

**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. 220/Bang/2021
Assessment Year : 2016-17

M/s. Citrix R&D India Pvt. Ltd., Prestige Dynasty, Ground Floor, 33/2, Ulsoor Road, Bangalore – 560042. PAN: AABCN3639C	Vs.	The Deputy Commissioner of Income Tax, Circle – 2(1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sumit Khurana, CA
Revenue by	:	Shri M. Mathivanan, CIT-DR

Date of Hearing	:	04-07-2022
Date of Pronouncement	:	25-08-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the assessment order dated 30/03/2021 passed by the National e-Assessment Centre, Delhi relating to Assessment Year 2016-17 on following grounds of appeal:

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

1. That the order passed by the Learned AO to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.

Transfer Pricing -

2. That the National e-Assessment Centre, Delhi / Deputy Commissioner of Income Tax, Circle 2(1)(1), Bangalore ("Assessing Officer" or "Learned AO") and the Dispute Resolution Panel - 1 ("Learned Panel" or "Learned DRP")

erred in upholding the rejection of Transfer Pricing ('TP') documentation by the Deputy Commissioner of Income tax, Transfer Pricing — Range 1(1)(2), Bangalore (Teamed TPO) and in upholding the adjustment to the transfer price of the Appellant in respect of Software Development services ('SWD') & Information Technology enabled services ('ITeS') segments.

3. That on the facts and circumstances of the case, the Learned TPO along with the Learned AO, pursuant to the directions issued by the Learned Panel, erred in rejecting the comparability analysis in the TP documentation undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962, ('the Rules') and also erred in rejecting companies functionally akin to the Appellant while performing the comparability analysis.

4. That on the facts and in the circumstances of the case, the Learned Panel and the Learned AO erred in upholding the Learned TPO's approach of determining the arm's length price for the provision of SWD services and ITeS of the Appellant by conducting a fresh comparability analysis by rejecting certain filters applied by Appellant in the TP documentation and applying additional / modified filters.

5. The Learned TPO along with the Learned AO in pursuance of the directions of the Learned Panel erred in law and on facts in not providing the Working Capital Adjustment to the Appellant.

6. The Learned TPO along with the Learned AO in pursuance of the directions of the Learned Panel erred in law and on facts in not providing Risk Adjustment and thus ignored the limited risk nature of the services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when full-fledged entrepreneurial companies are selected as comparables.

7. The Learned AO while passing the final AO order pursuant to the I)RP directions erroneously computed incorrect margin for various comparable companies in SWD and ITeS segments.

8. The Learned AO in pursuance of the directions of the Learned Panel inadvertently erred in computing the relief

to the Arm's length price much in deviation to the relief granted by the Panel, under the ITeS segment.

9. The Learned TPO along with the Learned AO in pursuance of the directions of the Learned Panel erred in law and on facts in including the following companies as comparable to the Appellant:

Software Development Services Segment-

- a) Inteq Software Private Limited*
- b) Larsen & Turbo Infotech Limited*
- c) Nihilent Technologies Limited*
- d) Persistent Systems Limited*
- e) Infobeans Technologies Limited*
- f) Aspire Systems (India) Private Limited*
- g) Infosys Limited*
- h) Thirdware Solution Limited*
- i) Cybage Software Private Limited*

II. IT enabled Services Segment-

- a) Tech Mahindra Business Services Limited*
- b) Infosys BPM Limited*
- c) SPI Technologies India Private Limited*
- d) Eclerx Services Limited*

10. The Learned TPO along with the Learned AO in pursuance of the directions of the Learned Panel erred in law and on facts in excluding the following companies as comparable to the Appellant:

I. Software Development Services Segment-

- a) Akshay Software Technologies Limited*
- b) Sagar Soft India Limited*
- c) Sasken Communication Technologies Limited (Segmental)*
- d) Maveric Systems Limited*
- e) InfoMile Technologies Limited*
- f) Evoke Technologies Limited*
- g) Harbinger Systems Private Limited*
- h) Celstream Technologies Private Limited*
- i) Isummation Technologies Private Limited*
- j) Synfosys Business Solutions Limited*
- k) OnjectOne Information Limited*
- l) Care Risk Solutions Private Limited*

II. IT enabled Services Segment-

- a) Sundaram Business Services Limited*
- b) Informed Technologies India Limited*
- c) ACE Software Exports Limited*
- d) Allsec Technologies Limited*
- e) Jindal Intellicom Private Limited*
- f) Cosmic Global Limited*

- g) Suprawin Technologies Limited*
- h) Cyfuture India Private Limited*
- i) ACE BPO Services Private Limited*

11. The Learned TPO has erred in not considering the following comparables which are functionally comparable to the Appellant and pass all the filters as adopted by the Learned TPO -

I. Software Development Services Segment-

- a) Yudz Solutions Private Limited*
- b) E-Zest Solutions Limited*
- c) Benchmark IT Solutions India Private Limited*
- d) Smartcloud Infoservices Private Limited*

II. IT enabled Services Segment-

- a) Hello Information Services Private Limited*
- b) Digicall Global Private Limited*

Other than Transfer Pricing -

12. That the Learned DRP erred in confirming the action of the Learned AO in disallowing deduction claimed under section 35AC and 80G of the Act amounting to INR 7,50,000.

13. That the Learned AO & Learned DRP failed to appreciate the fact that no restriction is imposed on claiming deduction under section 35AC and 80G of the Act provided the payment is made to eligible entities listed in section 35AC and 80G of the Act.

14. That the Learned AO & Learned DRP failed to appreciate the fact that the obligations to incur expenditure on CSR activities flows from the Companies Act, 2013 which has no linkage with section 35AC and 80G of the Act.

15. On the facts and in the circumstances the Learned AO erred in levying interest under section 234A of the Act amounting to INR 43,54,634 without giving due consideration to the fact that the return of income has been filed within the due date as specified under section 139(1) of the Act.

16. On the facts and in the circumstances the Learned AO erred in levying interest under section 234B of the Act amounting to INR 13,06,39,020.

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or

produce further documents before or at the time of hearing of this Appeal.”

Brief facts of the case are as under:

2.1 The assessee is a subsidiary of Citrix Systems Inc., USA. The Group Citrix Group develops market, sells and supports comprehensive application delivery and management software that enables the effective and efficient enterprise-wide deployment and management of applications. In addition, the products aim to enable organizations to deploy and manage certain applications without regard to location or type of client hardware platforms. The assessee filed its return of income for the A.Y. 2016-17 on 30/11/2016 declaring total income of Rs.65,08,91,720/-. Subsequently, the case was selected for scrutiny. Statutory notice u/s 143(2) of the Act along with notice u/s 142(1) were issued and served on the assessee.

2.2 The Ld.AO noted that, during the F.Y. 2015-16, the assessee company had international transactions as per Section 92 of the Income-tax Act, 1961. According to Section 92CA of the Income-tax Act, 1961, the case was referred to the Transfer Pricing Officer in order to determine the Arm's Length Price after obtaining necessary approval. The Ld.TPO observed that the assessee had following international transaction with its AE for the year under consideration:

Sl. No	Particulars	Amount (in INR)
1.	Provision for software development services	353,73,66,567
2.	Provision of IT enabled services	110,76,89,935
3.	Cost reimbursement by Citrix R&D India to Citrix group companies	3,90,30,428
4.	Cost reimbursement by Citrix group companies to	13,51,19,065

Sl. No	Particulars	Amount (in INR)
	Citrix R&D India	
5.	Payment of interest on ECB- 3 month LIBOR	76,43,107
6.	Payment of interest on ECB- 6 month LIBOR	75,63,742

2.3 The Ld.TPO noted that the assessee used TNMM as the most appropriate method and OP/TC as PLI to compute its margin under SWD and ITES segment. The assessee computed its margin at 15.29% for SWD segment and 13.31% for ITES segment. The assessee used following comparables under both the segments having

SWD Segment:

Sl.No.	Company Name	Weighted Average % OP/OC
1	Kals Information System	0.06%
2	Akshay Software Technologies Limited	1.01%
3	Sagar Soft India Limited	1.17%
4	Accel Frontline Ltd. (Seg.)	3.53%
5	Sasken Communication Technologies Limited (Segmental)	6.98%
6	Maveric Systems Limited	9.46%
7	Mudumuru Systems Limited	9.66%
8	CG-VAK Software & Exports Limited	10.91%
9	Infomile Technologies Ltd.	13.97%
10	Cigniti Technologies Ltd.	17.57%
11	R S Software (India) Limited	20.65%
12	R Systems International Limited (Seg.)	21.26%
13	SQS India BFSI Limited (formerly Thinksoft Global Services Ltd.) (Consolidated)	22.07%
14	Larsen & Toubro Infotech Limited	22.12%
15	Infobeans Technologies Limited	28.75%
16	Kellton Tech Solutions Ltd.	29.23%
	35 th Percentile	9.46%
	Median	12.44%
	65 th Percentile	20.65%

ITES Segment:

<u>Sl.No.</u>	<u>Company Name</u>	<u>Weighted Average OP/OC</u>
1	Sundaram Business Services Limited	-4.98%
2	Hartron Communications Limited (Seg.)	-4.68%
3	Informed Technologies India Limited	1.36%
4	ACE Software Exports Ltd.	4.85%
5	Allsec Technologies Ltd.	5.05%
6	Crystal Hues Limited	7.40%
7	Jindal Intellicom Private Limited	11.15%
8	Cosmic Global Limited	13.29%
9	Suprawin Technologies Ltd.	17.35%
10	R Systems International Limited (Seg.)	17.70%
11	Tech Mahindra Business Services Ltd.	23.97%
12	Ultramarine & Pigments Ltd. (Seg.)	24.35%
13	Datamatics Financial Services Ltd.	29.81%
14	Infosys BPO Limited	29.89%
35 th percentile		5.05%
Median		12.22%
65 th percentile		17.70%

2.4 As the 35th percentile of the comparables under both the segment was within +/- 5% range, the assessee concluded its transaction under SWD and ITES segment to be at arms length.

Dissatisfied with the approach by the assessee the Ld.TPO applied following filters:

Filters applied by the TPO	
1.	Companies whose data is not available for FY 2015-16 - excluded.
2.	Companies having different financial year ending (i.e., not March 31, 2015) or data of the company does not fall within 12 month period i.e., 01-04-2015 to 31-03-2016 - excluded.
3.	Companies whose income was less than Rs. 1 Crore - excluded.
4.	Companies whose software development service income is less than 75% of the total operating revenues - excluded.
5.	Companies which have more than 25% related party transactions of the sales - excluded.
6.	Companies which have export service income less than 75% of the sales - excluded.
7.	Companies with employee cost less than 25% of turnover - excluded.

2.5 The assessee furnished following additional comparables during transfer pricing proceedings:

SWD Segment:

<u>Sl.No.</u>	<u>Company Name</u>	<u>Weighted Average % OP/OC</u>
1.	Harbinger Systems Pvt. Ltd.	15.06%
2.	Evoke Technologies Pvt. Ltd.	5.13%
3.	Celestream Technologies Pvt. Ltd.	2.66%
4.	Isummation Technologies Pvt. Ltd.	3.50%

ITES Segment:

<u>Sl.No.</u>	<u>Company Name</u>	<u>Weighted Average % OP/OC</u>
1.	Bhilwara Info Technology Limited	9.13%
2.	One Touch Solutions India Private Limited	15.57%
3.	Microland Ltd. (Seg.)	13.62%

2.6 The Ld.TPO after considering the submissions, shortlisted following comparables under both the segment:

SWD Segment:

<u>Sl. No</u>	<u>Comparable Company</u>	<u>OP/OC</u>
1.	Kals Information Systems Ltd.	8.60%
2.	Rheal Software Pvt. Ltd.	14.50%
3.	Harbinger Systems Pvt. Ltd.	15.06%
4.	CG-VAK Software & Exports Ltd.	18.50%
5.	R S Software (India) Ltd.	20.87%
6.	Larsen & Tourbo Infotech Ltd.	24.83%
7.	Nihilent Technologies Ltd.	26.36%

8.	Inteq Software Pvt. Ltd.	28.20%
9.	Persistent Systems Ltd.	30.89%
10.	Infobeans Technologies Ltd.	32.42%
11.	Thirdware Solutions Ltd.	36.90%
12.	Infosys Ltd.	38.61%
13.	Aspire Systems (India) Pvt. Ltd.	39.28%
14.	Cybage Software Pvt. Ltd.	66.45%
35 th Percentile		24.83%
Median		27.28%
65 th Percentile		32.42%

ITES Segment:

<u>Sl. No</u>	<u>Comparable Company</u>	<u>OP/OC</u>
1.	Supra Technologies Ltd.	10.26%
2.	Tech Mahindra Business Services Ltd.	20.44%
3.	Infosys BPM Ltd.	26.44%
4.	SPI Technologies India Pvt. Ltd.	37.77%
5.	Eclerx Services Ltd.	56.44%
6.	Bhilware Infotechnology Limited	23.84%
7.	One Touch Solutions (India) Pvt. Ltd.	15.57%
8.	Microland Ltd. (Seg.)	13.62%
Average by TPO (S.No. 1-5)		30.27%
35 th Percentile		15.73%
Median		22.14%
65 th Percentile		26.44%

2.7 The Ld.TPO passed order u/s 92CA of the Act on 24/10/2019, and proposed TP adjustments to be made u/s 92CA to the Arm's Length Price, at Rs.51,31,30,728/- for SWD segment and Rs.16,58,20,569/- for ITES segment, being the shortfall.

2.8 On receipt of the transfer pricing order the Ld.AO passed the draft assessment order on 20/12/2019. In the draft assessment order the Ld.AO made further additions.

2.9 The Ld.AO noted that during the year under consideration, the assessee spent Rs.12,26,000/- towards CSR expenditure as per section 135 of Companies Act, 2013. It is submitted that the assessee in its return of income, disallowed the said expenditure as per explanation 2 of section 37 of the Act. Further, the CSR expenditure to the extent of Rs.10,00,000/- was made to the eligible entity registered under section 35AC/80G of the Act. The assessee thus claimed Rs.5,00,000/- under section 35AC which was contributed to Karunashraya, the receipt is placed at page 1160 of PB and Rs. 2,50,000 (being 50% of Rs. 5,00,000) under section 80G which was donated to Spastics Society of Karnataka, receipt of placed at page 1159 of the PB.

2.10 The Ld.AO disallowed the claim by holding that the payment lack voluntary act cannot be basis to disallow the deduction.

The assessee on receipt of the draft assessment order raised objection before the DRP.

The DRP upheld the comparable under the SWD segment, however under ITES segment DRP inclusion three comparables that was submitted by the assessee.

2.11 On receipt of the DRP direction the Ld.AO passed the impugned order by making transfer pricing addition in the hands of the assessee at Rs.59,94,72,979/-. The corporate tax addition proposed in the draft assessment order was also confirmed by the Ld.AO in the final assessment order.

Aggrieved by the final assessment order, the assessee filed present appeal before this *Tribunal*.

3. The Ld.AR at the outset submitted that **Ground No.1-3** are general in nature and therefore do not require any adjudication.

4. He submitted that assessee do not wish to press **Ground No.6, 8, 10 (g) partly and 10(h) partly**. He submitted that in Ground 10(h) assessee do not wish to press inclusion of following comparables:

In SWD segment, Harbinger Systems Pvt.Ltd., Synfosys Business Solutions Ltd, Onject One Information Ltd., and Care Risk Solutions Pvt.Ltd.

In ITeS segment, Sundram Business Services Ltd., Informed Technologies India Ltd., ACE Software Exports Ltd., Allsec Technologies Ltd., Jindal Intellicom Pvt.Ltd., Cosmic Global Ltd., Suprawin Technologies Limited, Cyfuture India Private Ltd., ACE BPO Services Private Ltd.

He also submitted that in Ground 10(h) in SWD- Benchmark IT Solutions India Pvt.Ltd., and in ITeS- Hello Information Services Pvt.Ltd., Digicall Global Pvt.Ltd., were sought for inclusion. He submitted that these comparables have been raised by the assessee vide Ground no.11.

The Ld.AR has filed written submissions in the form of synopsis highlighting the comparables that the assessee wish to argue for inclusion/exclusion.

Accordingly, the issue alleged in Ground No.6, 8, and comparables sought for exclusion/inclusion in 10 (g) partly and 10(h) partly not mentioned hereinabove are dismissed as not pressed.

5. Ground no.5 is in respect of non granting of WCA.

5.1 The contention of Ld.AR is that, the Ld.AO/TPO/DRP erred in not providing appropriate adjustments towards the difference in the working capital between the assessee and the companies selected as comparables. He submitted that in view of the following judgements, the assessee is entitled for working capital adjustment and prayed that the same may be granted:-

1. *Huawei Technologies India Pvt. Ltd. (AY 2012-13) IT(TP) No.1939/Bang/2017*
2. *IKA India (P) Ltd. vs. Deputy Commissioner of Income-tax (AY 12-13) IT(TP)A No.2192/Bang/2017.*
3. *Deputy Commissioner of Income-tax V. Apotex Pharmachem India (P) Ltd. in IT(TP)A No.156/Bang/2014 & 2200/Bang/2016 (AY 09-10 & 11-12).*

5.2 We have heard the submissions of both sides on this issue based on the records placed before us.

5.3 We note that, this issue has been considered by this coordinate bench of this *Tribunal* in the case of *Huawei Technologies India P. Ltd.* in *IT(TP)A No.1939/Bang/2017* dated 31.10.2018, wherein, it was held as under:

"10. The next grievance projected by the Assessee in its appeal is with regard to the action of the CIT(A) in not allowing any adjustment towards working capital differences. On this issue we have heard the rival submissions. The relevant provisions of the Act in so far as comparability of international transaction with a transaction of similar nature entered into between unrelated parties, provides as follows:

Determination of arm's length price under section 92C .

10B. (1) *For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :--*

(a) to (d).....

(e) transactional net margin method, by which,—

- (i) the net profit margin realised by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or*

- sales effected or assets employed or to be employed by 'the enterprise or having regard to any other relevant base;*
- (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;*
 - (iii) the net profit margin referred to in sub-clause (ii) arising in comparable. uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;*
 - (iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);*
 - (v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the, international transaction [or the specified domestic transaction];*

(f).....

(2) For the purposes of sub-rule (1), the comparability of an international transaction [or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:—

- (a) the specific characteristics of the property transferred or services provided in either transaction;*
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;*
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;*
- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs. of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.*

(3) An uncontrolled transaction shall be comparable to an international transaction [or a specified domestic transaction] if -

- (i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or*
- (ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.*

1. *A reading of Rule 10B(1)(e)(iii) of the Rules read with Sec.92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.*
2. *Chapters I and III of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the "TPG") contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.47-3.54 and in the Annex to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. In paragraph 2 of these guidelines it has been explained as to what is comparability adjustment. The guideline explains that when applying the arm's length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are generally compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:*
 - *None of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or*
 - *Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called "comparability adjustments."*
3. *In Paragraph 13 to 16 of the aforesaid OECD guidelines, need for working capital adjustment has been explained as follows:*

"13. In a competitive environment, money has a time value. If a company provided, say, 60 days trade terms for payment of accounts, the price of the goods should equate to the price for immediate payment plus 60 days of interest on the immediate payment price. By carrying high accounts receivable a company is allowing its customers a relatively long period to pay their accounts. It would need to borrow money to fund the credit terms and/or suffer a reduction in the amount of cash surplus which it would otherwise have available to invest. In a competitive environment, the price should therefore include an element to reflect these payment terms and compensate for the timing effect.

14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.

15. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Note that the interest rate July 2010 Page 6 might be affected by the funding structure (e.g. where the purchase of inventory is partly funded by equity) or by the risk associated with holding specific types of inventory)

16. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. The underlying reasoning is that:

- A company will need funding to cover the time gap between the time it invests money (i.e. pays money to supplier) and the time it collects the investment (i.e. collects money from customers)
- This time gap is calculated as: the period needed to sell inventories to customers + (plus) the period needed to collect money from customers — (less) the period granted to pay debts to suppliers."

14. Examples of how to work out adjustment on account of working capital adjustment is also given in the said guidelines. The guideline also expresses the difficulty in making working capital adjustment by concluding that the following factors have to be kept in mind (i) The point in time at which the Receivables, Inventory and Payables should be compared between the tested party and the comparables, whether it should be the figures of receivables, inventory and payable at the year end or beginning of the year or average of these figures. (ii) the selection of the appropriate interest rate (or rates) to use. The rate (or rates) should generally be determined by reference to the rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. The guidelines conclude by observing that the purpose of working capital adjustments is to improve the reliability of the comparables.

15. In the present case the TPO allowed working capital adjustment accepting the calculation given by the Assessee. The CIT(A) in exercise of his powers of enhancement held that no adjustment should be made to the profit margins on account of working capital differences between the tested party and the comparable companies for the following reasons:

- (i) The daily working capital levels of the tested party and the comparables was the only reliable basis of determining adjustment to be made on account of working capital because that would be on the basis of working capital deployed throughout the year.
- (ii) Segmental working capital is not disclosed in the annual reports of companies engaged in different segments and therefore proper comparison cannot be made.
- (vi) Disclose in the balance sheet does not contain break up of trade and non-trade debtors and creditors and therefore working capital adjustment done without such break up would result in computation being skewed.

- (vii) Cost of capital would be different for different companies and therefore working capital adjustment made disregarding this different based on broad approximations, estimations and assumptions may not lead to reliable results.

16. The CIT(A) also placed reliance on a decision of Chennai ITAT in the case of *Mobis India* ITA No.2112/Mds/2011 (2013) 38 [taxmann.com](#). That decision was based on the factual aspect that the Assessee was not able to demonstrate how working capital adjustment was arrived at by the Assessee. Therefore nothing turns on the decision relied upon by the CIT(A) in the impugned order. In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the Assessee or the Department to show what is the Arm's Length Price. The data available with the Assessee and the Department would be the starting point and depending on the facts and circumstances of a case further details can be called for. As far as the Assessee is concerned, the facts and figures with regard to his business has to be furnished. Regarding comparable companies, one has to fall back upon only on the information available in the public domain. If that information is insufficient, it is beyond the power of the Assessee to produce the correct information about the comparable companies. The Revenue has on the other hand powers to compel production of the required details from the comparable companies. If that power is not exercised to find out the truth then it is no defence to say that the Assessee has not furnished the required details and on that score deny adjustment on account of working capital differences. Regarding applying the daily balances of inventory, receivables and payables for computing working capital adjustment, the Delhi Bench of ITAT in the case of *ITO Vs. E Value Serve.com* (2016) 75 [taxmann.com](#) 195(Del-Trib) has held that insisting on daily balances of working capital requirements to compute working capital adjustment is not proper as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed. The Bench has also observed that that in Transfer Pricing Anal is there is always an element of estimation because it is not an exact science. One has to see that reasonable adjustment is being made so as to bring both comparable and test party on same footing. Therefore there is little merit in CIT(A)'s objection on working adjustment based on unavailable daily working capital requirements data. There is Also no merit in the objection of the CIT(A) regarding absence of segmental details available of working capital requirements of comparable companies chosen and absence of details of trade and non-trade debtors of comparable companies as these details are beyond the power of the Assessee to obtain, unless these details are available in public domain. Regarding absence of cost of working capital funds, the OECD guidelines clearly advocates adopting rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. Therefore this objection of the CIT(A) is also not sustainable.

17. In the light of the above discussion we are of the view that the CIT(A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT(A) has not found any error in the TPO's working of working capital adjustment, the working capital adjustment as worked out by the TPO has to be allowed. We may also add that the complete working capital adjustment working has been given by the Assessee and a copy of the same is at page 173 & 192 of the Assessee's paper book. No defect whatsoever has been pointed out in these working by the CIT(A). We may also further add that in terms of Rule 10B(1)(e)(iii) of the Rules, **the net profit margin arising in comparable uncontrolled transactions should be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market.** It is, not the case of the CIT(A) that differences in working capital requirements of the international transaction and the uncontrolled comparable transactions is not a difference which will materially affect the amount of net profit margin in the open market. If for reasons given by CIT(A) working capital adjustment cannot be allowed to the profit margins, then the comparable uncontrolled transactions chosen for the purpose of comparison will have to be treated as not comparable in terms of Rule 10B(3) of the Rules, which provides as follows:

"(3) An uncontrolled transaction shall be comparable to an international transaction if—

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged to paid in, or the profit arising from, such transactions in the open market; or

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences."

18. In such a scenario there would remain no comparable uncontrolled transactions for the purpose of comparison. The transfer pricing exercise would therefore fail. Therefore, in keeping with the OECD guidelines, endeavor should be made to bring in comparable companies for the purpose of broad comparison. Therefore, the working capital adjustment as claimed by the Assessee should be allowed. We hold and direct accordingly."

5.4 In view of the above, we remit the issue to the file of AO/TPO to compute the working capital adjustment after necessary examination in the light of the above observation and after allowing an opportunity of hearing to the assessee.

Accordingly this ground stands partly allowed for statistical purpose.

6. Ground No.7, is in respect of the incorrect margin computed by the Ld.AO/TPO in respect of certain comparables in both segments of SWD & ITes. It is prayed that the issue may be remitted for re-commutating correct margins in respect of following comparables:-

SWD Segment:

As most of the comparables in respect of which the assessee is seeking exclusion on functional dissimilarities, we direct the Ld.AO/TPO to correct the margin of the comparables that will be retained in the final list on order giving effect to this order.

Accordingly, this ground of appeal is allowed for statistical purposes.

7. Before we undertake the comparability analysis of the comparables sought for exclusion /inclusion, it is *sine qua non* to understand the FAR of the assessee under both SWD and ITES segment.

Functions:

SWD segment:

Citrix R&D India is not involved in the conceptualisation and design of the product / solution.

Based on customer interaction and market assessment, the AE decides the product / features to be developed. The AEs also determine the requirement analysis and functional specification of the software module to be developed by Citrix R&D India.

Based on the design and functional specifications provided by its AEs, Citrix R&D India confirms its understanding of the design and the functional specifications and requirements with the AEs before commencing the assignment.

Citrix R&D India undertakes software coding according to the functional specifications and software requirement analysis provided by its AEs. Citrix R&D India undertakes coding and documentation only for the software developed by it. During this phase, Citrix R&D India regularly interacts with its AEs and receives technical assistance, reviews and feedback on the work done. Citrix R&D India also generates and maintains documentation for the coding undertaken by it.

The AEs and Citrix R&D India jointly undertake project management for projects executed in India. The AEs provide more information (as required) in order to provide clarity in respect of the work to be performed. Citrix R&D India interacts regularly with its AEs and project tracking happens through e-mails and conference calls. This ensures close co-ordination, quality control and minimal rework in the development process. Citrix R&D India and its AEs are jointly responsible for maintaining the quality of work undertaken.

Citrix R&D India is responsible for initial / unit testing of the modules / components developed by it, to ensure that the activity undertaken by it meets the specification / requirements as agreed with its AEs.

Citrix R&D India provides only a limited assistance to its AEs in carrying out this functionality.

ITES segment:

Citrix R&D India has provided order processing services to its AEs.

Citrix R&D India carries out order processing for applications / products developed by Citrix group entities. Such order

processing work undertaken by Citrix R&D India primarily includes the following activities:

- Order gathering;
- Order processing; and
- Order fulfillment

Citrix R&D India has entered into an Inter-company Services Agreement (effective as of 1 April 2010) with Citrix group companies for provision of order processing services.

Salient features of the Agreement are:

- Citrix R&D India to provide order processing services (services relating to processing of orders) to Citrix Group companies
- Citrix R&D India will be compensated on a cost plus mark-up basis where cost would include its internal direct and indirect items. For this purpose 'Direct cost' includes salaries and other compensation provided to the employees. 'Indirect cost' includes other costs such as supplies, telephone charges etc.

However, in practice, the direct and indirect cost of each of the group entities party to the inter-company Agreement are pooled in and a mark-up of 5% is applied on the same.

Assets employed (Common for both segments):

Citrix R&D India procures the necessary support and relevant resources from its AEs for executing the software development activities in India.

The AEs of Citrix R&D India function as the principal / entrepreneur for its business. AEs and Citrix R&D India have entered into the service agreement for providing the IT enabled services (order processing and technical support). Citrix R&D India has not developed any intangibles in any form such as unique processes; service delivery methodologies etc. in carrying out its operations with respect to the IT enabled services. Even in the event Citrix R&D India is able to develop any such unique capabilities, the ownership rights in this with respect to such capabilities would rest with the AEs by virtue of the inter-company agreements.

The AEs are responsible for marketing their products and services worldwide. Citrix R&D India does not engage in marketing or sales of Citrix products and services and hence does not own any marketing, customer, contract and goodwill related intangibles or any brand names or trademarks.

Risks:

The key risks borne by Citrix R&D India and AEs in relation to the order processing services provided by Citrix R&D India to AEs.

Type of Risks	Order Processing Services		Technical services	Support
	Citrix R&D India	AEs	Citrix R&D India	AEs
Market risk	Limited	Yes	Limited	No
Foreign exchange risk	No	Yes	No	Yes
Service liability risk	Yes	No	No	Yes
Idle capacity risk	Yes	No	No	Yes
Credit and collection risk	No	No	No	No

Characterisation:**SWD**

Thus Citrix R&D India can be characterised as a routine software development service provider, carrying out routine functions and bearing minimal risks typically borne by a contract service providers operating in these industries.

ITES

Based on the functions, risks and asset analysis, Citrix R&D India can be characterised as a routine IT enabled service provider, bearing minimal risks typically borne by service providers operating in these industries.

8. Ground No.9 is in respect of the comparables sought for exclusion under the SWD & ITeS Segment.

The Ld.AR submitted that, the assessee seeks exclusion of following comparables under the SWD Segment:

- Inteq Software Private LTd,
- Larsen & Toubro Infotech Ltd.
- Nihilent Technologies Ltd,
- Persistent Systems Ltd.
- Tata Elxsi Ltd.
- Infobeans Technologies Ltd
- Aspire Systems (India) Pvt. Ltd.
- Infosys Ltd.
- Thirdware Solutions Ltd.
- Cybage Software Pvt Ltd.

8.1 Inteq Software Pvt. Ltd.:

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected.

The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, and that, the segmental data is not available in respect of diverse activities carried on by it. He relied on page 1406 & 1445 of the annual report paper book. He thus prayed for this comparable to be excluded from the final list due to lack of segmental data.

8.2 Larsen and Toubro Infotech Ltd.:

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it renders application development maintenance, enterprise solutions, testing and validation, digital solutions, infrastructure management services, platform-based service which cannot be equated to the routine software service provider like the assessee. The Ld.AR submitted that this company is also engaged in activities such as cloud computing, infrastructure management, analytics & information management, etc., and that No segmental details are available. The LdAR submitted that this company is also engaged in trading IT related products has cost of brought out items and has won awards and recognitions for innovative products. He relied on page 1171, 1214 and 1276 of the annual report paper book in support.

The Ld.AR submitted that this company is a market leader and enjoys significant benefits on account of ownership of marketing intangibles, intellectual property rights and business rights and brand value. As a result of this high brand value, the company enjoys a high bargaining power in the market. He relied on page

1190 & 1216, 1249 of the annual report paper book in support. Referring to page 1226 the Ld.AR submitted that this company has significant onsite activities. Further, he submitted that during the year under consideration, this company has extraordinary event, whereby Information Systems Resources Centre Private Limited amalgamated with the Company. He thus prayed for exclusion of this company from the final list.

8.3 Infobeans Technologies Ltd.:

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is specialised in business applications development for web and mobile. This company provides software engineering services primarily in Custom Application Development, Content Management Systems, Enterprise Mobility, Big Data Analytics. He placed reliance on page 1323 & 1356 of annual report paper book. The services rendered by this company are different from the routine low end software development services rendered by the assessee as a captive service provider to its AE. The Ld.AR further submitted that, segmental details of such diverse activities carried on by this company are not available. He thus prayed for exclusion of this company from the final list.

8.4 Thirdware Solutions Limited

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is engaged software and

consultancy. The Ld.AR submitted that this company has significant competencies in transaction systems, Analytics and Cloud applications. Further, the company has earned revenue from software development, implementation services, application management services, and other related services and from sale the sale of license and subscription for software application, which are not akin to the captive services rendered by the assessee. He placed reliance on page 2499 & 2531 of annual report paper book. The Ld.AR submitted that this company deals in product also and segmental details of diverse services are not available. He relied on page 2508 of annual report paper book. He thus prayed for exclusion of this company from the final list.

It is submitted by the Ld.AR that, Inteq Software Pvt.Ltd, L&T Infotech Ltd., Infobean Technologies Ltd., Thirdware Solutions Ltd. excluded by *Hon'ble Delhi Tribunal* in case of *Global Logic India Ltd.*, reported in (2022) 134 taxmann.com 35 for functional dissimilarities. He submitted that in assessee's own case for assessment year 2015-16, coordinate bench of this *Tribunal* reported in [2022] 141 taxmann.com 3, excluded these comparables on functional dissimilarities.

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

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

We note that the decision of *Hon'ble Delhi Tribunal* in case of *Global Logic India Ltd.*,(supra) considered these comparables for assessment year 2016-17 and has held them to be functionally not similar with a captive service provider like that of the

assessee before us. Further The assessee in *Global Logic India Ltd.,(supra)* is also as captive service provider as observed by *Hon'ble Delhi Tribunal* therein. *Hon'ble Tribunal* observed as under:

**COMPARABLE COMPANIES SOUGHT TO BE EXCLUDED BY THE TAXPAYER
LARSEN & TOUBRO INFOTECH LTD. (L&T)**

14. *The taxpayer sought to exclude L&T from the final set of comparables chosen by the ld. TPO for the purpose of benchmarking its international transactions qua SDS on the grounds inter alia that it is functionally dissimilar; that its segmental data is not available; that L&T is a huge brand with ownership of intangibles and on account of extra ordinary event; and on the ground that this company was rejected in taxpayer's own case in *Global Logic India Ltd. v. Dy. CIT [2020] 117 taxmann.com 39 (Delhi - Trib.)*.*

15. *However, on the other hand, ld. DR for the Revenue opposed the contentions raised by the taxpayer to exclude L&T as a comparable on the grounds inter alia that this comparable was chosen by the taxpayer itself and in case of TNMM applied for benchmarking the international transactions minor dissimilarities are not to be taken into account; that the taxpayer cannot be taken as a captive entity as its spectrum is much more and it is also a global brand having presence in many countries and relied upon the order passed by the ld. TPO/ld. DRP.*

16. *When we examine profile of L&T from its financials, available at pages 6, 7 & 11 of the paper book, it is into providing application development and maintenance services providing digital solutions such as big data analytics, enterprise computing, cognitive computing, infrastructure management services and enterprise solutions. It has also been awarded and recognized by various forums for providing such niche services in the field of innovation in information technology category, analytics solutions/services etc., explained at page 11 of the paper book.*

17. *When we examine Notes forming Parts of Accounts at page 116 of the paper book, it is evident that L&T is having two segment accounts, namely, (i) Services Cluster Segment which includes Banking and Financial Services, Insurance, Media & Entertainment, Travel & Logistics and Healthcare, and (ii) Industrial Cluster Segments which consists of Hi Tech and Consumer Electronics, Consumer Retail & Pharma, Energy & Process, Automobile & Aerospace, Plant Equipment & Industrial Machinery, Utilities and E&C. But aforesaid various segments do not indicate profit earned from provisions of SDS. Apart from it, L&T is a huge brand having ownership of significant intangibles to the tune of Rs. 7.42 millions, as is evident from its financials at pages 8 and 103 of the paper book.*

18. *Coordinate Bench of the Tribunal rejected L&T in taxpayer's own case for AY 2014-15 (supra), available at pages 61 to 63 of the case law paper book, by returning following findings :—*

"6.6 The next objection of the assessee is regarding multiple segments. From segment reporting on page S-1258 of the Annual Report (page 129 of PB-2), we find that the assessee has reported three business

segments. The first segment is service cluster which includes banking, financial services, insurance, media and entertainment, travel and logistics and healthcare. The second segment industry cluster which includes Hi Tech and consumer electronics, consumer, retail and Pharma, energy and process, auto Mobile and aerospace, plant equipment and industrial machinery, utilities and E &C. The third segment, is telecom segment which refers to product engineering services (PES) which has been discontinued in this year. Regarding the PES, in Director's report, (available on page S-1225 of the Annual Report or page 96 of PB-2), it is reported as under :

"TRANSFER OF PRODUCT ENGINEERING SERVICES (PES) BUSINESS TO L&T TECHNOLOGY SERVICES LIMITED (LTTSL) AND WINDING UP OF GDA TECHNOLOGIES INC. (GDA INC.) As part of business restructuring undertaken within L&T Group, it was decided to consolidate the engineering services business under a separate subsidiary of L&T, L&T Technology Services Ltd. (LTTSL). Pursuant to this, the Company initiated and completed transfer of its Product Engineering Services (PES) Business Unit to LTTSL effective January 1, 2014, PES Business Unit was transferred by way of slump sale for total sales consideration of Rs. 489.53 crs based on ITA No. 4740/Del./2018 fair valuation, GDA Technologies Inc., USA (GDA Inc.), a wholly owned subsidiary of the Company was part of PES business with synergy in terms of the end customers they serve, primarily the semiconductor companies. Over last few years, the performance of GDA Inc. was adversely affected resulting in falling revenues and operational losses. Consequent to the transfer of PES business, certain IPs (Intellectual Properties) owned by GDA Inc. were transferred to LTTSL, the Company was wound up during the year."

6.7 In view of the above reporting, it is clear that under the telecom segment, the assessee was engaged in providing engineering services, which is distinct from the services of the software development. Thus, at entity level, the company cannot be considered functionally similar to the assessee. The company cannot be considered comparable at the segment level also because of there are expenses of Rs. 205,80,17,445/- (page 129 of PB-2) , which has not been allocated into three segments, and thus the segmental result are distorted.

6.8 During the year, the extraordinary event of demerger of product engineering service business (PES) has occurred with effect from 01/01/2014, which has also impacted the profit of the company at the entity level. In the decision of the Tribunal in case of Xchanging Technology Service India Private Limited (ITA No. 1897/Del./2004), which has been approved the Hon'ble High Court in ITA No. 813/2015 , the company is held to be not valid comparable on account of extraordinary events. Thus, In view of the extraordinary event in the year under consideration also, this company is liable to be excluded from the set of the comparable."

19. In taxpayer's own case in *Global Logic India (P.) Ltd. v. DCIT [IT Appeal No. 8726 (Delhi) of 2019, dated 29-6-2020]* L&T was excluded

by the coordinate Bench of the Tribunal by returning following findings :—

Para 20 available at pages 89-90 of the paper book

"20. The Tribunal in assessee's own case in ITA No. 4740/Del/2018 relating to Assessment Year 2014-15 vide order dated 1-5-2020 has directed the exclusion of the said concern from the final list of comparables while benchmarking the ALP of the international transaction by the assessee with its AE. Before parting, we may also refer to an extraordinary event under which Larsen & Toubro Infotech Ltd. initiated and completed transfer of its Product Engineering Services Business (PES) Unit to L&T Technology Services Ltd. w.e.f. January 1, 2014 as part of the business restructuring undertaken within the Larsen & Toubro group. Though the initiation started from 1-1-2014 but the whole effect of the transaction was during the year under consideration. Further, Larsen & Toubro Infotech Ltd. during the year under consideration acquired Information Systems Resource Centre Private limited ("ISRC") thereby making it wholly owned subsidiary and because of such extraordinary event of acquisition, the said concern cannot be held to be a valid comparable and thus has to be excluded from the final set of comparable. Accordingly, we hold so."

20. In view of the facts inter alia that L&T is into various segments having no segmental financials, having huge brand value and intangibles is not a suitable comparable vis-à-vis taxpayer which was working as a captive entity and that contention raised by the ld. DR that under TNMM minor dissimilarities do not affect the overall comparability is not sustainable because though it is a taxpayer's own comparable but there being no estoppel against statute and that taxpayer can rectify its mistake at any stage of the proceedings. Secondly, it is not a case of minor dissimilarities rather it is a case of functional dissimilarity and non-availability of segmental financials to provide the clear picture qua profit earned by the company from provisions of SDS. L&T is a big brand having ownership of huge intangibles which ought to provide competitive advantage to the taxpayer in the form of premium pricing and huge volume of business ultimately leading to the higher profitability. So, we are of the considered view that L&T is not a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

THIRDWARE SOLUTION LTD. (THIRDWARE)

40. The taxpayer sought exclusion of Thirdware on the ground that it is functionally dissimilar vis-à-vis the taxpayer. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the ld. TPO/ld. DRP to retain this comparable.

41. Perusal of Notes - Additional Information and Profit & Loss account, available at page 570 of the annual reports paper book, shows that it has income earned from sale of licence and provision of training services also under the head 'software services from local unit', 'export of software services', 'revenue from subscription & training' and 'sale of licence' to the tune of Rs. 2809.62 lakhs, Rs. 19285.11 lakhs, Rs. 32.59 lakhs & Rs. 8.77 lakhs

respectively. The taxpayer has also brought on record website of the company, available at pages 71 to 73 of the appeal memo, which shows that Thirdware is having competency in providing services in most advanced and niche area of technologies such as Robotic Process Automation, Big Data Analytics & Cloud Computing.

42. From the profile of Thirdware it has come on record that Thirdware is functionally dissimilar vis-à-vis the taxpayer as it has been deriving income from sale of licence and software services export from SEZ unit and revenue from subscription and training etc. and it is also into sale of licence and its segmental financials are not available.

43. Thirdware has been ordered to be excluded by the coordinate Bench of the Tribunal in case of *Fiserve India (P.) Ltd. v. ITO* [2015] 60 taxmann.com 48 (Delhi - Trib.) on ground of dissimilarity to routine software development service provider which has been affirmed by Hon'ble Delhi High Court in ITA 17/2016 order dated 6-1-2016. So, we order to exclude Thirdware from the final set of comparables.

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-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.

INTEQ SOFTWARE LTD. (INTEQ)

46. The taxpayer sought exclusion of Inteq again on account of functional dissimilarity being into providing outsourced product development services and Healthcare BPO services to its customers as per website extracted at pages 83 to 85 of the appeal memo set. It being a private limited company its financials are not available in the public domain. Its annual report made available at pages 848 to 909 of the annual reports paper book does not provide segmental profitability earned from software development services, outsourced product development services and Healthcare BPO services.

47. When we examine profit & loss account at page 873 of the annual report paper book, software development and service charges are shown in composite manner with no segmental profitability. In these circumstances, we are of the considered view that Inteq is not a suitable comparable vis-à-vis the taxpayer which is a routine software development service provider working on

cost-plus mark up model, hence ordered to be excluded from the final set of comparables.

We note that the assessee in *Global Logic India Ltd. (supra)* was a captive service provider to its AE for assessment year 2016-17. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this *Tribunal* in *Global Logic India Ltd. (supra)*. He submitted that in assessee's own case for assessment year 2015-16, coordinate bench of this *Tribunal* reported in [2022] 141 taxmann.com 3, excluded these comparables on functional dissimilarities.

Respectfully following the view taken by the coordinate bench of this *Tribunal* in *Global Logic India Ltd. (supra)* and assessee's own case in the immediately preceding assessment year, we direct Ld. AO/TPO to exclude **Inteq Software Pvt.Ltd, L&T Infotech Ltd., Infobean Technologies Ltd., Thirdware Solutions Ltd.** from the final list of comparable for SWD segment.

8.5 Persistent Systems Ltd. :

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is engaged in, rendering Enterprise Digital Transformation, product engineering and solutioning for Internet of Things (IoT), product engineering and professional services to ISVs and enterprises, IP products, IT services, development of software products and offers complete product life cycle services without there being separate segmental information disclosed in its Annual Report for such activities . He placed reliance on page 1670, 1706 1793, 1876 and 1881 of the annual report paper book. It is submitted that Persistent Systems

made significant investments towards research and development activities in the relevant previous year. Persistent has collaborated with researchers from IGIB, JNU, IISER-Pune and NCL to develop SanGeniX - an DNA sequencing using Next Generation Sequencing (NGS) technology), eSkIN-will help discovery of new pharmaceutical and cosmetic products to empower pharmaceuticals and cosmetic companies to predict the effects of their products on human skin). He placed reliance on page 1721 & 1707 of the annual report paper book. Persistent has established “persistent labs” which focuses on latest technologies viz., gesture computing, machine learning etc. Using the innovations of Persistent labs. The Ld.AR further submitted that this company partnered with IBM and have added an engineering team that is building products and tools for continuous lifecycle management and for digital transformation and has partnerships with various leading platform providers in Analytics, Big Data, Cloud, Mobile, Machine Learning, and IoT. He placed reliance on page 1672 & 1676 & 1708 of the annual report paper book. The Ld.AR submitted that as a part of Aepona acquisition, this company acquired development centers in Belfast, UK and in Colombo, Sri Lanka during the year under consideration. He placed reliance on page 1706 of the annual report paper book. He thus prayed for exclusion of this company from the final list.

The Ld.AR submitted thus submitted that Persistent Systems Ltd, is not functionally similar with that of assessee who is a captive service provider to its AE.

8.6 Infosys Ltd.:

It is submitted that this company is functionally dissimilar to the assessee on various counts, and therefore, it ought to be rejected from the final list of comparables. It is submitted that the Ld.TPO erred rejected contentions of the assessee and upheld the inclusion of the company in the final list of comparables.

It is submitted that this company renders services like business IT services comprising of application development and maintenance, independent validation, infrastructure management, engineering services comprising product engineering and life cycle solutions and business process management; Consulting and systems integration services comprising consulting, enterprise solutions, systems integration and advanced technologies; Products, business platforms and solutions to accelerate intellectual property-led innovation including Financial, and banking solution; and offerings in the areas of Analytics, Cloud, and Digital Transformation He placed reliance on page 2227 & 2268 of annual report paper book. It is submitted that this company is a full-fledged risk bearing entrepreneur who cannot be compared to the assessee that renders routine software services. It is submitted that the company owns seven Edge products/platforms and six other product based solutions.

The Ld.AR submitted that, this company does not have segmental data in respect of rendering software services and development of products. It is submitted that this company has significant intangibles as a part of its fixed assets in the nature of intellectual property. He placed reliance on page 2275 of annual

report paper book. The company owns significant brand value and focuses immensely on brand building. The Ld.AR submitted that, this company heavily focuses on research and development activity and incurs significant expenditure for this account and for the financial year relevant to assessment year under consideration, the company incurred research and development expenses of Rs. 415 crores. He placed reliance on page 2286 of annual report paper book. The Ld.AR submitted that, this company for the year under consideration has earned abnormally high profit with margin of 38.61%, which makes it incomparable with the assessee.

The Ld.AR submitted thus submitted that this company is not functionally similar with that of assessee who is a captive service provider to its AE.

It is also submitted that these comparables are not functionally similar with that of the assessee as has been observed by *Coordinate Bench of this Tribunal* in following cases:

1. *Decision of Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT reported in (2022) 136 taxmann.com 52.*
2. *Decision of coordinate bench of this Tribunal in case of OLF India Software Pvt.Ltd. vs. ACIT in IT(TP)A No.182/2021 by order dated 28/09/2022 for A.Y. 2016-17.*
3. *Decision of Hon'ble Hyderabad Tribunal in case of Infor (India) Pvt. Ltd. vs. DCIT in ITA-TP.No. 198/Hyd/2021 by order dated 06.10.2021 for A.Y. 2016-17.*

On the contrary, the Ld.CIT.DR placed reliance on orders passed by authorities below.

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

Before us, the Ld.DR has not been able to place anything on record contrary to the above submissions by the Ld.AR. We of the view that with such varied functions, these companies cannot be compared with assessee before us, which is a captive service provider. We accordingly direct the Ld.AO/TPO **to exclude Persistent Systems Ltd., and Infosys Ltd. from the final list.**

8.7 Aspire Systems (India) Pvt.

It is submitted that, this company is functionally not comparable with the assessee as it earns income from power generation. The Ld.AR placed reliance on page 127 of Annual Report. The Ld.AR submitted that, the company owns significant intangibles in form of goodwill, customer contracts. He placed reliance on page 2077 & 2087 of annual report paper book in support. It is submitted that Applied Development Software (India) Pvt.Ltd., and Pure Apps Consulting Services Pvt. Ltd., amalgamated with the company that lead to acquisition of assets. He placed reliance on page 2056 of annual report paper book. The Ld.AR placed reliance on following decisions in support:

Decision of Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT reported in (2022) 136 taxmann.com 52

Decision of Hon'ble Hyderabad Tribunal in case of Infor India Pvt. Ltd. in IT(TP)A No. 198/Hyd/2021 by order dated 06.10.2021 for A.Y. 2016-17.

Decision of Hon'ble Punjab & Haryana in Equant Solutions India (P.) Ltd. reported in (2020) 113 taxmann.com 517

Coordinate bench of this Tribunal in case of ARM Embedded Technologies (P.) Ltd. reported in (2021) 129 taxmann.com 263

Coordinate bench of this Tribunal in case of Yahoo Software Development India Pvt. Ltd. reported in TS-191-ITAT-2020(Bang)

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions of both sides in light of records placed before us. We note that this company earns its revenue from power generation and it has nothing to do with the rendering of software development service. In fact, we note that this company is a full fledged entrepreneur in the business of power generation and therefore is not comparable functionally with a captive software service provider like assessee.

Nothing is been placed by the Revenue contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO **to exclude Aspire System India Pvt. Ltd. from the final list.**

8.8 Nihilent Technologies Limited

It is submitted that, this company is functionally dissimilar to the assessee and therefore ought to be rejected from the final list of comparables. It is submitted that, services rendered by this company are wide in range and diversified. The Ld.AR submitted that, the company is engaged in diversified activities. It is submitted that, it renders services in the nature of consulting, software development and product development, provision of business consulting in the area of the enterprise transformation, change and performance management, digital transformation, business intelligence and data science services and also providing related IT services. The Ld.AR submitted that, software-consulting services include end-to-end solutions, onsite management and IT functions, and planning & system designing, which are in no way comparable to the captive software development activities as provided by the assessee.

The Ld.AR further submitted that, this company has incurred significant expenses in foreign currency of 37.68%, 33.27% and 37.47% of its total expenditure during the FYs 2015-16, 2014-15 and 2013-14, respectively, which suggests that is engaged in provision of onsite services. And that, during the FY relevant to assessment year under consideration, this company acquired GNet Group LLC, a business intelligence and analytical company, and Intellect Bizware Services Pvt. Ltd., specialising in ERP and enterprise innovation. The Ld.AR submitted that, these acquisitions are bound to have a significant impact on the financials of the company. The Ld.AR thus submitted that, for all the above reasons this company cannot be considered to be comparable with. He relied on the decision of *Hon'ble Mumbai Tribunal* in case of *Red Hat India Pvt. Ltd. v. ACIT (supra)*

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions of both sides in light of records placed before us.

The assessee sought exclusion of Nihilent on ground of its functional dissimilarity vis-à-vis assessee. We have examined the website information of Nihilent, made available by the assessee at page No. 405 of the paper book, wherein it is mentioned that it is engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data science, cloud services etc.

45. *Perusal of the disclosure of enterprise's reportable segment explanatory available at page No. A406 of the paper book shows that Nihilent is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing and financials of Nihilent available at page No. A304, A405-A406 of the paper book shows that Nihilent has only one business segment and in the absence of segmental financials, as it is into diversified business, this company cannot be a valid comparable vis-à-vis assessee, who is a low risk entity working on cost + markup model. Hence, Nihilent is ordered to be excluded as a comparable. Nihilent Ltd.*

46. *The assessee sought exclusion of Nihilent Ltd. as a comparable on the ground that it is functionally dissimilar vis-à-vis assessee. This objection was also raised before the Ld. DRP but rejected. The assessee relied upon website of the company which is made available at page A 412 of the paper book wherein Nihilent Ltd. is shown to be engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data signs, cloud services etc. The annual financials of this company available at page A412 & A413 of the paper book shows that it is rendering Enterprise transformation and change management, Digital transformation services and Enterprise IT services but segmental financials are not available as is apparent from its financials available at page A305, A412 & A413 of the paper book. When this company is into various segments but segmental financials are not available it cannot be a valid comparable vis-à-vis assessee which is a routine software development service provider working on cost + markup model, hence ordered to be excluded.*

We note that the assessee in *Red Hat India Pvt. Ltd. v. ACIT (supra)* was a captive service provider to its AE for assessment year 2016-17. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this *Tribunal* in *Red Hat India Pvt. Ltd. v. ACIT (supra)*. We are of the view that, based on the functions performed by this company as submitted by the Ld.AR and the observations of *Hon'ble Mumbai Tribunal*, this comparable deserves to be excluded from the final list.

We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Nihilent Technologies Ltd from the final list.

8.9 Cybage Software Pvt.Ltd.

It is submitted that this company is engaged in the provision of diversified services which include product engineering, testing & quality assurance services, specialized services, support services, etc. It is submitted that this company is engaged in product development and has developed a product called 'excelshore' apart from providing spectrum of services including ITeS and BPO services and that segmental information of the diverse business functions undertaken by the company is not available.

The Ld.AR submitted that this company is making super normal profits and that it is not reflective of the performance of the industry in which it operates.

Particulars	FY 2013-14	FY 2014-15	FY 2015-16
OP/OC	68.82%	67.75%	62.04%

Reliance in this regard is placed on the decision of the *Hon'ble Hyderabad Tribunal in Infor (India) Pvt. Ltd. v. DCIT* (supra).

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions of both sides in light of records placed before us.

Primarily we note that this company is a product company and has diversified business segments. We note that this company is a full fledged entrepreneur and assumes all the risks attributable to the various business segments for which details are not available. In our view, under such circumstances, this company cannot be held to be functionally comparable with that of assessee which is a captive service provider that caters only to its AE.

We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Cybage Software Pvt.Ltd., from the final list.

9. The Ld.AR submitted that, the assessee seeks exclusion of following comparables under the ITES Segment:

- Tech Mahindra Business Services Ltd.,
- Infosys BPM Ltd.,
- SPI Technologies India Pvt.Ltd.,
- eClerx Services Ltd.

The Ld.AR submitted that these comparables have very high turnover as compared to that of assessee under ITES segment which is INR 110 crores:

S.No.	Comparable	Turnover in Crores	Page reference of ARC
1.	Tech Mahindra Business Services	722	3011
2.	Infosys BPM Ltd.	2,849	3101
3.	SPI Technologies India Private Limited	327	3174
4.	eClerx Services Limited	1,106	3440

10. Reliance is placed on the decision of coordinate bench of this Tribunal in case of *Autodesk India (P.) Ltd. reported in (2018) 96 taxmann.com 263*. The Ld.AR also submitted that these companies are consistently excluded from the final list of comparables in similarly placed assessee's as the present assessee before us. Reliance is placed on the following decisions:

- *decision Hon'ble Hyderabad Tribunal in the case of Infor India Pvt. Ltd. IT(TP)A No. 198/Hyd/2021*
- *decision of Hon'ble Punjab & Harayana High Court in case of Equant Solutions India (P.) Ltd., reported in (2020) 113 taxmann.com 517*
- *decision of coordinate bench of this Tribunal in case of ARM Embedded Technologies (P.) Ltd., reported in (2021) 129 taxmann.com 263*

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions of both sides in light of records placed before us.

11. This Tribunal in the case of *Autodesk India Pvt.Ltd. Vs. DCIT (supra)*, 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-jurisdiction 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 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 Chryscapital Investment (supra). We have already held that the decision rendered in the case of Chryscapital 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)."

12. Coordinate bench of this Tribunal in the case of *Barracuda Networks India (P.) Ltd. vs. DCIT* reported in [2021] 131 taxmann.com 337 excluded comparables from the final list for having high turnover more than 200 crores.

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. v. Dy CIT [2018] 89 taxmann.com 44, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software (P.) Ltd. v. Dy. CIT [2016] 67 taxmann.com 243 wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P.) Ltd. (supra) and the decision to the contrary in the case of CIT v. Pentair Water India (P.) Ltd., [2016] 69 taxmann.com 180/381 ITR 216 (Bom.) 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 India (P.) Ltd. (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International Services (P.) Ltd. (supra):*

'41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) (P.) 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 .ire (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 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.'

This *Tribunal* while taking the above view relied on the decision of coordinate bench of this *Tribunal* in the case of *Autodesk India Pvt.Ltd. Vs. DCIT (supra)*.

13. This *Tribunal* further considered a situation, *whether this company should also be excluded on the application of turnover filter by reason of its turnover in the earlier two years being more than Rs. 200 crores in the light of Rule 10CA of the rules which were applicable from AY 2014-15 onwards or whether in computing the weighted average profit margin of this company, the earlier two years profit margins have to be ignored because they fail the test of comparability in those two earlier years by reason of the application of the Rs. 200 Crore turnover filter.* This *Tribunal* observed as under:

16. To answer the above question, we need to look at the amendment to the rules that allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The provisions of the Income-tax Act were amended through the Finance (No.2) Act, 2014 to facilitate alignment of Indian transfer regime with international best practices. The manner of computation of ALP is laid down under the Income-tax Rules. The Government has notified the amended Rules for determining ALP vide S.O. No. 2860 (E) dated 19/10/2015. The amended regime will be applicable for computation of ALP of international transactions and specified domestic transactions undertaken on or after 1/04/2014 i.e. on and after PY 2014-15. The amended rules allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The use of range concept being a statistical tool enhances the reliability of analysis undertaken for computation of ALP. The range concept will be applicable in certain cases for determining the price and will begin with the 35th percentile and end with the 65th percentile of the comparable prices. Transaction price shown by the taxpayers falling within the range will be accepted and no adjustment will be made. The use of multiple year data allows for yearly variations to be averaged out and would therefore add value to transfer pricing analysis. The Amended Income-tax Rules, 1962 ('Rules') via Notification 83 of 2015 which is the 16th amendment to the originally drafted Indian Tax Rules, 1962, are applicable for transactions undertaken on or after 1 April 2014 (i.e. from FY 2014-15 and onwards). These amended provisions are applicable only when the determination of 'ALP' is done under the MAM being resale price method ('RPM'), cost plus method ('CPM') or transactional net margin method ('TNMM'). The relevant provisions of Rule 10CA of the Rules, in so far as it relates to choice of comparable companies, read as follows:

"Computation of arm's length price in certain cases.

10CA. (1) Where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in sub-section (1) of section 92C results in determination of more than one price, then the arm's length price in respect of such international transaction or specified domestic transaction shall be computed in accordance with the provisions of this rule.

(2) A dataset shall be constructed by placing the prices referred to in sub-rule (1) in an ascending order and the arm's length price shall be determined on the basis of the dataset so constructed:

Provided that in a case referred to in clause (i) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction then,-

(i) the most appropriate method used to determine the price of the comparable uncontrolled transaction or transactions

- undertaken in the aforesaid period and the price in respect of such uncontrolled transactions shall be determined; and
- (ii)** *the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the current year and in the aforesaid period preceding it shall be included in the dataset instead of the price referred to in sub-rule (1):*

Provided further that in a case referred to in clause (ii) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of the data relating to the financial year immediately preceding the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in the financial year immediately preceding the said financial year undertaken the same or similar comparable uncontrolled transaction then,-

- (i)** *the price in respect of such uncontrolled transaction shall be determined by applying the most appropriate method in a similar manner as it was applied to determine the price of the comparable uncontrolled transaction undertaken in the financial year immediately preceding the current year; and*
- (ii)** *the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the aforesaid period of two years shall be included in the dataset instead of the price referred to in sub-rule (1) :*

Provided also that where the use of data relating to the current year in terms of the proviso to sub-rule (5) of rule 10B establishes that, -

- (i)** *The enterprise has not undertaken same or similar uncontrolled transaction during the current year; or*
- (ii)** *the uncontrolled transaction undertaken by an enterprise in the current year is not a comparable uncontrolled transaction,*

then, irrespective of the fact that such an enterprise had undertaken comparable uncontrolled transaction in the financial year immediately preceding the current year or the financial year immediately preceding such financial year, the price of comparable uncontrolled transaction or the weighted average of the prices of the uncontrolled transactions, as the case may be, undertaken by such enterprise shall not be included in the dataset.

(3) *Where an enterprise has undertaken comparable uncontrolled transactions in more than one financial year, then for the purposes of sub-rule (2) the weighted average of the prices of such transactions shall be computed in the following manner, namely:-*

- (i)** *Where the prices have been determined using the method referred to in clause (b) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of sales which has been considered for arriving at the respective prices;*

(ii) where the prices have been determined using the method referred to in clause (c) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs which has been considered for arriving at the respective prices;

(iii) where the prices have been determined using the method referred to in clause (e) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs incurred or sales effected or assets employed or to be employed, or as the case may be, any other base which has been considered for arriving at the respective prices "

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17. Let us apply the above rules to the comparable company R.S. Software (India) Ltd. As per Rule 10CA(2), the dataset of comparable companies chosen has to be arranged in ascending order. As per the 1st proviso to Rule 10CA(2), R.S. Software (India) Ltd., was chosen as a comparable company based on the data relating to the current year and in the earlier two financial years immediately preceding the current financial year. In all the financial years the said company has undertaken similar comparable uncontrolled transaction. Clause (i) to 1st proviso to section 10CA(2) mandates that the same MAM has to be used to arrive at the price of the comparable uncontrolled transaction undertaken by R.S. Software (India) Ltd., in the financial years 2013-14 and 2014-15. As per clause (ii) of 1st proviso to section 10CA(2), weighted average of the prices of the 3 financial years have to be taken in accordance with Rule 10CA(3) and the weighted average so taken shall be included data set instead of the price arrived at by using current year data alone. In the present case, if one sees the chart of comparables of TPO given in paragraph-4 of this order, the profit margins of the Company R.S. Software (India) Ltd., for the three financial years were 2013-14 to 2015-16 were 24.14%, 32.75% and -2.09% respectively and the weighted average margin of 24.83% has been considered by the TPO.

18. The second proviso to section 10CA(2) of the Rules provides for a situation where R.S. Software (India) Ltd., has undertaken comparable uncontrolled transaction only in Financial year 2014-15 & 2015-16, then the weighted average of the two financial year 2014-15 and 2015-16 has to be computed in the manner laid down in Rule 10CA(3) of the Rules and the margin so arrived at has to be included in the dataset.

19. The third proviso to section 10CA(2) of the rules provides that if in the current year i.e., financial year 2015-16 if R.S. Software (India) Ltd., has not undertaken any uncontrolled comparable transaction then that company can never be considered for inclusion in the dataset.

20. The submission of the learned Counsel for the Assessee was that as per the proviso to Rule 10CA(2) of the Rules, R.S. Software (India) Ltd., cannot be regarded as comparable company for Financial Year 2013-14 and 2014-15 because in those years, the turnover of this company was more than Rs. 200 crores. Therefore as per the first and second proviso to Rule 10CA(2) of the Rules, the profit margin of this

company for Financial year 2013-14 & 2014-15 has to be ignored and the profit margin of the financial year 2015-16 alone should be taken. If one looks at Rule 10CA(2) in isolation, we have to reject this argument because the 1st and 2nd proviso to Rule 10CA(2) of the Rules refers to only R.S. Software (India) Ltd., (i.e., "where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction") undertaking uncontrolled transaction during the relevant previous year and if this condition is satisfied then the profit margin of R.S. Software for the 2 financial years immediately prior to the current financial year has to be taken. A plain reading of the 1st proviso would show that the question of comparability is not to be seen while applying the 1st and 2nd proviso to Rule 10CA(2) of the Rules. The provisions of Rule 10CA(2) have to be read harmoniously with the other provisions of Rule 10B:

"Determination of arm's length price under section 92C .

10B . (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :-

*(a) to (d). ***

(e) transactional net margin method, by which,-

(i) the net profit margin realised by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction [or the specified domestic transaction];

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(2) For the purposes of sub-rule (1), the comparability of an international transaction [or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:-

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction [or a specified domestic transaction] if-

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.

(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction [or a specified domestic transaction] shall be the data relating to the financial year [(hereafter in this rule and in rule 10CA referred to as the 'current year')] in which the international transaction [or the specified domestic transaction] has been entered into :

Provided that data relating to a period not being more than two years prior to [the current year] may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:"

A reading of Rule 10B(3) shows that comparison of an uncontrolled transaction to an international transaction can be done only if differences, if any, between the transactions that are compared or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market or reasonably accurate adjustments can be made to eliminate the material effects of such differences. A reading of Proviso to Rule 10B(4) would show that use of

data relating to a period of two years prior to the current year may also be considered but with a rider that "if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared". If by application of any filter an enterprise undertaking uncontrolled transaction similar to an international transaction is regarded as not being comparable in the earlier two years immediately preceding the current year and thereby attracting the provisions of Rule 10B(2) or 10B(3) then the data for those years will not have any influence on the determination of transfer prices in relation to the transactions being compared for the current year and hence have to be ignored. On a harmonious reading of the provisions of Rule 10CA, 10B(3) (4) of the Rules, we agree with the stand taken by the learned counsel for the Assessee. Therefore, if at all R.S.Software Ltd., is to be regarded as a comparable company, then the margins for AY 2014-15 and 2015-16 of the company have to be ignored because in those years they are to be regarded as not comparable. We hold accordingly.

The assessee in *Barracuda Networks India (P.) Ltd. vs. DCIT.* (*supra*) was a captive service provider to its AE for assessment year 2016-17. Respectfully following the above, we direct Ld. AO/TPO to exclude Tech Mahindra Business Services Ltd., Infosys BPM Ltd., SPI Technologies India Pvt.Ltd., eClerx Services Ltd. for having high turnover as compared to a captive service provider like assessee under the ITES segment.

Accordingly, Ground No.9 raised by the assessee stands allowed.

14. We note that the assessee in **Ground No.4** raised issue of non satisfaction of RPT in respect of certain comparables sought for exclusion. As we have dealt with the comparables on functionality in SWD segment and Turnover filter in ITES segment, we are not adjudicating this ground as it becomes academic at this stage.

15. Ground No.10 is in respect of the comparables sought for inclusion by the assessee under both SWD and ITES segments. It is submitted that the assessee wish to press only following comparables under SWD segment:

- Akshay Software Technologies Ltd.,
- Sagar Soft India Ltd.,
- Sasken Communication Technologies Ltd,
- Maveric Systems Ltd.,
- InfoMile Technologies Ltd.,
- Evoke Technologies Ltd.,
- Celstream Technologies Pvt.Ltd.,
- Isummation Technologies Pvt.Ltd

It is submitted that this company is engaged in providing software development services. It is submitted that these comparables were not considered by the Ld.TPO as they did not appear in the search matrix carried out by him, which has been upheld by the DRP. He placed reliance on the decisions of coordinate bench of this *Hon'ble Tribunal* in the case of *Prism Networks Pvt. Ltd. reported in (2022) 141 taxmann.com 163*.

On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions of both sides in light of records placed before us.

We note that this Tribunal in case of *Prism Networks Pvt. Ltd.(supra)* observed and held as under:

18. *We heard the rival submissions. It is clear from the order of the DRP that the DRP has not considered the plea of the Assessee in proper perspective. The fact that the TPO rejected the TP study of the Assessee cannot be the basis not to consider the claim of the Assessee for inclusion of comparable companies. The TPO excluded these companies only on the ground that information related to these companies was not available in the public domain and this fact was shown to be an incorrect assumption by the Assessee in the submissions before the DRP. In such circumstances, it was incumbent on the part of the DRP to have adjudicated the question of inclusion of these companies as comparable companies. The fact that these companies do not figure in the search matrix of the TPO is not and cannot be a ground not to consider inclusion of these companies as comparable companies. Since the DRP has failed to do so, we are of the view that the issue*

regarding inclusion of the aforesaid companies as comparable companies should be set aside to AO/TPO for fresh consideration in the light of the information available in public domain. Thus ground No. 7 is treated as allowed for statistical purposes.

Respectfully following the above view, we remit the comparables back to the Ld.AO/TPO for fresh consideration in the light of information available in public domain.

Accordingly this ground stands allowed for statistical purposes.

16. In **Ground No.11** the assessee is seeking inclusion of following comparables under SWD segment, that was provided before the transfer pricing proceedings:

- Yudz Solutions Pvt.Ltd.,
- E-Zest Solutions Ltd.,
- Smartcloud Infoservices Pvt.Ltd

As these comparables have not been considered by the Ld.AO/TPO, we remand these comparables for fresh consideration.

Accordingly this ground stands allowed for statistical purposes.

17. Ground No. 12 to 14

It is submitted that the Ld.AO disallowed the deduction claimed under section 35AC and section 80G of the Act for the reason that they were out of Corporate Social Responsibility (CSR) Expenditure and lacks voluntary act/element of charity on the part of donor.

The Ld.AR submitted that during the year under consideration, the assessee expended Rs.12,26,000/- as CSR expenditure which is mandated under section 135 of Companies Act, 2013. It is submitted that the assessee in its return of income disallowed the said expenditure as per *Explanation 2 of section 37* of the Act. He placed reliance on page 819 page 794 of PB where in the Computation of income and return of income are placed.

The Ld.AR submitted that, the CSR expenditure of Rs.10,00,000/- was made to the eligible entity registered under section 35AC/80G of the Act. It is submitted that, the assessee claimed Rs. 5,00,000 under section 35AC which was contributed to Karunashraya, receipt of which is placed at page 1160 of PB and Rs. 2,50,000 (being 50% of Rs. 5,00,000) under section 80G which was donated to Spastics Society of Karnataka, receipt of which is placed at page 1159 of the PB.

It is the submission of the Ld.AR that section 35AC and section 80G (except for sub section 2) nowhere restricts the Assessee to claim deduction which respect to CSR expenditure. He placed reliance on following decisions in support of this contention:

Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535 (Bangalore-Trib.) at para 16 page 17-18 (page 3925 to 3942 of CLC, relevant page 3941), FNF India (P.) Ltd. ITA No. 1565/Bang/2019 at para 10 page 8 (page 3952 to 3961 of CLC, relevant page 3959).

Allegis Services (India) (P.) Ltd. ITA No. 1693/Bang/2019 at para 19 & 20 page 8,

Sling Media (P.) Ltd. [2022] 135 taxmann.com 164 (Bangalore-Trib.) at para 6.1 & 6.2 page 7-8,

JMS Mining (P.) Ltd. [2021] 130 taxmann.com 118 (Kolkata-Trib.) at para 23 page 15-16.

We have perused the submissions advanced by both sides based on records placed before us.

18. We note that this Tribunal in case of *Sling Media (P.) Ltd.(supra)* observed as under:

6.1 *We note that assessee has suo moto disallowed the expenditure towards the CSR responsibilities u/s. 37(1) of the Act and claimed deduction u/s. 80G to the extent of donations paid to eligible charitable institutions. The observations of co-ordinate bench of this Tribunal in case of First American (India) (P.) Ltd. (supra) on the same issue is as under:*

"15. In our view, expenditure incurred under section 30 to 36 are claimed while computing income under the head, 'Income from Business and Profession', where as monies spent under section 80G are claimed while computing "Total Taxable income" in the hands of assessee. The point of claim under these provisions are different.

16. Further, intention of legislature is very clear and unambiguous, since expenditure incurred under section 30 to 36 are excluded from Explanation 2 to section 37(1) of the Act, they are specifically excluded in clarification issued. There is no restriction on an expenditure being claimed under above sections to be exempt, as long as it satisfies necessary conditions under section 30 to 36 of the Act, for computing income under the head, "Income from Business and Profession".

17. For claiming benefit under section 80G, deductions are considered at the stage of computing "Total taxable income". Even if any payments under section 80G forms part of CSR payments(keeping in mind ineligible deduction expressly provided, the same would already stand excluded while computing, Income under the head, "Income form Business and Profession". The effect of such disallowance would lead to increase in Business income. Thereafter benefit accruing to assessee under Chapter VIA for computing "Total Taxable Income" cannot be denied to assessee, subject to fulfillment of necessary conditions therein.

18. We therefore do not agree with arguments advanced by Ld. Sr. DR.

19. In present facts of case, Ld.AR submitted that all payments forming part of CSR does not form part of profit and loss account for computing Income under the head, "Income from Business and Profession". It has been submitted that some payments forming part of CSR were claimed as deduction under section 80G of the Act, for computing "Total taxable income", which has been disallowed by authorities below. In our view, assessee cannot be denied the benefit of claim under Chapter VI A, which is considered for computing 'Total Taxable Income'. If assessee is denied this benefit, merely because such payment forms part of CSR, would lead to double disallowance, which is not the intention of Legislature.

20. On the basis of above discussion, in our view, authorities below have erred in denying claim of assessee under section 80G of the Act. We also note that authorities below have not verified nature of payments qualifying exemption under section 80G of the Act and quantum of eligibility as per section 80G(1) of the Act.

21. Under such circumstances, we are remitting the issue back to Ld. AO for verifying conditions necessary to claim deduction under section 80G of the Act. Assessee is directed to file all requisite details in order to substantiate its claim before Ld. AO. Ld. AO is then directed to grant deduction to the extent of eligibility.'

6.2 Respectfully following the above view, we direct the Ld.AO verify the payments made by assessee towards CSR that also forms part of deduction u/s. 80G. Ld. AO shall then grant the deduction claimed u/s. 80G of the Act in accordance with law.

Respectfully following the above view, we direct the Ld.AO verify the payments made by assessee towards CSR that also forms part of deduction u/s. 80G. Ld. AO shall then grant the deduction claimed u/s. 80G of the Act in accordance with law.

Accordingly these grounds raised by the assessee stands allowed for statistical purposes.

18. Ground no. 15 – Interest cannot be levied u/s. 234A in case if assessee has filed the return of income within the time period prescribed u/s. 139(1) of the Act. The Ld.AO is directed to verify the same and consider the claim in accordance with law.

19. Ground no. 16 is consequential in nature and therefore do not require adjudication.

In the result, the appeal filed by the assessee stands allowed partly as indicated herein above.

Order pronounced in the open court on 25th August, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 25th August, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore