

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

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|---------------------------|
| IT(TP)A No.264/Bang/2021 |
| Assessment year : 2016-17 |

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|---|-----|--|
| NXP India Pvt.Ltd. (Successor of NXP Semiconductors India P. Ltd.), Ground Floor, Manyatta Tech Park, Green Heart Phase III, Nagawara, Bengaluru – 560 045 PAN: AADCP 9454H | Vs. | The Deputy Commissioner of Income Tax, Circle 5(1)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

| | | |
|---------------|---|--|
| Appellant by | : | Shri Vikram Vijayaraghavan, Advocate |
| Respondent by | : | Shri V S Chakrapani, CIT(DR)(ITAT), Bengaluru. |

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|-----------------------|---|------------|
| Date of hearing | : | 01.09.2022 |
| Date of Pronouncement | : | 13.09.2022 |

ORDER

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the final assessment order passed by Assessing Officer, National e-Assessment Centre, Delhi u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act, 1961 [the Act] dated 23.04.2021 for the assessment year 2016-17.

2. The assessee is among the top 5 MNC employers in the semiconductor space and is a major force in the Indian Semiconductor space and as a contract development service organization. The core areas of the assessee's activities in India include development, design and sales agent support services. The assessee creates semiconductor related system solutions and software that deliver better sensory experience in mobile phones, personal media players, identification applications, cars and a wide range of other electronic devices.

3. The assessee's Associated Enterprise (AE) formulates the overall strategy in respect of assessee's customers in India and South East Asia and lays down the guidelines, procedures and rules to be implemented by the assessee in respect of sales agent support services the assessee renders to its AE. The assessee within the overall marketing strategy developed by its AE is responsible for identifying prospective customers, generating customers lead information and educating the prospective customers about its AEs products and services within the target industry on the following services:-

- Developing marketing and sales collaterals
- Advertising and sales promotion
- Assistance in identifying customers in India
- Pricing decision
- Contracting with customers and invoicing.

4. The assessee filed its return of income for AY 2016-17 on 28.11.2016 declaring income of Rs.24,37,05,200. The case was selected for complete scrutiny and notice u/s. 143(2) and 142(1) of the Act served on the assessee. The case was referred to the Transfer

Pricing Officer (TPO) u/s. 92CA for computation of arm's length price [ALP] u/s. 92CA of the Act. The TPO made an adjustment to the ALP for an amount of Rs. 36,37,43,477. The AO passed the draft assessment order incorporating the TP adjustment and further made disallowance towards depreciation on networking equipments and mismatch in income as per Form 26AS and ITR. Aggrieved the assessee raised its objects before the DRP. The DRP gave marginal relief to the assessee due to which the TP adjustments was reduced to Rs.31,36,95,835 and upheld the disallowances/additions made by the AO. The AO passed the final order pursuant to the directions of the DRP against which the assessee is in appeal before the Tribunal.

5. The assessee raised grounds relating to the following issues
 - i. Ground Nos.1 & 2 - General
 - ii. Ground Nos.3 to 10 - Transfer Pricing issues.
 - iii. Ground 11 & 12 - Disallowance of depreciation on networking equipment
 - iv. Ground 13 - Disallowance of differential interest income and sub-lease income as appearing in Form 26AS
 - v. Ground 14 — Non allowance of deduction of education cess
 - vi. Ground 15 — Initiation of Penalty proceedings under section 271(1)(c) of the Act
 - vii. Ground 16 — Levy of interest under section 234B of the Act

6. Ground No. 1 and 2 being general does not warrant separate adjudication. Ground No.14 is not pressed and hence dismissed as not pressed. Ground No.15 & and 16 are consequential. Out of the 8 grounds raised for TP adjustment, the assessee vide Ground No.7 (a)

sought exclusion of 13 companies from the comparables. During the course of hearing the Id. AR pressed for exclusion of only the following 4 companies out of 13 companies and therefore the other comparables sought for exclusion are dismissed as not pressed:-

- (1) Infosys Ltd.
- (2) Larsen & Toubro Ltd.
- (3) Persistent Systems Ltd.
- (4) Thirdware Solutions Ltd.

7. The assessee sought inclusion of 6 comparables vide Ground No.7 (b) and (c). Out of this during the course of hearing the Id AR pressed for inclusion on only Akshay Software Technologies Limited and therefore the rest of the inclusions are dismissed as not pressed. The other grounds raised for TP adjustments are also dismissed as not pressed.

Transfer Pricing adjustment

8. The assessee company has entered into the following international transactions with its Associated Enterprises (AEs) as per the Transfer Pricing (TP) document furnished for the A.Y.2015-16:-

| International Transactions | | | |
|--|------------------------------|-----------------------|---------------|
| Particulars | Receivables /Received | Payables /Paid | Method |
| Purchase of Capital equipment | | 22,84,233 | TNMM |
| Purchase of consumable packing material | | 3,345 | TNMM |
| Received Free of charge | | 12,19,295 | TNMM |
| Provision of Software Development Services | 2,21,96,46,928 | | TNMM |

| | | | |
|--|-----------------------|--------------------|-----------------------|
| 1 Provision of Sale agent support Services | 9,85,46,260 | | TNMM |
| Outstanding Receivables | 21,15,82,448 | | TNMM |
| Reimbursement of employee Benefit | | 4,55,81,740 | Other Method |
| Reimbursement of provident fund | | 26,42,176 | Other method |
| Unbilled revenue | | 2,35,91,424 | TNMM |
| Total | 2,52,97,75,636 | 7,53,22,213 | 2,60,50,97,849 |

9. TNMM is used as the most appropriate method by the assessee as well as the TPO and there is no dispute to the same. The profit level indicator (PLI) is taken as Operating Profits / Operating Cost (OP/OC). The analysis of the financial results of the assessee are as under:-

| Particulars | Software Development Services | Sales agent support Services | Unallocated | Total |
|---|-------------------------------|------------------------------|--------------------|-----------------------|
| Income | | | | |
| Income from Services | 2,21,96,46,928 | 9,85,46,260 | | 2,31,81,93,188 |
| Foreign exchange gain | 1,68,04,461 | | | 1,68,04,461 |
| Non Operating Income | 1,68,788 | | 5,00,73,647 | 5,02,42,435 |
| Operating revenues | 2,23,66,20,177 | 9,85,46,260 | 5,00,73,647 | 2,38,52,40,084 |
| Expenditure | | | | |
| Employee benefits | 1,22,55,75,271 | 4,10,44,547 | 5,02,99,200 | 1,31,69,19,048 |
| Finance Cost | 6,09,415 | | 52,88,542 | 58,97,957 |
| Depreciation and amortization expenses | 12,96,88,211 | | | 12,96,88,211 |
| Other operating expenses | 68,68,88,007 | 2,39,56,766 | | 71,08,44,773 |
| Operating cost | 2,04,27,60,904 | 6,50,01,313 | 5,55,87,742 | 2,16,33,49,960 |
| Operating profit | 19,38,59,272 | 3,35,44,947 | (55,14,095) | 22,18,90,124 |
| Operating profit/ Operating cost | 9.49% | 51.61% | | 10.26% |

10. The assessee had selected 16 comparable companies in the Software Development [SWD] services. The TPO observed that 10 comparables selected by the assessee failed the filters selected by him and after considering the objections to the show cause notice, the TPO arrived at the final set of comparables as under:-

| S.No. | Company Name | Financial Year wise OP/OC (%) | | | |
|-------|------------------------------------|-------------------------------|---------|--------------------------|------------------|
| | | 2015-16 | 2014-15 | 2013-14 | Weighted Average |
| 1 | Kals Information Systems Pvt. Ltd. | 3.97% | 5.77% | 16.94% | 8.60% |
| 2 | Rheal Software Pvt. Ltd. | 3.20% | 2.76% | 36.64% | 14.50% |
| 3 | Harbinger Systems Pvt. Limited | 12.69% | 17.18% | No Data in Public Domain | 15.06% |
| 4 | C G-V A K Software & Exports | 19.60% | 19.87% | 13.81% | 18.50% |
| 5 | R S Software (India) Ltd. | -2.09% | 32.75% | 24.14% | 20.87% |
| 6 | Larsen & Toubro Infotech Ltd. | 26.29% | 24.22% | 23.54% | 24.83% |
| 7 | Nihilent Ltd. | 15.94% | 29.19% | 35.72% | 26.36% |
| 8 | Inteq Software Pvt. Ltd. | 7.53% | 32.14% | 45.00% | 28.20% |
| 9 | Persistent Systems Ltd. | 26.92% | 31.34% | 35.64% | 30.89% |
| 10 | Infobeans Technologies Ltd. | 34.98% | 20.78% | 41.95% | 32.42% |
| 11 | Thirdware Solution Ltd. | 23.89% | 44.39% | 44.68% | 36.90% |
| 12 | Infosys Ltd. | 38.22% | 41.30% | 36.28% | 38.61% |
| 13 | Aspire Systems (India) Pvt. Ltd: | 34.26% | 47.56% | 38.04% | 39.28% |
| 14 | Cybage Software Pvt. Ltd. | 62.90% | 68.68% | 68.82% | 66.45% |
| | 35th Percentile | | | | 20.87% |
| | Median | | | | 27.28% |
| | 65th Percentile | | | | 32.42% |

11. The TPO considered the median of the weighted average Profit Level Indicator as the arm's length margin and computed the TP adjustment of Rs.36,37,43,477 u/s. 92CA of the Act in the SWD segment as follows:-

| SWD SEGMENT | | |
|--|------------------|---------------------|
| Particulars | Formula | Amount (in |
| Taxpayers operating revenue | OR | 2,23,62,82,601 |
| Taxpayers operating cost | OC | 2,04,27,60,904 |
| Taxpayers operating profit | OP | 19,35,21,697 |
| Taxpayers PLI | $PLI=OP/OC$ | 9.47% |
| 35th Percentile Margin of comparable set | | 20.87% |
| Adjustment Required (if $PLI < 35th$ | | Yes |
| Median Margin of comparable set | M | 27.28% |
| Arm's Length Price | $ALP = (1+M)*OC$ | 2,60,00,26,078 |
| Price Received | OR | 2,23,62,82,601 |
| Shortfall being adjustment | ALP-OR | 36,37,43,477 |

12. The assessee preferred its objections before the DRP. Consequent to the directions of the DRP, the AO passed the final assessment order, against which the assessee is in appeal before the Tribunal.

13. The Id. AR for the assessee submitted that 3 companies viz., Larsen & Toubro Infotech Ltd., Persistent Systems Ltd. and Infosys Ltd. were functionally different from the assessee's activities. L&T Infotech Ltd. has certain extra-ordinary events such as acquisition/peculiar economic circumstances during the relevant FY, besides brand value and intangibles. There was no segmental information of sub-contracting expenses. Persistent Systems Ltd. is engaged in product development and segmental information is not available. Infosys Ltd. is engaged in diversified activities, break-up of revenue from software services and software product is not available, it owns intellectual property rights and incurs significant R&D costs.

The Id. AR further submitted that these 3 companies were considered by the coordinate Bench of the Tribunal in assessee's own case for AYs 2012-13 & 2013-14 in IT(TP)A Nos.692 & 2861/Bang/2017 and by order dated 27.4.2020 directed for exclusion of from the list of comparables.

14. The Id. DR supported the order of the lower authorities.

15. We have considered the rival submissions and perused the material on record. As far as the above 3 companies are concerned, we notice that they are functionally not comparable on different parameters and further the coordinate Bench of the Tribunal in assessee's own case for AYs 2012-13 & 2013-14 (supra) excluded these comparable companies. The relevant observations of the Tribunal are as follows:-

“Persyent Systems Limited

6. The assessee objected for the exclusion of this company by the lower authorities in the tally of comparables by arguing that it is engaged in OPD and there is a difference in OPD and IT services and that the assessee is having revenue from other sources and no segmental data is available. It was also submitted that in the assessment year 2012-2013, it is an abnormal year of operation and it is owning various intangibles. For this purpose, he relied on the order of the Bangalore Bench of the Tribunal in the case of NXP Semiconductor India (P.) Ltd. v. Dy. CIT [IT Appeal No. 1634 (Bang.) of 2014, dated 22-7-2015].

6.1 We have carefully gone through the order of the coordinate Bench in the case of NXP Semiconductor India (P.) Ltd. (supra) for the assessment year 2009-2010, wherein it was observed that Persyent Systems Limited was engaged in product development and product design and analysis services is functionally different

from a pure software service provider and therefore, excluded it from the list of comparables for software development services. The same view was taken in the case of Saxo India (P.) Ltd. v. Asstt. CIT [2016] 67 taxmann.com 155 (Delhi - Trib.), by observing that Persysent Systems Limited is engaged in running software development services as well as sale of software products. Albeit the percentage of software products in the total revenue is less, as has been noted by the TPO, and also there is no precise information about the contribution made by such small sale of software products to the total profits of the company. As no segmental information is available in respect of this company and the figures have been adopted by the TPO at entity level, it was directed to exclude Persysent Systems Limited from the list of comparables. In the present case also, it is noticed that Persysent Systems Limited is engaged in software products development. There is a difference between the outsourced software product development and IT services, which is evident from page nos. 973 and 974 of the paper book, as under:—

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

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

OPD and outsourced IT services: the difference.

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

In product development, requirements are less clearly defined. Instead, most product developers are given ship-dates for the product that are typically determined by external factors. Once

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

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

Larsen & Toubro Infotech Limited

7. The learned AR relied on the order of the ITAT Bangalore Benches in the case of CGI Information Systems and Management Consultants (P.) Ltd. v. Asstt. CIT [2018] 94 taxmann.com 97 and submitted that it was excluded from the list of comparables for the reason that Larsen & Toubro Infotech Limited was a software product company and segmental information on SWD services was not available. In the present case, Larsen & Toubro Infotech Limited engaged in development of software onsite and its overseas revenue for the financial year 2011-2012 was Rs.27,838,752,995 and domestic revenue was Rs.1,756,792,454. Further in the case of Huawei Technologies India (P.) Ltd. v. Jt. CIT [2019] 101 taxmann.com 313 (Bang. - Trib.) has taken the same view that it cannot be a comparable with that of the assessee. Being so, we direct the TPO to exclude the same from the list of comparables.

Infosys Limited

8. The argument of the learned AR is that Infosys Limited is functionally different from the assessee. It owns intangible and undertakes research and development. The learned AR also

submitted that it has high brand value and turnover. On the contrary, the learned DR submitted that the nature of services remains the same irrespective of whether it is engaged in providing onsite/offsite services.

8.1 We have heard the rival submissions and perused the material on record. Similar issue came up for consideration before the Tribunal in the case of NXP Semi Conductors India (P.) Ltd. (supra), wherein it was held as under:—

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

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

26.2 Infosys Technologies Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. 3DPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28-11-2013 with regard to this comparable has held as follows:—

"11.0 Infosys Technologies Ltd.

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

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

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

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

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

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

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

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

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

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

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

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

16. Following the above decision of the Tribunal in the assessee's own case for AYs 2012-13 & 2013-14, we direct exclusion of these companies i.e., Larsen & Toubro Infotech Ltd., Persistent Systems Ltd. and Infosys Ltd. from the list of comparables.

17. As far as Thirdware Solutions Ltd. is concerned, the Id. AR submitted that this company is also functionally different and engaged in product development and earns revenue from sale of licenses and subscriptions. Segmental information is not available. Further, this company was excluded as a comparable in the decision of the coordinate bench of the Tribunal in the case of *Sandisk India Device Design Centre Pvt. Ltd.* in IT(TP)A No.288/Bang/2021 for AY 2016-17 by order dated 30.6.2022.

18. We have heard both the parties and perused the material on record. We notice that the coordinate Bench of the Tribunal in Sandisk India Device Design Centre Pvt. Ltd. (supra) has considered the comparability of this company and held as follows:-

“17.6 We have perused the submissions advanced by both sides in the light of records placed before us. 17.7 He placed reliance on the decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT (supra) wherein this Tribunal following its decision in case of LSI India research development (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 83, excluded Persistent Systems Ltd., L&T Infotech Ltd., Thirdware Solutions and Infosys Ltd. by observing as under:

“3.2 This Tribunal in LSI India research development (P.) Ltd. v. DCIT (supra) observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:

16. As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the ld. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded 3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-

"5. The Ld A.R submitted that M/s Infosys Ltd, M/s Persistent Systems Ltd and M/s Thirdware Solutions Ltd have been excluded by the co-ordinate bench in the assessee's own case in AY 2008-09 in IT(TP)A No. 1673/Bang/2012.

6. We notice that the co-ordinate bench has excluded M/s Infosys Ltd in AY 2008-09 by following the decision rendered by another co-ordinate bench in the case of 3DPLM Software Solutions Ltd (IT(TP)A No. 1303/Bang/2012 dated 28-11-2013, wherein the decision rendered in the case of Triology E Business

Software India P Ltd (ITA No. 1054/Bang/2011) was followed and it was held that M/s Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It was further observed that the break-up of revenue from software services and software product is not available.

6.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Infosys Ltd.

7. In AY 2008-09, the co-ordinate bench has excluded M/s Persistent Systems Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s Persistent Systems Ltd is engaged in product development and product design services while the assessee is a software development service provider. Further, the segmental details were not available.

7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Persistent Systems Ltd.

We also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Thirdware Solutions Ltd.

17. As far as exclusion of Larsen & Toubro Infotech Ltd., is concerned, the Tribunal in the very same case of LG Soft (P.) Ltd. (supra) in another order dated 27-9-2019 in MP No. 95/Bang/2019 held that exclusion of Larsen & Toubro Infotech Ltd., was omitted to be adjudicated in the original order dated 28-5-2019 passed by the Tribunal referred in the earlier paragraph and held that Larsen & Toubro Infotech Ltd., is also not a

comparable company because there were extraordinary events that occurred in the relevant previous year and that it possessed brand and intangibles and there was no segmental information of sub-contracting expenses”.

3.3 There is nothing on record brought by the Ld.CIT.DR in order to establish that these are comparable with assessee that is a captive service provider which functions at the strict supervision and instructions by the AE's. Further we note that turnover criteria has to be applied with an upper limit which is not been considered by the Ld. TPO. The TPO has applied less than 1 crore turnover limit to eliminate the comparables however it failed to apply upper limit considering the functions performed assets owned and risk assumed by assessee under this segment for the year under consideration.”

17.8 Before us, the Ld.AR has not been able to place anything on record contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Persistent Systems Ltd., L& T Infotech Ltd., Thirdware Solutions and Infosys Ltd. from the final list.”

19. In view of the above decision of the Tribunal, we direct that Thirdware Solutions Ltd. be excluded from the list of comparables.

20. Though assessee has sought inclusion of three companies vide ground 7(c), at the time of hearing the ld. AR pressed for inclusion of only Akshay Software Technologies Ltd. from the comparables. Accordingly, the other companies are dismissed as not pressed.

21. The ld. AR submitted that Akshay Software Technologies Ltd. is primarily engaged into software services such as procurement, installation, implementation, support and maintenance and the nature of business. This company was accepted as a comparable in assessee's own case for AYs 2012-13 & 2013-14 (supra).

22. The ld. DR supported the orders of lower authorities.
23. We notice that the Tribunal has considered this company's comparability in assessee's own case for AYs 2012-13 & 2013-14 (supra) and held as under:-

“IV. AKSHAY SOFTWARE TECHNOLOGIES LIMITED

32. It was rejected by the TPO for the reason that the function of this company appears to be more in the nature of support services and I.T. enabled services. However, this company is engaged in providing professional services, implementation, support and maintenance of ERP products and other services. These are nothing but software development services, as is evident from Notes forming part of the financial statement, which is placed at paper book page No.1825. Further, the revenue from software services accounts for 99.45% of the total revenue of the company as evident from the financial statement placed on record at paper book page No.1831. Being so, we direct the TPO to consider this company as comparable to the assessee's case while selecting the comparables. ”

24. Following the above order of the Tribunal in assessee's own case for AYs 2012-13 & 2013-14, we direct inclusion of this company in the list of comparables.

Corporate Issues

25. Ground No.11 is regarding disallowance of depreciation on networking equipment. The assessee acquired certain networking equipments during the year under consideration and the same have considered as addition to 60% depreciation block of assets. The AO held that the networking equipments cannot be classified as Computers and therefore allowed the depreciation at 15% instead of 60% and

made the addition for the difference. The DRP confirmed the addition on the same ground.

26. Before us, it is the contention of the assessee that the net working equipment included servers, netapp filter, optiplex, monitor, laptop video, etc. which ought to be classified as a “computers” and depreciation @ 60% thereon ought to be allowed. The IdAR submitted that the very same issue was before a co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 and in its order in IT(TP)A No.1174/Bang/2011 dt.14.11.2014, the matter was remanded back to the file of the Assessing Officer for examination afresh.

27. We have heard rival submissions and perused the material on record including the judicial decision cited. On an appreciation of the material on record, we find that the same issue was before a co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08. In its order in IT(TP)A No.1174/Bang/2011 dt.14.11.2014, at para 11 thereof the co-ordinate bench has held as under :-

“ 11. We have considered the rival submissions and are of the view that the issue requires a fresh consideration in the light of the submissions made by the Assessee before the DRP. As far as depreciation on Networking equipment is concerned, the AO has not called upon the Assessee to demonstrate as to how Networking equipment on which depreciation was claimed at 60%, satisfied the requirements being classified as “Computers”. This specific objection by the Assessee before the DRP has not been controverted. Therefore there was lack of proper opportunity afforded to the Assessee before the AO. Therefore the issue

requires to be examined afresh by the AO after due opportunity to the Assessee of being heard. As far as depreciation on active components and 19 inch heavy racks, the position remains the same, in as much as the AO has not given due opportunity of being heard to the Assessee. Before DRP the Assessee has explained the nature of the components and racks on which depreciation was claimed at 60% and as to how they were in the nature of "Computers". These submissions have not been considered by the DRP. In the circumstances, we are of the view that this issue also requires to be examined afresh by the AO after due opportunity to the Assessee of being heard to the Assessee. We hold and direct accordingly. The relevant ground of appeal is treated as allowed for statistical purpose."

28. We also notice that the Special Bench of Hon'ble ITAT Mumbai has considered a similar issue in the case of *Datacraft India Ltd (133 TTJ 377)* and held that -

'31. Now we have to consider whether a 'router' can be considered as "computer hardware" or a "computer component". Computer hardware refers to the physical parts of a computer and related devices. Internal hardware devices include motherboards, hard drives, and RAM. External hardware devices include monitors, keyboards, mouse, printers, and scanners. The internal hardware parts of a computer are often referred to as 'components', while external hardware devices are usually called 'peripherals'. Together, they all fall under the category of computer hardware. 'Software', on the other hand, consist of the programs and applications that run on computers. Because software runs on computer hardware, software programs often have 'system requirements', that list the minimum hardware required for the software to run.

31.1 In short, "Router" is a hardware device that routes data (hence the name) from a local area network (LAN) to another network connection. A router acts like a coin sorting machine, allowing only authorized machines to connect to other computer systems. Most routers also keep log files about the local network activity. Now the question is whether this "machine" can be used independent of Computer. If yes, then it cannot be called "Computer Hardware" in all circumstances.

31.2 When "Computer Hardware", is used as a component of the computer, it becomes part and parcel of the computer, as in the case of

operating software in the computer. In such a situation, hardware in question can be considered as a part of a computer and hence a 'computer'. Per contra, when the machine is not used as a necessary accessory or in combination with a Computer, it cannot be called a 'Computer component.'

31.3 Coming to the Routers, it is seen that these can also be used with a Television and in such use, no computer is required. These are also called T.V. routers. Similarly, "Internet Service Providers", give connectivity, by installing a router in the premises of the persons/institutions availing the internet connection. In these cases the router is not used along with a computer. In such a situation, it would be a "Stand alone" equipment. In such cases this cannot be considered a component of a computer or computer Hardware. Giving another example, a computer software can be used in many devices including washing machine, televisions, telephone equipment etc. When such software is used in those devices, it integrates with that particular devices. The predominant function of the device determines its classification. Only if the Computer software, resides in a computer, then it become a part and parcel of a computer and, as long as it is as integral part of a computer, it is classified as a 'Computer'.

31.4 In view of the above discussion, we are of the considered view that router and switches can be classified as a computer Hardware when they are used along with a computer and when their functions are integrated with a 'computer' In other words, when a device is used as part of the computer in its functions, then it would be termed as a computer.

32. Now we will advert to the decisions relied on by the rival parties. We have set out above the cases decided by various Benches of the Tribunal in favour of the assessee. The lead order is in the case of Samiran Majumdar (supra) which has been followed, directly or indirectly, in most of the subsequent cases. We will take up this case for discussion, in which the question was whether printer and scanner could be allowed a higher rate of depreciation as applicable to computers. The Bench noticed that the printer and scanner cannot be used without computer. It was on this appreciation of the factual position that the printer and scanners were held to be part of computer qualifying for depreciation at the rate applicable to computer. In the opposition the orders taking view in favour of the Revenue are led by the case of router mania Technologies (supra). In this case it was observed that the router is a device which links or connects the computers for the exchange of

relevant data. In reaching the conclusion that router is not eligible for depreciation at the rate applicable to computer, the Bench noticed that the router at its own does not perform any logical, arithmetical or memory functions by manipulations of electronic, magnetic or optical impulses.

33. We prefer the view taken in the case of Samiran Majumdar (supra) over that in the case of Router mania Technologies (supra) ; With utmost respect, the Mumbai Bench had taken a narrow view on this issue, by holding that only a device which can perform logical, arithmetical or memory functions by manipulations of electronic impulses etc. is computer. It has restricted the meaning of computer only to the CPU of the computer and pulled out the input and output devices from the ambit of computer. No doubt the function of the computer, as one composite unit, is to perform logical, arithmetical or memory functions etc., but it is not only the equipment which performs such functions that can be called as computer ; All the input and output devices, as discussed above, which support in the receipt of input and outflow of the output are also part of computer. CPU alone, in our opinion, cannot be considered as synonymous to the expression 'Computer'. The function of CPU is akin to the brain playing a pivotal role in the conduct of the body. As we do not call the brain alone as the body, similarly the CPU alone cannot be described as computer. Thus the computer has to necessarily include the input and output devices within its scope, subject to their exclusive user with the computer, as discussed above. If we constrict the definition of computer only to processing unit, as has been held in the case of Router mania (supra), then even the keyboard and mouse etc. will not qualify to be called as computer because these equipments also do not perform logical, arithmetical or memory functions. In the light of the meaning of 'computer' discussed in earlier paras, we are inclined to agree with the view taken by the Kolkata Bench in Samiran Majumdar (supra).

34. We therefore answer the question referred to this Special Bench in affirmative by holding that the routers and switches in the circumstances of the case, are to be included in the block of 'Computer' entitled to depreciation at the rate of 60%.'

29. Following the above decision of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra), we remand the issue back to the file of the Assessing Officer

for fresh consideration with a direction to take into account the decision of the special bench in the case of *Datacraft India Ltd(supra)*, after affording the assessee adequate opportunity of being heard and to file details / submissions required. It is ordered accordingly. This issue is allowed for statistical purposes only.

30. Ground No.12 is regarding not granting depreciation allowance on networking equipment, active components and computer server racks amounting to Rs.18,24,252 on adjusted opening balance. This ground is consequential in nature and does not warrant a separate adjudication.

31. Ground No.13 is regarding disallowance of differential interest income and sub-lease income as appearing in Form 26AS. In this regard the AO is directed to verify the facts afresh based on evidences submitted by the assessee and decide in accordance with law.

32. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 13th day of September, 2022.

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 13th September, 2022.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.