

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

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.204/Bang/2022
Assessment Year: 2017-18

IG Infotech (India) Pvt. Ltd. 2 <sup>nd</sup> Floor, Infinity Building Khata No.436, Survey No.13/1B, 12/1B, Challagatta Village Varthur Hobli, Intermediate Ring Road Domlur Bengaluru 560 071  <b>PAN NO : AABCH4430K</b>	<b>Vs.</b>	ACIT Circle-3(1)(1) Bengaluru
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Nageswar Rao, A.R.
<b>Respondent by</b>	:	Shri Praveen Karanth, D.R.

<b>Date of Hearing</b>	:	01.11.2022
<b>Date of Pronouncement</b>	:	01.11.2022

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against order of Id. AO passed u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act,1961 [‘the Act’ for short] dated 17.2.2022 for the assessment year 2017-18. The assessee has raised following grounds of appeal:-

*“On the facts and circumstances of the case and in law. the Addl. /Joint / Deputy / Assistant Commissioner of Income Tax / Income-tax Officer. National*

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*Faceless Assessment Center, Delhi i.e. the learned Assessing Officer ("learned AO") has erred in passing the assessment order under section 143(3) read with section 144C(13) read with section 144B of the Income Tax Act, 1961 ("the Act") after considering the adjustments proposed by the learned Transfer Pricing Officer ("the learned TPO") in his order passed under section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("Honble DRP").*

*Each of the ground is referred to separately. which may kindly be considered independent of each other.*

*That on the facts and circumstances of the case and in law:*

**GROUND OF APPEAL RELATING TO TRANSFER PRICING MATTERS**

- 1. The learned AO/TPO/DRP have erred in making an addition of INR 5,30,28,523 to the total income of the appellant in respect of international transaction pertaining to provision of software development services by the appellant to its associated enterprise ("AE") (hereinafter referred to as 'subject transaction').*
- 2. The learned AO/TPO/DRP have erred in not accepting the economic analysis undertaken by the appellant in accordance with provisions of the Act and modifying the economic analysis for determination of arm's length price ("ALP") of the subject transaction to hold that the same is not at arm's length.*
- 3. The learned AO/TPO/DRP have erred by incorrectly using "persistent operating losses" to reject companies reporting loss for any two years out of last three years for benchmarking the subject transaction.*
- 4. The learned AO/TPO/DRP have erred by incorrectly considering employee cost less than 25 percent of turnover" as a comparability criterion for the subject transaction.*
- 5. The learned AO/TPO/DRP have erred by incorrectly considering export earnings less than 75 percent of sales" as a comparability criterion in respect of the subject transaction.*

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6. *The learned AO/TPO/DRP have erred in selecting certain companies (which are earning super normal profits) as comparable to the appellant to benchmark the subject transaction.*
  
7. *The learned AO/TPO/DRP have erred in wrongly rejecting certain companies from and adding certain companies to the final set of comparables for the impugned transaction on an ad-hoc basis, thereby resorting to cherry picking of comparable for benchmarking the subject transaction.*
  
- 7.1 *The learned AO/TPO/DRP have erred in excluding certain companies from the final set of comparables viz. Batchmaster Software, DCIS Dot Com Solutions India, Sasken Technologies and Evoke Technologies, even though these companies are comparable to the appellant.*
  
- 7.2 *The learned AO/TPO./DRP have erred in excluding certain companies from the final set of comparables viz. Batchmaster Software, DCIS Dot.Com Solutions India, Sasken Technologies and Evoke Technologies, even though these companies are comparable to the appellant.*
- 7.2 *The learned AO/TPO/DRP have erred in including certain companies to the final set of comparables viz. Larsen & Toubro Infotech. Great Software Laboratory, Mindtree, R Systems. Persistent Systems. Tata Elxsi. Aptus Software Labs. Cygnet Infotech, Infobeans Technologies. Nihilent. OFS Technologies. Threesixty Logica Testing Services. Infosys Limited, Cybage Software, Consilient Technologies even though these companies are not comparable to the appellant.*
  
8. *The learned AO/ TPO has passed an order under section 92CA(3) of the Act which suffers from several computational errors which has led to incorrect computation of adjustment made in respect of the subject transaction.*
  
9. *The learned AO/TPO/DRP have erred by failing to make appropriate adjustments to account for differences in working capital employed by the appellant vis-à-vis comparable companies in respect of the subject transaction.*
  
10. *The learned AO/TPO/DRP have erred in not making suitable adjustments to account for differences in the risk profile of the appellant vis-a-vis the comparable companies.*

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11. *The learned AO has erred in levying consequential interest under section 234B of the Act.”*

2. At the time of hearing, assessee pressed only ground Nos.7.1, 7.2, 8 & 9 and other grounds are not pressed. Accordingly, these grounds are dismissed as not pressed.

3. **Ground No.7.1:**

*The learned AO/TPO/DRP have erred in excluding certain companies from the final set of comparables viz. Batchmaster Software, DCIS Dot Com Solutions India, Sasken Technologies and Evoke Technologies, even though these companies are comparable to the appellants.*

3.1. In this ground assessee pressed only inclusion of following 3 comparables:

- i. Batchmaster Software
- ii. DCIS Dot Com Solutions India
- iii. Evoke Technologies Ltd.

3.2 After hearing both the parties, we are of the opinion that these 3 comparables were considered in the case of M/s. Quicklogic Software (India) Pvt. Ltd. in IT(TP)A No.181/Bang/2022 dated 27.7.2022, wherein it was held as under:

*“13. In respect of **Ground no. 2**, assessee is seeking inclusion of only following comparables:*

- a) Batchmaster Software Pvt. Ltd.*
- b) DCIS DOT COM Solutions India Pvt. Ltd.*
- c) Evoke Technologies Ltd.*
- d) Sagarsoft (India) Ltd.*
- e) Akshay Software Technologies Ltd.*

*13.1 It is submitted by Ld.AR that **Batchmaster Software Pvt. Ltd. and DCIS DOT COM Solutions India Pvt. Ltd.** was ignored by the Ld.TPO as it was reflecting in the search matrix carried out by him. **Evoke Technologies Ltd.** was rejected by the*

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*Ld.TPO for the reason that it supplies end to end services. The Ld.TPO also noted that it may be included in the services other than IT services.*

*13.2 It is thus submitted by the Ld.AR that in respect of the above three comparables, the Ld.TPO has not considered the functions performed and has cherry picked the comparables without going through the actual functions and annual reports. We are therefore directing these comparables to be reconsidered by the Ld.AO/TPO based on the annual reports.*

*13.3 The Ld.TPO shall consider these comparables after verifying the FAR of these comparables with that of assessee.*

***Accordingly, Batchmaster Software Pvt. Ltd., DCIS DOT COM Solutions India Pvt. Ltd. and Evoke Technologies Ltd. for denovo consideration to Ld.AO/TPO.***

3.3 In view of the above order of the Tribunal, we remit the issue relating to the inclusion of these 3 comparables to the file of AO/TPO for fresh consideration as decided in that order.

4. **Ground No.7.2:**

*The learned AO/TPO./DRP have erred in excluding certain companies from the final set of comparables viz. Batchmaster Software, DCIS Dot.Com Solutions India, Sasken Technologies and Evoke Technologies, even though these companies are comparable to the appellant.7.2The learned AO/TPO/DRP have erred in including certain companies to the final set of comparables viz. Larsen & Toubro Infotech. Great Software Laboratory, Mindtree, R Systems. Persistent Systems. Tata Elxsi. Aptus Software Labs. Cygnet Infotech, Infobeans Technologies. Nihilent. OFS Technologies. Threesixty Logica Testing Services. Infosys Limited, Cybage Software, Consilient Technologies even though these companies are not comparable to the appellant.*

4.1 In this ground, assessee wants exclusion of following 8 comparables:

- i. L&T Infotech
- ii. Mindtree
- iii. R Systems
- iv. Persistent Systems
- v. Tata Elxsi
- vi. Infosys Ltd.
- vii. Nihilent
- viii. Cybage software

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4.2 After hearing both the parties, we are of the opinion that these comparables were considered in the case of M/s. Quicklogic Software (India) Pvt. Ltd. cited (supra), wherein held as under:-

*11. Ground no. 1 – The Ld.AR submitted that following are the turnover of the comparables sought for exclusion in ground no.1.*

- 1. L&T Infotech Ltd. - Rs. 6183 crores*
- 2. Persistent Systems Ltd. – Rs. 1720 crores*
- 3. Tata Elxsi Ltd. – Rs. 1201 crores*
- 4. Infosys Ltd. – Rs. 59,257 crores*
- 5. R Systems Ltd. – Rs. 264 crores*
- 6. Nihilent Technologies Ltd. – Rs. 259 crores*
- 7. Cybage Software Pvt. Ltd. – Rs. 759 crores*

*11.1 He submitted that these comparables are not at all similar even in functions with that of the assessee as they have product segment without segmental details available. It is the submission of the assessee that these comparables are involved in various research and development activities that generate huge intangibles.*

*11.2 The Ld.AR submitted that in case of the present assessee, the turnover for year under consideration is only 13 crores and it is a captive service provider rendering services only to its AE. The Ld.AR submitted that the business profile of the activities carried out by the assessee is no way a match with the functions performed and services rendered by the above comparables. The Ld.AR thus prayed for these comparables to be excluded.*

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

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

*11.5. Coordinate bench of this Tribunal in the case of Barracuda Networks India (P.) Ltd. vs. DCIT reported in [2021] 131 [taxmann.com](http://taxmann.com) 337 excluded Tata Elxi Ltd (Seg.), Persistent Systems Ltd., Larsen and Toubro Infotech Ltd., RS International Ltd., Nihilent Technologies Ltd., Infosys Ltd., Cybage software Pvt.Ltd., from the list of comparables for having high turnover more than 200 crores. This Tribunal observed that, the said company was having multiple segments and cannot be compared with a captive service provider. The relevant observation of this Tribunal in the case of Barracuda Networks India (P.) Ltd. vs,DCIT (supra), are as follows:*

11. As far as comparability of companies listed as (a) to (g) in Grd.No.4 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. 17,77,11,711/-. 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) (P.) Ltd v. Dy. CIT [\[2017\] 82 taxmann.com 167\(Delhi - Trib\)](#), 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 before the Tribunal challenging the aforesaid view of the DRP.

12. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. v. Dy CIT [\[2018\] 89 taxmann.com 44](#), took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software (P.) Ltd. v. Dy. CIT [\[2016\] 67 taxmann.com 243](#) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P.) Ltd. (supra) and the decision to the contrary in the case of CIT v. Pentair Water India (P.) Ltd ., [\[2016\] 69 taxmann.com 180/381 ITR 216 \(Bom.\)](#) wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water India (P.) Ltd. (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International Services (P.) Ltd. (supra):

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

"9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which are (sic) making losses as comparables. This shows that there is

*a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs. 1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."*

*42. The Assessee's turnover was around Rs. 110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs. 200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore*

*following the said view, the action of the CIT(A) excluding companies with turnover of above Rs. 200 crores from the list of comparable companies is held to correct and such action does not call for any interference.'*

**13.** *The Tribunal in the case of Autodesk India (P.) Ltd. v. Dy. CIT [2018] 96 [taxmann.com](http://taxmann.com) 263 (Bang-Trib), 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) (P.) 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.*

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*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 v. Pentair Water India (P.) 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 58-2011. 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 (P.) Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding coordinate 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*

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*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 companies listed in Sl. No.(a) to (g) of Grd.No.4 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 company listed at Sl .No.(h) of Grd.No.4 and Grd.No.5 i.e., R.S. Software (India) Ltd., is concerned, the turnover of this company in the current year is less than Rs. 200 Crores but in the earlier two years its turnover was more than Rs. 200 crores and was liable to be excluded in those earlier two years. The question raised in the aforesaid grounds is as to: whether this company should also be excluded on the application of turnover filter by reason of its turnover in the earlier two years being more than Rs. 200 crores in the light of Rule 10CA of the rules which were applicable from AY 2014-15 onwards*

*or*

*whether in computing the weighted average profit margin of this company, the earlier two years profit margins have to be ignored because they fail the test of comparability in those two earlier years by reason of the application of the Rs. 200 Crore turnover filter.*

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

*10CA of the Rules, in so far as it relates to choice of comparable companies, read as follows:*

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

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

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

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

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

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

- (i) the price in respect of such uncontrolled transaction shall be determined by applying the most appropriate method in a similar manner as it was applied to determine the price of the comparable uncontrolled transaction undertaken in the financial year immediately preceding the current year; and*

- (ii) *the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the aforesaid period of two years shall be included in the dataset instead of the price referred to in sub-rule (1) :*

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

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

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

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

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

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

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

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17. *Let us apply the above rules to the comparable company R.S. Software (India) Ltd. As per Rule 10CA(2), the dataset of comparable companies chosen has to be arranged in ascending order. As per the 1st proviso to Rule 10CA(2), R.S. Software (India) Ltd., was chosen as a comparable company based on the data relating to*

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

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

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

*20. The submission of the learned Counsel for the Assessee was that as per the proviso to Rule 10CA(2) of the Rules, R.S. Software (India) Ltd., cannot be regarded as comparable company for Financial Year 2013-14 and 2014-15 because in those years, the turnover of this company was more than Rs. 200 crores. Therefore as per the first and second proviso to Rule 10CA(2) of the Rules, the profit margin of this company for Financial year 2013-14 & 2014-15 has to be ignored and the profit margin of the financial year 2015-16 alone should be taken. If one looks at Rule 10CA(2) in isolation, we have to reject this argument because the 1st and 2nd proviso to Rule 10CA(2) of the Rules refers to only R.S. Software (India) Ltd., (i.e., "where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction") undertaking uncontrolled transaction during the relevant previous year and if this condition is satisfied then the profit margin of R.S. Software for the 2 financial years immediately prior to the current financial year has to be taken. A plain reading of the 1st proviso would show that the question of comparability is not to be seen while applying the 1st*

*and 2nd proviso to Rule 10CA(2) of the Rules. The provisions of Rule 10CA(2) have to be read harmoniously with the other provisions of Rule 10B:*

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

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

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

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

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

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

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

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

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

*\*\**

*(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;*

*(c) 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.*

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

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

*(v) 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*

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*preceding the current year and thereby attracting the provisions of Rule 10B(2) or 10B(3) then the data for those years will not have any influence on the determination of transfer prices in relation to the transactions being compared for the current year and hence have to be ignored. On a harmonious reading of the provisions of Rule 10CA, 10B(3) (4) of the Rules, we agree with the stand taken by the learned counsel for the Assessee. Therefore, if at all R.S.Software Ltd., is to be regarded as a comparable company, then the margins for AY 2014-15 and 2015-16 of the company have to be ignored because in those years they are to be regarded as not comparable. We hold accordingly.*

*The assessee in Barracuda Networks India (P.) Ltd. vs. DCIT. (supra) was a captive service provider to its AE for assessment year 2016-17.*

*12. Further this Coordinate Bench of this Tribunal in case of ACI Worldwide Solutions in ITA no.106/Bang/2022 by order dated 13/05/2022 for assessment year 2017-18 in an identical situation in respect of the alleged comparables observed as under:*

*“4. By raising ground 6(iii), the assessee is seeking to exclude seven comparables on the grounds that the turnover of the said companies far exceeds Rs.200 crore, and therefore, the said companies cannot be compared with that of the assessee, where the turnover under the software development segment is only Rs.45.35 crore. In this context, the learned AR relied on the following judicial pronouncements:-*

*(i) [Autodesk India \(P\) Ltd. v. DCIT, Circle 11\(1\), Bangalore \(2018\) 96 taxmann.com 263 \(Bangalore Trib.\)](#)*

*(iii) [Cenduit \(India\) Services Pvt. Ltd. v. DCIT, Circle 2\(1\)\(1\), Bangalore \(TS-19-ITAT-2022 Bang-TP\)](#).*

*(vi) [M/s.Software Paradigms Infotech Pvt. Ltd. v. ACIT, Circle 1\(1\), Mysuru \(TS-676-ITAT-2021 Bang-TP\)](#)*

*4.1 The learned Departmental Representative was duly heard.*

*4.2 We have heard rival submissions and perused the material on record. Admittedly, the assessee's turnover in the software development segment is Rs.45.35 crore. The turnover of for Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited, are far exceeding Rs.200 crore for the relevant assessment year. The TPO/DRP has excluded the companies having turnover of less than Rs.1 crore, however, the TPO / DRP has not put upper limit of the turnover for exclusion of comparables having high turnover. The Bangalore Bench of the Tribunal in the case of Autodesk India*

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*(P) Ltd. v DCIT, Circle 11(1), Bangalore (supra) has held as follows:-*

*"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*

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*these decisions ignore a binding coordinate 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)."*

*4.2.1 In view of the judicial pronouncements, cited supra, we direct the AO to exclude Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited from the list of comparables, since the said companies are having turnover far exceeding Rs.200 crore for the relevant assessment year. It is ordered accordingly.*

*4.3 In the result, ground 6(iii) is partly allowed."*

*12.1. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this Tribunal in Zynga Game Network India (P.) Ltd. (supra). Respectfully following the above, we direct Ld. AO/TPO to exclude Tata Elxi Ltd (Seg.), Mindtree Ltd., Larsen and Toubro Infotech Ltd., RS Software (India) Ltd., Persistent Systems Ltd., Nihilent Technologies Ltd., Infosys Ltd., Cybage software Pvt.Ltd. for having high turnover as compared to a captive service provider like assessee.*

*Accordingly, we direct the Ld.AO to exclude the above comparables from the final list.*

***Accordingly Ground no. 1 raised by assessee stands allowed."***

4.3 In view of the above order of the Tribunal, we direct the AO/TPO to exclude the above comparables on the basis of high

turnover. Since the assessee's turnover is only Rs.32.81 crores on the basis of turnover filter, these comparables to be excluded. This ground of appeal is allowed.

5. **Ground No.8:**

*The learned AO/ TPO has passed an order under section 92CA(3) of the Act which suffers from several computational errors which has led to incorrect computation of adjustment made in respect of the subject transaction.*

5.1 At the time of hearing, the Ld. A.R. submitted that there are various computational errors which lead to incorrect computation of ALP and this may be corrected. We acceded to the request of the Ld. A.R. Accordingly, any computational error committed by AO/TPO to be corrected. Accordingly, the issue remitted to AO/TPO to correct the mistake in computation of adjustments made in respect of international transactions while determining the ALP.

6. **Ground No.9:**

*The learned AO/TPO/DRP have erred by failing to make appropriate adjustments to account for differences in working capital employed by the appellant vis-à-vis comparable companies in respect of the subject transaction.*

6.1 The grievance of the assessee in this ground is with regard to non-granting of working capital adjustment.

6.2 After hearing both the parties, we are of the opinion that this issue came for consideration before this Tribunal in the case of Huawei Technologies India Pvt. Ltd. in IT(TP)A No.1939/Bang/2017 dated 31.10.2018 in which it was held as under:-

*"17. In the light of the above discussion we are of the view that the CIT(A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT(A) has not found any error in the TPO's working of working capital*

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

*“(3) an uncontrolled transaction shall be comparable to an international transaction if –*

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

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

*19. In the result, the appeal of the assessee is allowed.”*

6.3 In view of the above order of the Tribunal, we inclined to remit the issue to the file of AO/TPO to determine the correct working capital adjustment.

7. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 1<sup>st</sup> Nov, 2022

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 1<sup>st</sup> Nov, 2022.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,**  
**ITAT, Bangalore.**