecting the Transfer Pricing Officer (TOP)’s stand to the contrary. The assessee’s cross objection CO No. 18/Pun/2022, on the other hand, pleads that the learned lower

authorities have erred in law and facts in excluding M/s. Thirdware Solutions Pvt. Ltd. from the list of comparables in issue.

3. We have given our thoughtful consideration to the vehement rival submissions reiterating the respective stands of both the parties. Suffice to say, the instant “lis” hardly requires us to delve the relevant factual matrix at length since the sole substantive issue involved herein is that of the alleged improper acceptance and rejection of the foregoing five comparable entities; as the case may be, in this taxpayer’s segment of provision for software development services.

4. It next emerges that the CIT (A)’s detailed discussion in paras 4.2 & 4.3 and 4.5 to 4.5.2 of his order excludes M/s. Bodhtree Consulting Ltd. and M/s. Kals Information Systems Ltd. based on the tribunal’s coordinate bench’s direction in AY 2008-09 dated 06.11.2013 involving assessee’s appeal ITA No. 6733/Mum/2012 rejecting the Revenue’s contentions regarding the first and foremost entity herein M/s. Bodhtree Consulting Ltd. as follows:-

*“21. On this comparable, case of the assessee is that the company is not a good comparable in view of the software products produced by the company. As such, no segmental data is adequately available too.*

*22. On the other hand, Ld DR filed a copy of the financial statement and argued vehemently stating that this company is not engaged in the software products. In this regard, Ld DR relied on the note no.3, relating to the relating to the revenue recommendation in Schedule 12, note no.5 relating to the segmental information etc to mention that the company is engaged in the software development only. However, the assessee argued vehemently stating that this company is engaged in the software based products. Further, Ld Counsel mentioned that the said company was already examined and was held as product based company by the TPO in the TP study of other case and the TPO cannot take different stand in this case. In this regard, we have perused the para 29 of the order of the Tribunal in the case of M/s. Wills Processing Services (I) P Ltd (supra) wherein it was mentioned that the TPO described this company is engaged in the business of software products, not the software development services. Relevant portions from the said para 29 of the order of the Tribunal is reproduced here under:*

*“29.1 The Id Sr Counsel for the assessee has submitted that this company is engaged in the software products. He has referred the TPO order and submitted that in the profile of the comparables selected by the TPO itself has mentioned the business of the assessee is in software products. The Id AR has referred the objections raised by the*

assessee before the TPO at page 286 of the paper book and submitted that the assessee brought this fact that this company is engaged in providing open and end to end web solutions, software consultancy, design and development of software, using the latest technologies. Further, the company has identified only one segment i.e software development. Therefore, the Id AR has submitted that this company is functionally not comparable with the assessee and consequently should be excluded from the comparables.

29.2 On the other hand, the Id DR has filed the information collected u/s 133(6) of the I T Act and submitted that as per this information, this company has revenue from ITES activity to the extent of Rs. 2,94,85,528/-Therefore, this company is a good comparable having functional similarity.

29.3 .....

30. We have considered the rival submissions as well as the relevant material on record. The details filed by the Id DR before us has been obtained by the TPO at Hyderabad and not by the TPO of the assessee in the present case. It is stated in the letter dated 5.2.2010 written by the Chartered Accountant of Bodhtree Consulting Ltd to the TPO Hyderabad that the company is providing data cleaning services to clients for whom it had developed the software application.....”

23. Considering the above, we are of the opinion that Bodhtree Consulting Limited is not engaged in the software development services and there is no segmental data comparable. Therefore, the FAR analysis goes against the TPO/AO. Accordingly, we dismiss the argument of the Ld DR in this regard. Ex consequenti, the AO/TPO is directed to exclude the same from the list of final comparables for working out the arithmetic mean.”

5. The factual position is very much similar regarding the second entity herein M/s. Kals Information System Ltd. as follows: -

“26. In this regard, Sri Lohia, Ld Counsel for the assessee argues that this company is also engaged in development of software and software products and no segmental details are available.

27. On the other hand, the case of the Revenue is that the revenues on account of software development is 2.05 Crs and there is no breakup for the same to know the revenue’s for software services and the software products. Ld DR brought our attention to the details under the head “inventories” and mentioned that Work in Progress is NIL for the period ending March, 2008; but the fact is that there are no segment details relating to software products out of the segmental information under the head “application in software”. Considering all the information available in public domain, we are of the opinion that this case cannot be considered as a good comparable. As such, the fact that the company is producing the ERP software products called Shine, the internationally proven ERP software and other software products called Docuflo (Document Management Software) etc are brought revenue to the

*assessee in the year under consideration. Therefore, considering the absence of data as well as the unfavourable FAR analysis to the TPO, this case cannot be considered as comparable. We direct the AO to exclude the same from the list of comparables.”*

6. Mr. Yadav vehemently argued during the course of hearing that the TPO's 92CA(3) order in the issue dated 29.11.2013 had rightly included both these entities having operating margin of 29.07% and 34.41%, respectively as against 11.86% only declared at the taxpayer's behest. He further referred to assessee's twin paper books pages 249 and 254 (regarding M/s. Bodhtree Consulting Ltd.) and pages 285 and 287 (relating to M/s. Kals Information Systems Ltd.) that these twin entities had indeed derived revenue from provision for software development services only.

7. All these Revenue's arguments failed to evoke our concurrence. This is for the reason that not only the learned coordinate bench's findings stand upheld in the hon'ble jurisdictional high court's decision PCIT v. Barclays Technology Centre India Pvt. Ltd. (2018) 409 ITR 138/ 305 CTR 193 /171 DTR 58 (Bom.) (HC) but also the corresponding financials referred at its behest hardly prove M/s. Bodhtree Consulting Ltd. and M/s. Kals Information Systems Ltd. as engaged in the very segment of provision for software development services. Faced with this situation, we adopt judicial consistency to confirm the CIT (A)'s findings under challenge regarding exclusion of these twin entities from the array of comparables.

8. Mr. Pathak at this stage invited our attention to the assessee's computation that its PLI of 11.86% (supra) falls within  $\pm 5\%$  tolerance mark of the arithmetic mean coming to 13.57% under Section 92C(2) of the Act 2<sup>nd</sup> proviso in light of our adjudication on the foregoing issue. This clinching plea has gone unrebutted from the Revenue side. We thus conclude that Revenue's twin substantive grounds involving M/s. Quintegra Solutions Pvt. Ltd. and M/s. CG-VAK Software & Exports Ltd. as well taxpayer's cross objection seeking inclusion of M/s. Thirdware Solutions Ltd. (supra) stand rendered academic. Ordered accordingly.

9. This Revenue's appeal ITA No. 553/Pun/2020 is dismissed and the assessee's cross objection CO No. 18/Pun/2022 is dismissed as not pressed in above terms.

A copy of this common order be placed in the respective case files.

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

Sd/-  
**(G.D. Padmahali)**  
**Accountant Member**

Sd/-  
**(S.S. Godara)**  
**Judicial Member**

Pune, Dated: 29<sup>th</sup> August, 2022

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A) -13, Pune
4. The Pr.CIT-2, Pune
5. The DR, "C" Bench, ITAT, Pune

*By Order*

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*Assistant Registrar*  
*ITAT, Pune Benches, Pune*

n.p.

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	25.08.2022		Sr. PS/PS
2	Draft placed before author	25.08.2022		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			