

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

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.242/Bang/2021
Assessment Year : 2016-17

M/s. ContinuServe Softech India Pvt. Ltd., Prathik Tech Park, 2 nd and 3 rd Floor, Sy. No.93/1, Veerasandra Village, Attibele Hobli, Hosur Road, Electronic City Phase 1, Bengaluru – 560 100. PAN : AAACC 8342 A	Vs.	DCIT, Circle – 2(1)(1), Bengaluru.
ASSESSEE		RESPONDENT

Assessee by	:	Shri. Darpan Kirpalani, Advocate
Revenue by	:	Shri. Sumer Singh Meena, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	22.09.2022
Date of Pronouncement	:	23.09.2022

ORDER

Per N V Vasudevan, Vice President

This appeal by the Assessee is directed against the final order of assessment dated 30.03.2021 of National e-Assessment Centre (NFAC), Delhi (hereinafter referred to as the Assessing Officer, “AO” in short) passed u/s.143(3) read with Section 144C(13) of the Income Tax Act, 1961 (Act) in relation to AY 2016-2017.

2. The Assessee is engaged in the business of provision of Software Development Services (SWD services), to its wholly owned holding company. In terms of the provisions of Sec.92-A of the Act, the Assessee and its wholly owned holding company were Associated Enterprises

("AEs"). In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services was an "international transaction" i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the any income arising from an international transaction shall be computed having regard to the arm's length price. In this appeal by the Assessee, the dispute is with regard to determination of Arms' Length Price (ALP) in respect of the international transaction of rendering SWD services to the AE.

3. As far as the provision of Software Development services are concerned, the Assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The Assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison of the Assessee's profit margin with that of the comparable companies. The OP/OC of the Assessee was arrived at 9.62% by the Assessee in its TP study. The operating income was Rs.27,33,52,756/- and the Operating Cost was Rs.24,93,63,899/-. The Operating profit (Operating income – Operating cost was Rs.2,39,88.857/-.

Thus, the OP/TC was arrived at 9.62%. The Assessee chose companies who are engaged in providing similar services such as the Assessee. The Assessee identified 7 companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the Assessee. The Assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/OC, which was arrived at 6.76% by the TPO. He also selected comparable companies from database. The TPO accepted some companies chosen by the Assessee as comparable companies. The TPO on his own identified some other companies as comparable with the Assessee company and arrived at a set of 13 comparable companies. The PLI was reworked by the TPO at 24.83%. The TPO worked out the average arithmetic mean of their profit margins of the 15 comparable companies as follows:

<i>Sl. No.</i>	<i>Company Name</i>	<i>Financial Year wise OP/OC (%)</i>			
		<i>2015-16</i>	<i>2014-15</i>	<i>2013-14</i>	<i>Average</i>
1.	<i>Kals Information Systems Pvt. Ltd.</i>	3.97%	5.77%	16.94%	8.60%
2.	<i>Rheal Software Pvt. Ltd.</i>	3.20%	2.76%	36.64%	14.50%
3.	<i>C G-V A K Software & Exports Ltd.</i>	19.60%	19.87%	13.81%	18.50%
4.	<i>R S Software (India) Ltd.</i>	-2.09%	32.75%	24.14%	20.87%
5.	<i>Larsen & Toubro</i>	26.29%	24.22%	23.54%	24.83%

	<i>Infotech Ltd.</i>				
6.	<i>Nihilent Ltd.</i>	15.94%	29.19%	35.72%	26.36%
7.	<i>Inteq Software Pvt. Ltd.</i>	7.53%	32.14%	45.00%	28.20%
8.	<i>Persistent Systems Ltd.</i>	26.92%	31.34%	35.64%	30.89%
9.	<i>Infobeans Technologies Ltd.</i>	34.98%	20.78%	41.95%	32.42%
10.	<i>Thirdware Solution Ltd.</i>	23.89%	44.39%	44.68%	36.90%
11.	<i>Infosys Ltd.</i>	38.22%	41.30%	36.28%	38.61%
12.	<i>Aspire Systems (India) Pvt. Ltd.</i>	34.26%	47.56%	38.04%	39.28%
13.	<i>Cybage Software Pvt. Ltd.</i>	62.90%	68.68%	68.82%	66.45%
	35th Percentile				24.83%
	Median				28.20%
	65th Percentile				32.42%

5. The TPO did not give working capital adjustment to the margin of the comparable companies as claimed by the Assessee. TPO computed the Addition to total income on account of adjustment to ALP as follows:

“21.4. Computation of Arm's Length Price:

21.4.1 The median of the weighted average Profit Level indicators is taken as the arm's length margin. Please see Annexure A for details of computation of PLI of the comparables. Based on this, the arm's length price. of the services rendered by the taxpayer to its AE(s) is computed as under:

SWD SEGMENT		
Particulars	Formula	Amount (in Rs.)
Taxpayers operating revenue	OR	27,33,52,757
Taxpayers operating cost	OC	25,60,44,142
Taxpayers operating profit	OP	1,73,08,615
Taxpayers PLI	$PLI=OP/OC$	6.76%
35th Percentile Margin of comaparable set		24.83%
Adjustment Required (if $PLI < 35th$ Percentile)		Yes
Median Margin of comparable set	M	28.20%
Arm's Length Price	$ALP=(1+M)*OC$	32,82,48,590
Price Received	OR	27,33,52,757
Shortfall being adjustment	ALP-OR	5,48,95,833

21.4.2 The above shortfall of Rs.5,48,95,833/-is treated as transfer pricing adjustment u/s 92CA in respect of software development segment of the taxpayer's international transactions.

Thus a sum of Rs.5,48,95,833/- was added to the total income of the Assessee on account of determination of ALP for provision of SWD services by the Assessee to its AE.

6. The Assessee filed objections before the Disputes Resolution Panel (DRP) against the draft assessment order passed by the AO wherein the addition suggested by the TPO as adjustment consequent to determination of ALP was added to the total income of the Assessee by the AO. The DRP gave certain directions. Based on the directions of the DRP, the AO passed the final order of assessment. To the extent the Assessee did not get relief from the DRP, the Assessee has preferred appeal before the Tribunal.

7. The main grievance of the Assessee projected in the grounds of appeal filed before the Tribunal which was pressed for adjudication and argued before us were:

(i) choice of comparable companies by the TPO which was affirmed by the DRP (Ground No.4 to 4.3), which reads as follows.

4. Comparability Analysis adopted by the Ld. TPO for determination of arm's length price

4.1 The Ld. ITO/ Ld. TPO/ Ld. Panel erred in facts and in law by benchmarking the transactions of IT Services of the Appellant with companies operating as full-fledged entrepreneurs thereby not considering the differences in the functions performed, assets employed, and risk undertaken by the Appellant vis-à-vis the companies selected as being comparable.

4.2 The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability.

4.3 The Ld. ITO/ Ld. TPO/ Ld. Panel, while applying the turnover filter rejected companies having turnovers less than INR 1 crore, however, erred in not applying an appropriate upper limit to reject high turnover companies and thereby, erred in accepting companies without considering the turnover and size of the Appellant and comparables. The Appellant submits that should an upper limit be applied, the following companies would be rejected:

Sl.No	Company	Turnover		
		FY 2013-14	FY 2014-15	FY 2015-16
1	R S Software (India) Ltd.	351.88	345.51	-
2	Persistent Systems Ltd.	1,184.12	1,242.50	1,447.14
3	Thirdware Solution Ltd.	206.76	230.08	-
4	Larsen & Toubro Infotech Ltd.	4,643.94	4,744.40	5,569.52
5	Infosys Ltd.	44,341.00	47,300.00	53,983.00
6	Nihilent Ltd.	242.00	267.00	
7	Aspire Systems (India) Pvt Ltd	156.53		-
8	Cybage Software Pvt. Ltd.	544.27	622.26	722.25

In this ground, the assessee has prayed for exclusion of some companies by applying the turnover filter;

(ii) Inclusion of certain companies set out in Ground No.5, which reads as follows:

5. *Erroneous rejection of comparable companies*

The Ld. ITO/ Ld. TPO erred in rejecting certain comparable companies like Akshay Software Technologies Ltd., Evoke Technologies Pvt. Ltd. and Sasken Technologies Ltd. despite these companies being functionally similar to the Appellant and the Ld. Panel grossly erred in not adjudicating their exclusion by cursorily mentioning that the companies do not feature in the Ld. TPO's search matrix.

(iii) Exclusion of profit margins of R.S.Software (India) Pvt.Ltd., for FY 2013-14 & 14-15 because in these two financial years, the turnover of these companies was more than Rs.200 Crores and therefore is not a

comparable company in those two Financial Years and therefore while computing the average profit margin of three financial years, the profit margins of these two Financial years 2013-14 & 2014-15 should be excluded and only margins for FY 16-17 should be taken for working out the average profit margin of this company.

(iv) Exclusion of profit margins of Inteq Software Pvt.Ltd. for FY 2013-14 because in this financial year, the related Party transaction of this company was more than 15% i.e., 17.62% and hence this company will not be regarded as comparable company for that year and therefore while computing the average profit margin of three financial years, the profit margins of the Financial years 2013-14 should be excluded and only margins for FY 2014-15 & 2016-17 should be taken for working out the average profit margin of this company.

(iv) Correct computation of profit margins of comparable company CG VAK Software and Exports Ltd., It is taken as 16.71% by the TPO. It is the stand of the Assessee that the correct profit margin (weighted average NC) is 12.03%.

(v) Allow working Capital Adjustment as prayed for by the Assessee. The grievance in this regard is projected by the Assessee in Grd.No.7 of the grounds of appeal raised by the Assessee.

(vi) Exclude Infobeans Technologies Ltd., from the list of comparable companies on the ground of functional comparability as projected in Grd.No.6.1.

8. As far as Ground No. 4 to 4.3 is concerned, the learned Counsel for the assessee prayed for exclusion of 7 companies out of the 8 companies set out in Ground No.4.3. As far as comparability of companies listed in Grd.No.4.3 raised by the Assessee is concerned, the admitted factual position is that the turnover of these companies is more than Rs.200 Crores and the Assessee's turnover is only Rs. 27,33,52,756/-. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the Assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India Pvt.Ltd Vs. DCIT 82 Taxmann.com 167(Del), wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a company which is otherwise functionally comparable cannot be excluded only on the basis of high turnover. The Assessee has raised Grd.No.4, 4.1 to 4.3 before the Tribunal challenging the aforesaid view of the DRP.

9. On the issue of application of turnover filter, 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.

10. 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.

11. 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.”

12. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon’ble Delhi High

Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

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

“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .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 arc 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.”

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

17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the

learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of *obiter dictum*. Judicial discipline requires that the Tribunal should follow the decision of a non-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 Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

14. In view of the aforesaid decision, we hold that 7 companies listed in Grd.No.4.3 other than R.S.Software (india) Ltd., raised by the Assessee whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.

15. As far as the company R.S. Software (India) Pvt.Ltd., listed at Sl.No.1 in Ground No.4.3 is concerned, the said company has admittedly a turnover of above Rs.200 crores in FY 2013-14 & 2014-15 and hence is not a comparable company in those two Financial Years and therefore while computing the average profit margin of three financial years, the profit margins of these two Financial years 2013-14 & 2014-15 should be excluded and only margins for FY 16-17 should be taken for working out the average profit margin of this company. In the case of M/S.BORQS Software Solutions Pvt.Ltd. Vs. ACIT IT(TP) A.No.310/Bang/2021 for AY 2016-17, the ITAT Bangalore Bench in its order dated 25.10.2021 has taken the view as canvassed by the Assessee. The following are the relevant observations of the Tribunal in this regard:

“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.”

16. Following the same, we hold that R.S. Software (India) Pvt.Ltd., has admittedly a turnover of above Rs.200 crores in FY 2013-14 & 2014-15 and hence is not a comparable company in those two Financial Years and therefore while computing the average profit margin of three financial years, the profit margins of these two Financial Years 2013-14 & 2014-15 should be excluded and only margins for FY 16-17 should be taken for working out the average profit margin of this company.

17. The next plea of the Assessee is for exclusion of profit margins of Inteq Software Pvt.Ltd. for FY 2013-14 because in this financial year, the related Party transaction of this company was more than 15% i.e., 17.62% and hence this company will not be regarded as comparable company for that year and therefore while computing the average profit margin of three financial years, the profit margins of the Financial years 2013-14 should be excluded and only margins for FY 2014-15 & 2016-17 should be taken for working out the average profit margin of this company. In the case of M/S.BORQS Software Solutions Pvt.Ltd. Vs. ACIT IT(TP) A.No.310/Bang/2021 for AY 2016-17, the ITAT Bangalore Bench in its order dated 25.10.2021 has taken the view as canvassed by the Assessee. The following were the relevant observations of the Tribunal in this regard on the comparable company Inteq Software Pvt.Ltd.:

“26. The next argument is that by applying RPT filter this company cannot be regarded as comparable for FY 2013-14 and therefore while working the margin of this company the margin for FY 2013-14 should not be considered. We have already upheld similar argument while deciding on the exclusion of margins of R.S.Software on the ground of application of turnover filter for FY 2013-14 and 2014-15. Those reasons given will equally apply to this comparable company also and accordingly, we direct that the margins of this company for FY 2013-14 should not be taken for working out the average profit margins of this company which is to be included in the dataset.”

Following the said view we hold that the company Inteq Software Pvt.Ltd. for FY 2013-14 had related Party transaction of more than 15% i.e., 17.62% and hence this company will not be regarded as comparable company for that year and therefore while computing the average profit margin of three financial years, the profit margins of the Financial years 2013-14 should be

excluded and only margins for FY 2014-15 & 2016-17 should be taken for working out the average profit margin of this company.

18. The next plea of the Assessee is for inclusion of certain comparable companies as set out in Ground No.5 of the grounds of appeal. As far as the plea of the Assessee for inclusion of the aforesaid companies is concerned, the DRP dealt with the plea of the Assessee as follows:

“Objections / contentions for the acceptance of comparable companies erroneously rejected with respect to the international transaction of provision of software development services

2.24 Ground of objection No. 24:

Objection No. 24.1: Akshay Software Technologies Limited ('Akshay Software') should be accepted as a comparable.

- *Functionally comparable*
- *Inconsistent approach to comparability analysis undertaken by learned TPO*
- *Erroneous Rejection of Transfer Pricing Documentation learned TPO - Akshay Software qualifies all other filters proposed by learned TPO in the show cause notice*
- *Qualifies all other filters proposed by the ld. TPO*

&

2.25 Ground of objection No. 25

Objection No. 25.1: Evoke Technologies Private Limited ('Evoke Technologies') should be accepted as a comparable to the Assessee.

- *Functionally comparable*
- *Inconsistent approach to comparability analysis undertaken by learned TPO*
- *Qualifies all other filters proposed by the ld. TPO in the show cause notice*

&

2.26 Ground of objection No. 26:

Objection No. 26.1: Sasken Technologies Ltd. ('Sasken Technologies') should be accepted as a comparable company to the assessee.

- *Functionally comparable*
- *Qualifies all other filters proposed by the ld. TPO*
- *Inconsistent approach to comparability analysis undertaken by learned TPO*

2.26.1 *Having considered the submissions, it is seen that the above companies do not figure in the search matrix or the TPO. We have already upheld the rejection of TP document of the assessee which in turn means that a fresh search has to be conducted by the TPO. Based on the fresh search, the TPO has identified the comparables. The assessee can only ask those companies out of the TPO's search matrix which have been wrongly rejected by the TPO.,As these companies do not figure in the TPO's search matrix, we opine that the functionality is not required to be seen at all, as it amounts to cherry picking. Accordingly, the plea for inclusion of these companies is rejected."*

19. It can be seen from the directions of the DRP that they have rejected the plea of the Assessee only on the basis that these companies do not figure in the search matrix of the TPO. On identical facts and directions of the DRP, this tribunal in the case of M/S.Prism Network Pvt.Ltyd. Vs. ACIT IT(TP) A.No.349/Bang/2021 order dated 11.2.2022 for AY 2016-17 remanded the issue to the TPO/AO for fresh consideration with the following observations:

"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.”

We are of the view that identical directions would be just and sufficient in the present case hence the regarding inclusion of the aforesaid companies as comparable companies is hereby set aside to AO/TPO for fresh consideration.

20. The next grievance of the Assessee is with regard to incorrect computation of profit margins of CG VAK Software and Exports Ltd. As far as the grievance of the Assessee is concerned, the DRP gave the following directions to the AO:

“2.27 Ground of objection No. 27: CG-VAK Software Exports Limited should be accepted with rectified margin

Objection No. 27.1: *For CG VAK Exports Software Limited (CG JAW), revised margin should be considered.*

➤ *Erroneous margin computation*

2.27.1 On the plea of error in margin computation, the issue was referred to TPO to comment on the objection with regard to the error in the computation of margins in the above listed companies. The TPO vide letter dated 03.02.2020 has replied and the relevant part of the reply is extracted as under:

“6The source of the data for these financial analytical companies such as prowess or capital line is ministry of corporate affairs. Hence, the data obtained from these data bases, which is in public domain, is very much valid as there is no data pilferage.

7. Notwithstanding anything contained in the preceding paragraphs, if the assessee assumes that there is a difference between the figures from the data bases and the annual reports of the comparable companies, the assessee should have moved a rectification application u/s. 154 of the Income tax Act, 1961 before the TPO, with necessary documentary proof thereof.”

2.27.2 Considering the above, the TPO is directed to verify the computation of margins as provided by the assessee and if the assessee with necessary documentary proves the computation the same may be rectified. Otherwise, the TPO should adopt correct margins as per the information available with regard to these companies.”

21. The TPO in the order giving effect to the directions of the DRP has however not considered the plea of the Assessee as directed by the DRP. Hence, we deem it fit and appropriate to set aside the order of the AO on this aspect and direct the TPO/AO to verify the profit margin of this company and the claim of the Assessee after affording the Assessee opportunity of being heard.

22. The next argument of the learned Counsel for the assessee was the plea with regard to excluding Infobeans Technologies Ltd., from the list of

comparable companies. The plea of the assessee for exclusion of this company was that it is functionally not comparable as the activities are not similar to that of the assessee and lack segmental information. Besides the above, the assessee has also raised contentions that this company has intangibles significant to related party transactions and insufficient business information. With regard to functional comparability, it was submitted by the learned Counsel for the assessee that this company is not providing business IT Services (CAD) (application development and maintenance, Big Data, UX and UI, Automation engineering services, including product engineering and lifestyle solutions and business process management) in verticals of storage and virtualization, media and publishing, HR and Payroll and e-commerce. It is also providing software engineering services primarily in Custom Application Development (CAM), enterprise mobility and Big Data Analytics (BDA).

23. The DRP dealt with the objection of the assessee by placing reliance on the annual report of the company which mentions that this company is in the business of rendering software services. The learned Counsel for the assessee brought to our notice decision of the ITAT, Pune Bench, in the case of Optiva India Technologies Pvt. Ltd., Vs. ACIT ITA No.194/PUN/20212 for Assessment Year 2016-17, order dated 21.07.2022 and the decision of the ITAT, Mumbai Bench, in the case of Red Hat India Pvt. Ltd., Vs. ACIT ITA No.379/Mum/2021 for Assessment Year 2016-17, order dated 25.02.2022 and the decision of the Hyderabad Bench of ITAT rendered in the case of Infor India Pvt. Ltd., Vs. DCIT IT(TP)A no.198/Hyd/2021 for Assessment Year 2016-17, order dated 06.10.2021. In all the aforesaid 3

decisions rendered in the case of software development companies, the Tribunal took the view that Infobeans Technologies Ltd., is not functionally company and the decisions relied on by the learned counsel for the assessee were decisions rendered by the ITAT, Pune Bench, Mumbai Bench in the case of Redhat India Pvt. Ltd., (supra) has been followed and it has been held that Infobeans Technologies Ltd., is not a comparable company. In the decision rendered by the ITAT, Hyderabad Bench, the issue was remanded to the TPO for verification of the diversified activities of Infobeans Technologies Ltd. In the decision rendered by the ITAT, Mumbai Bench, in the case of Red Hat India Pvt. Ltd., the finding in para 50 of the aforesaid order is that Infobeans Technologies Pvt. Ltd., is into diversified services and no segmental information is available. In the case of the assessee in this appeal, a specific objection was raised regarding lack of segmental information. This has been dealt with by the DRP in para 2.16.2 of its directions and the plea has been rejected on the ground that it is based on information available in the website which is conclusive. The Bengaluru Bench of the Tribunal in the case of Prism Networks Pvt. Ltd., (supra) as well as BORQS Software Solutions Pvt. Ltd., (supra) has upheld the inclusion of Infobeans Technologies Ltd. In the given facts and circumstances of the case, we are of the view that it would be just and appropriate to set aside the issue with regard to comparability of Infobeans Technologies Ltd., to the TPO/AO for fresh consideration to verify the claim of the assessee based on the decisions cited by the learned Counsel for the assessee and verification of facts. The TPO/AO will verify the factual details and decide the issue of comparability of this company afresh after affording assessee opportunity of being heard.

24. The next ground that needs adjudication is the ground with regard to the grievance of the Assessee that no adjustment towards working capital has been allowed to the Assessee. In this regard though the ground of appeal makes a reference to risk adjustment also, the point that was pressed for adjudication was only with regard to grant of working capital adjustment. On the issue of non granting of working capital adjustment, the DRP gave its decision by observing that (i) The Assessee has not demonstrated with any data or information as to the impact of working capital on the costs, price or profit. (ii) working capital requirements and impact depends on various factors such as business cycle, the nature of business activity with its correlation on the general economic trends, the fund and capital position of the company, its marketing strategies, its market share etc., all of which cannot be captured in the year end receivable or payable position. (iii) the year end receivables and payable may not reflect as to whether it arises from transactions relating to revenue account or capital account as there is no uniformity in the accounting or reporting requirements and an intermixing is generally possible. (iv) 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.

25. The learned counsel for the Assessee submitted that the conclusions of the DRP are identical to the conclusions arrived at by the revenue authorities in the case of *Huawei Technologies India Pvt. Ltd. v. JCIT [2019] 101 taxmann.com 313 (Bang. Trib.)*. In the aforesaid decision on an identical issue, the Tribunal held that working capital adjustment has to be given. The tribunal reasoned in the aforesaid decision that a reading of Rule

10B(1)(e)(iii) of the Rules read with Sec.92CA of the Act, would clearly show 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. The tribunal referred to 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 Annexure to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. The Tribunal referred to Paragraphs 13 to 16 of the aforesaid OECD guidelines, wherein the 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."

26. The tribunal observed that 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

tribunal observed that the guidelines conclude by observing that the purpose of working capital adjustments is to improve the reliability of the comparables. The Tribunal further observed that 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. One has to see that reasonable adjustment is being made so as to bring both comparable and test party on same footing.

27. We are therefore of the view that the issue with regard to the grant of working capital adjustment should be directed to be examined by the TPO/AO afresh in the light of the decision of the tribunal referred to above, after affording opportunity of being heard to the Assessee.

28. The TPO/AO is directed to compute the ALP of the international transaction of rendering of SWD services by the Assessee to AE in the light of the directions given above, after affording Assessee opportunity of being heard.

29. In the result, the appeal by the Assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(N.V. VASUDEVAN)
Vice President

Bangalore,
Dated: 23.09.2022.
/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.