

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

IT(TP)A No. 278/Bang/2021
Assessment Year : 2016-17

M/s. HP PPS Services India Pvt. Ltd., No. 24, Salarpuria Arena, Hosur Main Road, Adugodi, Bangalore – 560 030. PAN: AADCH5825N	Vs.	The Deputy Commissioner of Income Tax, Circle 3 (1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Shri Binod Kumar Singh, CIT DR

Date of Hearing	:	22-08-2022
Date of Pronouncement	:	29-09-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against assessment order dated 29/03/2021 passed by National e-Assessment Centre, Delhi for A.Y. 2016-17 on following grounds of appeal.

“The Appellant submits that:

I. Transfer Pricing

The grounds mentioned hereinafter are without prejudice to one another.

1. The learned Assessing Officer ('learned AO'), learned Transfer Pricing Officer ('learned TPO') and the Honourable Dispute Resolution Panel ('Hon'ble DRP')

erred in law and facts in making an aggregate Transfer Pricing adjustment ('TP adjustment') of Rs. 18,16,94,876/- [adjustment of Rs.11,53,50,416/- to the Software Development ('SWD') services segment and an adjustment of Rs. 6,63,44,460/- to the Information Technology enabled Services ('ITeS') segment]

2. The learned AO has made an error in mentioning adjustment on account of IT enabled services as interest on delayed receivables.

3. The learned AO/ learned TPO/ Hon'ble DRP erred on facts and law in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.

4. The learned AO/ learned TPO/ Hon'ble DRP erred on facts and law in rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters while determining the Arm's Length Price ('ALP').

5. The learned AO/ learned TPO/ Hon'ble DRP erred on facts and law in not considering the financial data of the preceding two years in case of the comparable companies wherein the data for the current year is unavailable, while determining the ALP.

6. The learned AO/ learned TPO/ Hon'ble DRP erred in arbitrarily rejecting companies merely on the ground that they have a different financial year ending (i.e. other than 31st March 2016) or the data which does not fall within 12-month period (i.e. 1st March 2015 to 31st March 2016).

7. The learned AO/learned TPO/Hon'ble DRP erred in applying the service income filter of 75% to sales, leading to a narrower comparable set.

8. The learned AO/learned TPO/Hon'ble DRP erred in applying export earning filter of 75% of the total sales, leading to a narrower comparable set.

9. The learned AO/learned TPO/Hon'ble DRP erred in rejecting companies having ratio of employee cost to sales of less than 25%.

10. The learned AO/ learned TPO/ Hon'ble DRP erred in not applying the upper limit on turnover while selecting the comparable companies.

11. The learned AO/ learned TPO/ Hon'ble DRP erred in calculating RPT ratio by dividing revenue transactions to total revenue or expenditure transaction to total expenses.

12. The learned AO/ learned TPO/ Hon'ble DRP erred in accepting companies that ought to have been rejected as comparable:

SWD Services Segment

- Inteq Software Private Limited
- Larsen and Toubro Infotech. Limited

- *Nihilent Ltd.*
- *Persistent Systems Ltd*
- *Infosys Limited*
- *Thirdware Solutions Limited*
- *Infobeans Technologies Limited*
- *Aspire Systems (India) Private Limited*
- *Cybage Software Private Limited*
- *Exilant Technologies Private Limited*

ITeS Segment

- *Infosys BPM Limited*
- *SPI Technologies India Private Limited*
- *Eclerx Services Limited*

13. *The learned AO/ learned TPO/ Hon'ble DRP erred in rejecting companies that ought to have been accepted as comparable:*

SWD Services Segment

- *I2T2 Limited*
- *Minvesta Infotech Limited*
- *Sasken Communication Technologies Limited*
- *E-Zest Solutions Limited*
- *Agilisys IT Services India Private Limited*
- *ELuminous Technologies Private Limited*
- *Isummation Technologies Private Limited*
- *Batchmaster Software Private Limited*
- *DCIS DOT COM Solutions Private. Limited*
- *Evoke Technologies Limited*
- *Sagarsoft (India) Limited*
- *Ace Software Exports Limited*

ITeS Segment

- *Informed Technologies India Limited*
- *Ace BPO Services Private Limited*
- *Jindal Intellicom Limited*
- *Crystal Voxx Limited*
- *Microgenetic Systems Limited*
- *R Systems International Limited*^{1\11}

14. *The learned AO/ learned TPO erred in not considering provision of bad and doubtful debts and operating in nature.*

15. *The learned AO/ learned TPO erred in computing the operating margins of the following comparable companies:*

SWD comparable companies

- *CG VAK Software and Exports Limited;*
- *Kals Information Systems Limited;*
- *Larsen & Toubro Infotech Limited;*
- *Aspire Systems (India) Private Limited; and*
- *Cybage Software Private Limited*
- *Orion India Systems Private Limited*

16. *The learned AO/ learned TPO/ Hon'ble DRP has erred in not allowing appropriate adjustments towards working capital.*

17. *The learned AO/ learned TPO/ Hon'ble DRP erred in not allowing appropriate adjustment towards the risk difference between the Appellant vis-a-vis the comparable companies.*

II. Corporate Tax and other grounds

18. *The learned AO has erred in law and on facts by levying interest under section 234A of the Act amounting to INR 1,143,238 even though the Assessee filed its return within the due date prescribed under Section 139(1) of the Act i.e. 30 November 2016.*

19. *The learned AO has erred in law in levying interest under Section 234C of the Act of INR 4,588,402 as against INR 3,875,685 determined as per the return of income.*

20. *The learned AO has erred in law and on facts in computing interest under section 234B of the Act.*

21. *The learned AO has erred in law and on facts in proposing to initiate penalty proceedings under section 274 read with section 271(1)(c) of the Act.*

Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

2. Brief facts of the case are as under:

2.1 The assessee, is engaged in the business of rendering software development, software maintenance and IT enabled services primarily to its Associated Enterprises. These are in the areas of application of development services, maintenance support services and network management services for software development; maintenance services and voice-based support services; and e-mail chat/ support services for the IT enabled services.

2.2 For year under consideration, assessee filed its return of income on 30/11/2016 declaring total income of Rs.47,90,89,890/-. The case was selected for scrutiny and statutory notices were issued to assessee. In response to the notices, assessee filed the relevant details as called for. The Ld.AO observed that assessee had entered into international transactions exceeding Rs. 15 crores. Accordingly, the case was referred to the transfer pricing officer.

2.3 On reference received by the Ld.TPO under 92CA, the Ld.TPO called upon assessee to furnish the economic details of the international transaction in form 3CEB. From the details filed, the Ld.TPO observed that following the international transaction entered into by assessee.

Sl.No	Nature of international transactions	Amount (in INR)
1	Provision of Software development services	1,27,45,08,116
2	Provision of IT enabled Services	92,90,54,956
3	Purchase of Consumables	5,11,442
4	Cross charges of employee stock purchase plan	3,64,16,559
Total		2,24,04,91,073

2.4 The Ld.TPO observed that the following were the segmental break-up of incremental revenue and corresponding cost:

Particulars	Software Development (Amount in INR)	IT Services (Amount in INR)	Domestic Segment (Amount in INR)	Amount in INR (Total)
Revenue from Operations	1,27,45,08,115	92,90,54,955	24,97,17,707	2,45,32,80,777
Interest income on bank deposit	0	0	0	1,51,11,896
Other non- operating income	0	0	0	1,23,07,048
Operating Income	1,27,45,08,115	92,90,54,955	24,97,17,707	2,48,06,99,721
Bank charges	36,852	41,271	43,944	1,22,067
Communications Costs	39,88,76,916	16,43,97,418	1,800	56,32,76,134
Computer Software Purchases and consumables	14,243	1,21,79,115	0	1,21,93,358
Contributions to provident and other fund	1,41,96,796	1,65,46,530	44,23,770	3,51,67,096
Depreciation	3,50,93,524	81,91,389	54,54,829	4,87,39,742
Gratuity expenses (Refer note 31)	2,97,56,407	67,62,469	17,20,357	3,82,39,233
Housekeeping Security and other charges	60,21,520	2,47,83,264	1,24,71,501	4,32,76,285
Legal & Professional	5,34,672	24,48,101	6,37,568	36,20,341
Miscellaneous expenses	40,216	14,23,535	22,953	14,86,704

Power & Fuel	44,99,933	50,39,508	53,65,935	1,49,05,376
Rates & taxes	40,12,171	59,57,411	14,39,139	1,14,08,720
Rent	1,05,03,041	1,04,90,077	1,11,69,559	3,21,62,676
Retainer & Consultancy	30,52,43,365	3,08,82,857	5,91,46,915	39,52,73,137
Salaries, wages & Bonus	28,54,83,053	42,04,95,381	8,58,70,194	79,18,48,628
Staff welfare expenses	51,76,803	8,30,82,760	2,79,66,867	11,62,26,430
Training Charges	5,64,280	46,81,987	0	52,46,267
Travelling & conveyance	1,04,26,840	1,20,83,755	18,44,042	2,43,54,637
Less: Gain on foreign currency transaction (net)	-31,99,646	-23,32,387	0	-55,32,033
Less: Provisions no longer required written back	-10,58,022	-7,71,247	-2,07,301	-20,36,570
Operating Expenses	1,10,62,22,964	80,63,83,194	21,73,72,072	2,12,99,78,228
Other non-operating expenses				
Interest on incorporate loan				8,91,65,493
Interest expenses				1,37,00,000



Total expenses as per P&L	1,10,62,22,964	80,63,83,194	21,73,72,070	2,23,28,43,721
Operating Profit	16,82,85,151	12,26,71,761	3,23,45,635	24,78,56,000
Operating Margin	15.21%	15.21%		

2.5 The Ld.TPO observed that, the assessee reported international transactions in respect of Software Development Service (SWD), IT Enabled Services (ITeS). The arm's length price of the international transactions in SWD/ITeS segments provided to the associated enterprises (AE) has been determined by applying Transactional Net Margin Method (TNMM), stating to be the most appropriate method in the facts and circumstances of the case. The operating profit to operating cost ratio has been taken as the profit level indicator (PLI) in TNMM analysis.

2.6 Assessee used following comparables under both segments that had an average margin of 11.55% and 6.64% for SWD & ITeS segment as under:

SWD

S.no.	Company Name	2013-14	2014-15	2015-16	Weighted Average
1.	I2T2 India Limited	3.82%	5.52%	-36.60%	-0.09%
2.	Minvesta Infotech Limited	2.33%	3.25%	6.78%	4.04%
3.	Sasken Communication Technologies Limited	7.65%	3.32%	7.26%	6.11%
4.	KALS Information Systems Limited	16.57%	4.82%	3.67%	8.05%
5.	Bells Softech Limited	25.03%	-0.35%	1.05%	10.37%
6.	E-Zest Solutions Ltd	15.90%	12.38%	8.48%	12.24%
7.	CG-VAK Software & Exports Limited	9.49%	13.67%	13.50%	12.30%
8.	Exilant Technologies Private Limited	10.00%	16.62%	25.56%	17.72%
9.	Otco International Limited	5.55%	15.54%	18.73%	17.83%
10.	Agilisys IT Services India Private Limited	17.85%	19.48%	15.60%	17.54%
11.	RS Software India Limited	24.34%	32.81%	-2.09%	20.97%
	Average Margin				11.55%
	35th Percentile				8.05%
	65th Percentile				17.54%
	Median				12.24%

ITES

S.no.	Company Name	2013-14	2014-15	2015-16	Weighted Average
1.	Sundaram Business Services Ltd.	-12.33%	-4.82%	1.61%	-5.20%
2.	Informed Technologies India Ltd.	6.70%	-5.52%	-1.02%	-3.13%
3.	ACE BPO Services Pvt. Ltd.	0.95%	1.99%	-0.27%	0.89%
4.	Allsec technologies limited	8.12%	-2.81%	9.15%	4.79%
5.	Digitally Global Private Limited	6.97%	1.18%	-3.06%	5.20%
6.	e4e Healthcare Business Services Private Limited	4.61%	6.07%	-7.13%	8.48%
7.	Jindal Intellicom Limited.	11.45%	8.01%	5.82%	8.16%
8.	Cosmic Global Limited	22.44%	5.00%	5.47%	14.15%
9.	Microland Limited. (IT Enabled Services)	8.71%	19.30%	14.02%	12.80%
10.	Tech Mahindra Business Services Limited.	13.33%	29.72%	19.13%	20.30%
	Average margin				6.64%
	35th Percentile				4.79%
	65th Percentile				8.48%
	Median				6.68%

2.7 The Ld.TPO not satisfied with the comparables selected by assessee shortlisted following set of comparables for SWD segment.

SWD

S.No.	Company Name	Financial Year wise OP/OC (%)			
		2015-16	2014-15	2013-14	Weighted Average
1	Synfosys Business Solution Ltd.	0.52%	-1.42%	6.74%	1.74%
2	Kals Information Systems Pvt. Ltd.	3.97%	5.77%	16.94%	8.60%
3	Rheal Software Pvt. Ltd.	3.20%	2.76%	36.64%	14.50%
4	Sybrant Technologies Private Limited	16.10%	13.88%	15.26%	14.74%
5	Harbinger Systems Pvt. Limited	12.69%	17.18%	No Data in Public Domain	15.06%
6	C G-V A K Software & Exports Ltd.	19.60%	19.87%	13.81%	18.50%
7	R S Software (India) Ltd.	-2.09%	32.75%	24.14%	20.87%

8	Larsen & Toubro Infotech Ltd.	26.29%	24.22%	23.54%	24.83%
9	Orion India Systems Private Limited	26.08%	25.14%	No Data in public domain	25.64%
10	Nihilent Ltd.	15.94%	29.19%	35.72%	26.36%
11	Inteq Software Pvt. Ltd.	7.53%	32.14%	45.00%	28.20%
12	Persistent Systems Ltd.	26.92%	31.34%	35.64%	30.89%
13	Infobeans Technologies Ltd.	34.98%	20.78%	41.95%	32.42%
14	Thirdware Solution Ltd.	23.89%	44.39%	44.68%	36.90%
15	Infosys Ltd.	38.22%	41.30%	36.28%	38.61%
16	Aspire Systems (India) Pvt. Ltd.	34.26%	47.56%	38.04%	39.28%
17	Cybage Software Pvt. Ltd.	62.90%	68.68%	68.82%	66.45%
	35th Percentile				18.50%
	Median				25.64%
	65th Percentile				30.89%

ITES

S.No.	Company Name	Financial Year wise OP/OC (%)			
		2014-15	2013-14	2012-13	Average
1	BNR Udyog Limited - Segmental	31.89%	5.32%	24.99%	4.40%
2	One Touch Solutions (India) Private Limited	12.23%	14.87%	18.29%	15.33%
3	Tech Mahindra Business Services Ltd.	19.71%	29.53%	13.33%	20.44%
4	Infosys B P M Ltd.	25.34%	26.80%	27.43%	26.44%
5	S P I Technologies India Pvt. Ltd.	40.70%	32.18%	42.48%	37.77%
6	Eclerx Services Ltd	57.75%	44.39%	70.72%	56.44%
	35th Percentile				20.44%
	Median				23.44%
	65th Percentile				26.44%

2.8 Thus, the Ld.TPO computed the proposed adjustment under both the segments as under:

S.No.	Description	Adjustment u/s 92CA (in Rs.)
1.	Software development segment	11,53,50,416
2.	ITeS Segment	6,63,44,460
Total adjustment u/s 92CA		18,16,94,876/-

2.9 On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order on 27/11/2019 by proposing to make an addition of Rs.18,16,94,876/- in respect of the international transactions. The assessee filed objections before the DRP against the draft assessment order. The DRP vide directions

issued dated 11/02/2021 upheld the proposed comparables by the Ld.TPO. On receipt of the directions, the Ld.AO passed the impugned order on 29/03/2021 making addition of Rs.18,16,94,876/- in the hands of the assessee. Against the final assessment order passed by the Ld.AO, the assessee is in appeal before this *Tribunal*.

2.10 It is submitted by the Ld.AR that the assessee wishes to press only following grounds wherein it seeks exclusion/inclusion of following comparables under SWD & ITes Segment.

Ground No. 12 – The assessee seeks exclusion of following comparables

SWD Segment

1. Larsen & Toubro Infotech Ltd.
2. Persistent Systems Ltd.
3. Infosys Ltd
4. Aspire Systems (India) Pvt. Ltd
5. Cybage Software Pvt. Ltd.
6. Nihilent Ltd
7. Thirdware Solution Ltd.
8. Exilant Technologies Pvt.Ltd.
9. Infobeans Technologies Ltd

IT Segment

1. Infosys BPO Ltd.
2. SPI Technologies India Pvt.Ltd.
3. Eclerx Services Ltd.
4. Tech Mahindra Business Services Ltd.

2.11 **Ground No. 13** – The assessee seeks exclusions of following Comparables

SED Segment:

1. Sagarsoft (India) Ltd.
2. Evoke Technologies Ltd.
3. Isummation Technologies Pvt.Ltd.
4. Batchmaster Software Pvt.Ltd.
5. DCIS DOT COM Solutions Pvt.Ltd.
6. Ace Software Exports Ltd.

ITeS Segment

1. Informed Technologies India Ltd.
2. Ace BPO Services Pvt.Ltd.
3. Crystal Voxx

2.12 Before we undertake to examine the comparability of the above companies under both the segment with that of assessee it is sine qua non to understand the FAR of assessee under both the segments.

Functions:

SWD

Low Level Design and software coding are undertaken by HPIT service entities;

Based on the project description and complexity involved, software development is undertaken applying either Agile or Waterfall Methodology depending on the functionality and complexity of the software;

Unit testing and Integration testing are undertaken at HP PPS Services location.

In cases where Agile methodology is adopted, HP PPS Services is involved in the following functions:

- Assemble the team
- Identify the roles of Scrum master, product owner, developers, testers, etc.
- Backlog definition and grooming
- Conduct Scrum and .crum of scrum meetings
- Report status via burndown charts, remaining work, user stories completed etc.
- Unit and Integration testing and defect triaging and fixing
- Support with move to production and warranty

Waterfall Methodology — Role of HP PPS Services

In cases where Waterfall methodology is adopted, HP PPS Services is involved in the following functions.

- Assemble the team
- Participate in requirements/design meetings and review solutions and feedback
- Assemble team, task break down and allocation of work
- Report completion status and issues and resolutions
- Unit, integration testing and facilitation of User testing
- Support for move to production
- Warranty support
- Status reporting on work completed and issues/risks

Software development activity at HP PPS Services is partly done in-house and partly outsourced depending on the complexity of the activities involved in each project. In case, some activity is found to be repetitive or routine (maintenance and testing) then such work is outsourced to third party vendors. The decision to

outsource software development/ maintenance activity to third parties is primarily taken by HP US. The role of HP PPS services involvement in the work outsourced to third party would depend on the contract terms. Employees are hired from IT services industries and typically at senior level because the software development requires domain expertise.

ITES

HP PPS Services provides IT enabled services to its AEs through its Customer Delivery Centre in Bangalore. The services rendered are in the nature of voice, e-mail/ chat based support services. The services are presently rendered through LO, LI., Social Media (SoME), Process Engineering (PE), 2LS, Support Engineering Centres (SEC) and Remote Management Centres (RMCs), End to End Delivery 7 Transformation (E2E), HP Back Office Management (HBOM), Global customer experience (GCE) and Global Support Engineering (GSE).

Based on the requirements, the services are provided by HP PPS Services' CSC which is equipped with necessary infrastructure and personnel. The AEs provide training to HP PPS Services for rendering the IT enabled services at the agreed/ required levels of quality. HP PPS Services renders Level 0 ('L0'), Level 1 ('L1') and Level 2 ('L2') support, while L3 services are provided by the AEs.

a. L0 technical support team facilitates guiding the customer to the service desk and is the first point of contact for the customers. The LO team routes calls to the L1 teams.

b. L1 technical support team provides troubleshooting services through phone, web chat and Email.

c. L2 support team handles escalation from Level 1 i.e. open issues from Level 1 and provides technical support to the customer.

d. For both L1 and L2 queries, there are standard responses available which could be referred to for resolving queries. In some cases though, they may require to refer to data sources to facilitate resolving the issues.

e. The teams refer to L3 support, based at the AE locations for any unresolved technical issues. L3 support involves simulation and interaction with engineering resolution team which provides system level support. HP PPS Services does not provide L3 support to the customers of HP Group.

Assets:

In context of provision of software development services, HP PPS Services employs routine assets such as furniture, fixtures, computers, land and buildings etc. HP PPS Services does not own any non-routine intangibles. HP Group is the owner or licensor, as the case may be of rights, titles and interest in intellectual properties.

The table below highlights the assets employed by HP PPS Services for provision of software development services provided to its AEs:

Particulars	HP PPS Services	AEs
Routine Assets	Yes	Yes
Non Routine Assets	No	Yes

Risks assumed

Service liability risk

Since the software development services rendered by HP PPS Services are for internal consumption, HP PPS Services is

required to adhere to the instructions on quality standards as provided by the ultimate product managers. However, HP PPS Services is immune to costs incurred in this regard, since the costs incurred by HP PPS Services on any corrections / rectifications are charged back to AEs at cost plus mark-up. AEs bear service liability risk as they enter into contracts with customers and are responsible for any liability arising from defective services as a result of the software development undertaken by HP PPS Services.

Market risk

HP PPS Services does not bear the market risk directly because it only acts as a captive service provider, providing software development services to its AEs. Since the AEs of HP PPS Services directly liaise with the customers, such risk is borne by AEs.

Foreign exchange risk

As HP PPS Services invoices its AEs in foreign currency, any adverse movement in the exchange rate would directly impact the profitability of HP PPS Services. Accordingly, HP PPS Services bears foreign exchange which is mitigated as the same is included in the cost base of HP PPS Services.

Credit risk

HP PPS Services invoices its AEs for the provision of software development services on a regular basis and realizes the same in line with industry standards. The risk of nonpayment by AEs is mitigated for HP PPS Services since they are related enterprises. In respect to the software development services rendered by HP PPS Services, the AEs do not bear any credit risk since the services are availed by the AEs for internal consumption only.

Capacity utilization risk

As HP PPS Services is compensated on a cost plus basis for all direct and indirect costs of operation including idle time cost, the capacity utilization risk is effectively borne by its AEs.

Technology risk

HP PPS Services provides services on the basis of the requirements of its AEs, any change in technology will have a limited impact on the profitability of HP PPS Services.

HP Group is exposed to higher technology risk, being the technology owner. Due to market competition and an ever-

changing technology scenario, HP Group needs to continuously upgrade its existing technology and develop new technology.

Conclusion (both segments)

Based on the functional and risk analysis, it can be concluded that HP PPS Services is a captive service provider bearing substantially lower risks as against the AEs.

2.13 Ground No.12: It is submitted that the turnover of the assessee is 127 crores for the SWD Segment, and the turnover of Larsen & Toubro Infotech Ltd., Persistent Systems Ltd., Infosys Ltd., Aspire Systems (India) Pvt. Ltd., Cybage Software Pvt. Ltd., Nihilent Ltd., Thirdware Solution Ltd., Exilant Technologies Pvt.Ltd., are more than 200 crores and hence fails the turnover filter of 200 crore as under:

1. Larsen & Toubro Infotech Ltd. – 291.90 crores
2. Persistent Systems Ltd. – 152.77 crores
3. Infosys Ltd. – 5699.20 crores
4. Aspire Systems (India) Pvt. Ltd. – 233.05 crores
5. Cybage Software Pvt. Ltd. – 753.48 crores
6. Nihilent Ltd. – 258.07 crores
7. Thirdware Solution Ltd. – 221.36 crores
8. Exilant Technologies Pvt.Ltd. – 375.93 crores

3. The Ld.AR placed reliance on the decision of coordinate bench of this *Tribunal* in case of *Mindteck India Limited* in *IT(TP) No 252/Bang/2021* for assessment year 2016-2017 by order dated 27/06/2022 in support of the above contention. The Ld.AR submitted that the decision of *Coordinate Bench* of this *Tribunal* in case of *M/s.SanDisk India Device Design Centre Pvt. Ltd. vs. JCIT* in *IT(TP)A No. 288/Bang/2021* for assessment year 2016-17

by order dated 30/06/2022 has excluded the above comparable on failing in functionality test also.

4. In respect of **Infobeans Technologies Ltd.**, the Ld.AR further submitted that this company is engaged in providing custom developed services to offshore clients. It was submitted that Infobeans is engaged in providing software engineering services primarily in Custom application development ('CAD'), Content Management Systems ('CMS'), Enterprise Mobility ('EM'), Big data analytics ('BDA'), and has incurred expenses towards the software licenses and subscription fees worth INR 46.44 lakhs. The Ld.AR referred to Pg 47 of the paper book in support.

5. The Ld.AR also submitted that the segmental information is not available for the company and the company is into diversified activities such as providing business IT services (comprising application development and maintenance, Big Data, UX & UI, Automation engineering services, including product engineering and lifecycle solutions, and business process management); in the Verticals of Storage & Virtualization, Media & Publishing, HR & Payroll and e commerce The Ld.AR referred to page 854 of the paper book in support of the submission.

The Ld.DR on the contrary relied on orders passed by the authorities below and decision of *Coordinate Bench of this Tribunal* in case of *BORQS Software Solutions Pvt. Ltd. vs. ITO in IT(TP)A No. 310/Bang/2021 by order dated 25/10/2021 for A.Y. 2016-17.*

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

6. We note that coordinate bench of this *Tribunal* in case of *M/s.SanDisk India Device Design Centre Pvt. Ltd. vs. JCIT (supra)* observed and held as under:

“17.3 At the outset, the Ld.AR submitted that the above comparables have been considered by Coordinate Bench of this Tribunal, Hon’ble Hyderabad Tribunal as well as Hon’ble Mumbai Tribunal in other cases having similar facts it is also been submitted by Ld.AR that these comparables do not satisfy the turnover filter that has been applied by the Ld.TPO and at the outset deserves to be eliminated. The Ld.AR referring to the annual reports, placed in the paper books filed before this Tribunal reveals that turnover is more than Rs.200 crores and does not match even 10 times the turnover of assessee. The Ld.AR thus submitted that applying either the turnover filter of Rs. 1 crore to Rs. 200 crores or 10 times the assessee’s turnover to 1/10th , these comparables deserves to be excluded.

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

1. Decision of Hon’ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT in ITA No. 1379/M/2021 by order dated 25.02.2022 for A.Y. 2016-17.

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

3. Decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT in IT(TP)A No. 182/Bang/2021 by order dated 28.09.2021 for A.Y. 2016-17.

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

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.

17.9 In respect of Nihilent Ltd., Infobeans Technologies Ltd. and Aspire Systems (India) Pvt. Ltd., Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT (supra) observed as under:

*“Comparable Sought to be excluded by the assessee **Aspire System India Pvt. Ltd. (Aspire)***

40. The assessee sought exclusion of Aspire from the final set of comparables for benchmarking SDS segment on the ground that it fails Related Party Transaction (RPT) filters as its RPT/ sales ratio is more than 25%. The assessee computed the significant related party transactions at 37.58% whereas the Ld. TPO computed it at 23.55%. The

TPO is directed to recalculate the RPT/sales ratio by providing opportunity of being heard to the assessee. So this comparable is remitted back to the Ld. TPO to decide afresh.”

“Nihilent Analytics Ltd. (Nihilent)

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

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

Nihilent Ltd.

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

“Infobeans Technologies Ltd. (Infobeans)

49. *The assessee sought exclusion of Infobeans on the ground that it is also functionally dissimilar being into 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).*

50. *Perusal of financials available at page A303, A418 to A421, Infobeans shows that it is into diversified services but its segmental financials are not available without which it is difficult to compute the correct profit margin of the relevant segment. So Infobeans is also ordered to be excluded as a comparable being not a comparable to the assessee."*

17.10 *Perusal of the annual report, filed before us in respect of the above two comparables, we note that the segmental financials are not available in respect of Nihilent and Infobeans and the RPT in respect of Aspire Systems India Pvt. Ltd. is more than 25% being the threshold limit considered by the Ld.TPO. Nothing has been placed before us by the Ld.DR in order to take a different view. Respectfully following the Hon'ble Mumbai Tribunal, we direct the Ld.TPO to exclude Nihilent, Infobeans and Aspire Systems from the final set."*

7. We also note that the Ld.DR placed reliance on the decision of *Coordinate Bench of this Tribunal in the case of BORQS Software Solutions Private Limited v. ACIT (supra)*.

8. We have heard rival submissions and perused the material on record. On perusal of the financial of Infobean Technologies Limited placed at pg 1676 of AR, it is clear that the said company is engaged in providing software engineering services primarily in Custom application development, Content Management Systems, Enterprise Mobility, big data analytics (The company's overview is annexed to this order as Annexure-A) (placed at page 1676 of the paper book submitted by the

assessee). The above services rendered by the company are different from the services rendered by routine software development companies like that the assessee in the instant case. Further, the segmental details for these diverse services are not available and therefore the company cannot be selected as a comparable. Apart from the functional dissimilarity that has been observed regarding this company by *Hon'ble Mumbai Tribunal* in case of *Red Hat India Pvt. Ltd. vs. Addl. CIT in ITA No. 1379/M/2021* by order dated 25.02.2022 for A.Y. 2016-17 which is followed by *Coordinate Bench of this Tribunal* in case of *M/s. SanDisk India Device Design Centre Pvt. Ltd. vs. JCIT (supra)*. We also note that this company is not a good comparable for following reasons:

(i) Significant Intangible assets:

During the FYs 2013-2015 to 2015-2016, the company owned intangible assets representing around 7% of the total fixed assets held by the company.

(ii) Export of goods:

The annual report of the company at Note 33 under the head earnings in foreign currency shows export of goods calculated on F.O.B. basis. In the absence of segmental details, the company cannot be selected as a comparable.

(iii) Expenses in foreign currency:

It also incurred significant expenditure in foreign currency, in the nature of onsite activities representing around 1.5% of the total sales.

(iv) Abnormal increase in revenue and fluctuation in margin:

The revenue increased from Rs.35 crore (F.Y.2014- 2015) to Rs.62 crore (FY 2015-2016) in a period of 1 year (76%). Also, the company's profitability increased by 147%. Also, the company's margin fluctuates widely (34.98% - F.Y.2015-016, 20.78% - F.Y. 2014-2015, 41.95% - F.Y.2013-2014) which demonstrates that there exists some factor having an impact on the margin, and therefore the company cannot be selected as a comparable.

(v) Sales Tax:

The annual report of the company shows that it incurs Central Sales Tax liability, which demonstrates that the company is not a pure software development company.

9. For all the above noted reasons, this company has been consistently excluded from the final set of comparables. Reference is made to the following orders of the ITAT :-

(i) *SanDisk India Device Design Centre Pvt. Ltd. v. JCIT* (Order dated 30.06.2022 passed by this Hon'ble Tribunal in IT(TP)A No. 288/Bang/2021 for AY 2016-17)- at para 17.9 and 17.10 (on account of functional dissimilarity as company renders diverse services and lack of segmental details);

(ii) *ADP Pvt. Ltd. v. DCIT* [Order dated 03.02.2022 in ITA Nos. 227&228/Hyd/2021 for A Y 2016-17]- at para 7.4 (on account of functional dissimilarity as company earns revenue from export of goods and segmental details are unavailable).

(iii) *GlobalLogic India (P.) Ltd. V. DCIT* (reported in [2022] 134 taxmann.com 35- for AY 2016-17) (on account of functional dissimilarity as the company is into diversified activities which are not comparable to routine SWD service provider)

(iv) *Red Hat India Pvt. Ltd. v. ITO, NFAC* (Order dated 25.05.2022 passed by the Mumbai Bench of this Hon'ble Tribunal in ITA No. 1379/Mum/2021 for AY 2016-17)- at paras 49 and 50 (on account of functional dissimilarity as company renders diverse services and lack of segmental details).

(v) *Skillnet Solutions India Pvt. Ltd. v. DCIT* (Order dated 24.02.2021 passed by the Mumbai Bench of this Hon'ble Tribunal in ITA No. 6570/Mum/2017 for the AY 2013-14)- at para 6 (on account of functional dissimilarity as the company renders diverse services and segmental details are unavailable)

(vi) *Alcatel Lucent India Ltd. v ACIT* (Order dated 29.11.2019 passed by the Delhi Bench of this Hon'ble Tribunal in ITA No. 4706/0e1/2018 for AY 2014-15)- at para 15 (on account of functional dissimilarity as the company was engaged in providing custom development services to offshore customers and was engaged in software engineering services in different fields and segmental details were unavailable)

(vii) *Kony IT Services Private Limited v. DCIT* (Order dated 20.11.2019 passed by the Hyderabad Bench of this Hon'ble Tribunal in ITA No. 2304/Hyd/2018 for AY 2014-15)- at para (iii) on page 15 (on account of functional dissimilarity as it has earning from export of goods and has deposited MODVAT and sales tax).

(viii) *Avaya India Pvt. Ltd. v. ACIT* (Order dated 24.09.2019 passed by the Delhi Bench of this Hon'ble Tribunal in ITA No. 7290/0e1/2018 for the A Y 2014-15)- at para 7.4 (on account of functional dissimilarity as the company has earnings from export of goods).

(ix) *Pubmatic India Pvt. Ltd. v. ACIT* (Order dated 09.03.2018 passed by the Pune Bench of this Hon'ble Tribunal in ITA No. 655/Pun/2017 for the AY2012-13)- at para 18 (on account of functional dissimilarity as the company has earnings from export of goods).

10. In the case law relied on by the Ld.DR, namely, *BORQS Software Solutions Private Limited v. ACIT (supra)*, this Tribunal merely affirmed the findings of the DRP, which in turn relied on the reply filed by the company in response to notice u/s 133(6) of the I.T.Act. Further, this Tribunal held the finding of DRP has not been countered by the assessee in the said case. However, the company's response to the notice u/s 133(6) of the I.T.Act is contrary to the functions set out in the audited financial statements (enclosed as Annexure-A to this order), and therefore, the same cannot be relied upon.

10.1 Further, the website of the company shows tht the company is engaged in diverse service, which are not similar to functions of a captive service provider like the assessee in the instant case. Since the Ld.AR has clearly established that Infobean Technologies Limited is not functionally comparable to that of the assessee, we follow the orders of the ITAT referred in para 9 (supra) and direct the Ld.AO / TPO to exclude Infobean Technologies Limited from comparable list. It is ordered accordingly.

Accordingly, we direct the Ld.TPO to exclude the above comparables from the Final list of SWD segment for failing in TO criteria as well as functionality tests.

11. **For ITeS Segment,** the Ld.AR submitted that the Turnover of the assessee is 92 crores and therefore Infosys BPO Ltd., SPI Technologies India Pvt.Ltd., Eclerx Services Ltd., Tech Mahindra Business Services Ltd., are not comparable with that of the assessee as they have turnover more than 200 crores.

The Ld.AR submitted that these comparables have turn over as under:

Infosys BPO Ltd., Turn over of Rs. 305 crores

SPI Technologies India Pvt.Ltd., Turn over of Rs. 347.68 crores

Eclerx Services Ltd., Turn over of Rs. 114.24 crores

Tech Mahindra Business Services Ltd., Turn over of Rs. 722.80 crores

12. The Ld.AR relied on the decision of coordinate bench of this Tribunal in case of *Mindteck India Limited* in *IT(TP) No 252/Bang/2021* for AY 2016-2017 by order dated 27/06/2022, wherein the above companies were excluded for having turnover of more than 200 crores. It is also submitted that these comparables are functionally not similar to the assessee due to various reasons such as diversified business, segmentation unavailability, presence of extraordinary events, etc. The Ld.AR submitted that similar view has been taken in another decision of this coordinate bench, in the case of *Swiss Re Global Business Solutions India (P.) Ltd. vs. ACIT* reported in *(2022) 137 taxmann.com 417* for assessment year 2016-17, the comparables *Infosys BPO Ltd. (in para 20)*, and *Eclerx Services Limited. (in para 29)* were excluded on the basis of failing in functionality also.

Accordingly, we direct the Ld.TPO to exclude the above comparables from the Final list of ITES segment for failing in TO criteria as well as functionality tests.

Accordingly Ground 12 raised by the assessee stands partly allowed as above.

13. **Ground no.13:** The assessee seeks exclusions of following Comparables:

SED Segment:

1. Sagarsoft (India) Ltd.
2. Evoke Technologies Ltd.
3. Isummation Technologies Pvt.Ltd.
4. Batchmaster Software Pvt.Ltd.
5. DCIS DOT COM Solutions Pvt.Ltd.
6. Ace Software Exports Ltd.

ITeS Segment

1. Informed Technologies India Ltd.
2. Ace BPO Services Pvt.Ltd.
3. Crystal Voxx

All comparable companies sought for inclusion by the assessee in SWD and ITES segment are remanded to the Ld.AO/TPO for reconsideration based on the details filed by the assessee.

The Ld.AO is directed to verify the same in accordance with Law, by granting proper opportunity of being heard to the assessee.

Accordingly Ground 13 raised by the assessee stands allowed for statistical purposes.

14. The Ld.AR also prayed for a direction to the Ld.AO/TPO to adopt correct margin in respect of the comparables that would be finally retained.

We direct the Ld.AO/TPO to compute the margine as per rules while passing the OGE.

Except for the above grounds and the specific comparables sought for inclusion as well as exclusion, the Ld.AR submitted that the assessee do not wish to argue any other issue raised in the remaining grounds.

Accordingly those grounds and comparable not considered herein above are left open to the assessee to contest in an appropriate circumstances.

In the result the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 29th September, 2022.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th September, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore

ANNEXURE - A

InfoBeans Technologies Limited (Formerly Known as InfoBeans Systems India Private Limited) Notes Forming Part of Financial Statements	
Company Overview	<p>InfoBeans operating at CRM level 3, is a software services company specialising in business IT Services. Our business is primarily engaged in providing custom developed services to off-hire clients. InfoBeans provides software engineering services primarily in Custom Application Development (CAD), Content Management Systems (CMS), Enterprise Mobility (EM), Big Data Analytics (BDA).</p> <p>The Company is a public limited company incorporated and domiciled in India and has its registered office at Indore, Madhya Pradesh, India. The Company has its primary listing on the National Stock Exchange in India.</p>
1. Significant accounting policies	
(a) Basis of Preparation of Financial Statements:	<p>These financial statements are prepared in accordance with Indian Generally Accepted Accounting Principles (GAAP) under the historical cost convention on the accrual basis except for certain financial instruments which are measured at fair values. GAAP comprises mandatory accounting standards as prescribed under Section 133 of the Companies Act, 2013 (the Act) read with Rule 7 of the Companies (Accounts) Rules, 2014, the provisions of the Act (to the extent notified). Accounting policies have been consistently applied except where a newly issued accounting standard is initially adopted or a revision to an existing accounting standard requires a change in the accounting policy hitherto in use. All Asset and Liabilities have been classified as current or non-current as per the operating cycle criteria set out in the revised Schedule III to the Companies Act, 2013.</p>
(b) Use of Estimates:	<p>The preparation of the financial statements in conformity with GAAP requires the Management to make estimates and assumptions that affect the reported balances of assets and liabilities and disclosures relating to contingent liabilities as at the date of the financial statements and reported amounts of income and expenses during the period. Accounting estimates could change from period to period. Actual results could differ from these estimates. Appropriate changes in estimates are made as the Management becomes aware of changes in circumstances surrounding the estimates. Changes in estimates are reflected in the financial statements in the period in which changes are made and, if material, their effects are disclosed in the notes to the financial statements.</p>
(c) Revenue Recognition:	<p>Revenue is recognized only when it can be reliably measured and it is reasonable to expect ultimate collection. Revenue includes rendering of Services. Dividend income is recognized when received.</p>
(d) Fixed Assets:	<p>Tangible Assets are stated at cost of acquisition less accumulated depreciation and impairment loss, if any. Cost includes all identifiable expenditure incurred in their acquisition and construction/ installation and other related expenditure. Capital work in progress comprises of the cost of fixed assets that are not yet ready for their intended use at the reporting date.</p> <p>Intangible assets are recorded at the consideration paid for acquisition of such assets and are carried at cost less accumulated amortization and impairment, if any.</p>