

IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE

SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 218/PUN/2021 : A.Y. 2016-17

Velocity Tech-Sol India Pvt. Ltd.
9th floor, DTC Erandawane,
PUNE – 411 004
PAN: AACCT 7151 J

Appellant

Vs.

The Dy. C.I.T. T.P. 2(2), Pune
(National e-assessment Centre, Delhi)

Respondent

Appellant by : Shri Tejas Dharwadkar, C.A.
& Meenal Sabnis .

Respondent by : Shri Prashant Gadekar

Date of Hearing : 03-11-2022
Date of Pronouncement : 09-11-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

This appeal preferred by the assessee emanates from findings of the Ld. Disputes Resolution Panel-3, Mumbai-2, (hereinafter referred to as "the DRP") dated 28108-2020 for A.Y. 2016-17 u/s 144C(5) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") as per the following grounds of appeal.

- 1. The learned A.O. / DRP erred in recomputing the transfer price of the international transactions relating to software development services, despite the fact that none of the conditions as prescribed in Section 92C(3) of the Income Tax Act, 1961 ('the Act'), had been violated by the appellant. Thus, the learned Assessing Officer ('AO') erred in making an addition of INR 6,04,95,225/- u/s 92C on the basis of the order of the TPO u/s 92CA(3) dated 30.10.2019 in the case of the appellant company.*
- 2. The learned A.O. / DRP erred in computing the Arm's Length Price (ALP) of the software development services rendered by the assessee company to its AE by holding that the assessee should have earned operating margin of 21.74% as against 8.86% earned by the assessee company.*
- 3. The learned A.O. / DRP erred in not appreciating that the transactions of software development services entered into by the assessee company with its AE were at Arm's Length Price (ALP) and thus, there was no reason to make any ad on in respect of the said transaction.*
- 4. learned A.O. erred in considering Cybercom Datamatics Information Solutions Ltd and Fixstream India Pvt Ltd as comparable companies in the final set of companies by ignoring the directions of Hon'ble DRP to exclude such companies on account of having related party transactions of more than 25% of the Sales.*

5. *The learned A.O. / DRP erred in confirming Thirdware Solutions Ltd, Infobeans Systems India Ltd, E-Infochips Ltd, Dun and Brandstreet Technologies and Data Services Pvt Ltd, Aspire Systems India Private Limited and Puresoftware Pvt Ltd as comparable entities for determining the ALP in respect of the International Transaction of provision of software development services without appreciating that all the said entities were not comparable on FAR basis with the assessee company and therefore, the same should have been excluded while working out the ALP.*
6. *The learned A.O. / DRP further erred in not appreciating that Thirdware Solutions Ltd, E-Infochips Ltd, Dun and Bradstreet Technologies and Data Services Pvt Ltd and Infobeans Systems India Ltd had earned super normal profits during the year under consideration and accordingly, on this ground also, the above four companies should have been excluded while determining the ALP in respect of the provision of software development services.*
7. *The learned AO/DRP erred in rejecting Smartcloud Infoservices Pvt Ltd and Synerzip Softech India Pvt Ltd as comparable entities to the Appellant by giving incorrect reasons.*
8. *The learned AO erred in not considering the corrected margin computation of comparable companies - Evoke Technologies Ltd, .Sasken Technologies Ltd, CG VAK Software and Exports Ltd, Rheal Software Pvt Ltd, Exilant Technologies Pvt Ltd, R S Software India Ltd, Harbinger Systems India Pvt Ltd even though the same was directed by the Hon'ble DRP.*
9. *Without prejudice to the above grounds, the assessee submits that the learned A.O. / DRP erred in not making adjustments to the ALP to account for various differences on account of intangibles, R & D, risk factors, etc. etc. between the assessee company and the comparables.*
10. *The Learned A.O./DRP incorrectly applying turnover filter of INR 5.11 Crore to INR 511.14 Crore i.e. ten times lower and higher turnover than Appellant, thereby using a completely different criteria than what was used by the Appellant.*

The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal."

2. At the outset, the Id. Counsel for the assessee taking us through grounds of appeal submitted that grounds No. (1) to (3) are general. That in ground No. (4) and (8) the D.R.P has provided relief to the assessee as per their directions. However, it is grievance of the assessee that the said findings of the Id. D.R.P have not been given effect to by the Id. A.O/T.P.O while passing his order. The other grounds pertains to either exclusion or inclusion of various comparables as sought for by the assessee. With this background, the Id. Counsel referred to the T.P study report of the assessee and

the functional analysis at page 15 of the said report, at para 3.3.1, which is as follows:

“A functional analysis facilitates understanding of the transactions between group companies after taking into account their functions, assets and risks and assists in establishing a degree of comparability with similar transactions in uncontrolled conditions for the purpose of transfer pricing study.

Velocity India is a captive service provider for Velocity Inc. which is its parent company. Veloc outsources the work of software development to Velocit India. Velocity India acts a service to Velocity Inc. and velocity Inc. deals with the customers.

Velocity India is engaged in provision of captive software development services to its parent company i.e. Velocity Inc. Velocity Inc. ultimately provides services to end customers in USA. During the, financial year 2015-16, Velocity Inc. is handling a work force of nearly 70 specialised people who monitor the services provided by Velocity India and accordingly provide further services to the final customers.

Velocity India is working in various ERP domains such as SAP, Oracle, Hyperian, PeopleSoft etc. and cloud hosting software related services. It also provides support services to customers of Velocity Inc. through the data centres available at Velocity Inc. During the financial year 2015-16, Velocity India is working with the team of approximately 227 people at its office situated at Pune.

A typical software development process involves the following tasks: product management, requirement gathering, requirement analysis and feasibility study, preparation of a project plan, software architecture, software coding, quality assurance ("QA") and testing, integration, documentation, release and packaging. Software product includes software related services.”

3. Further, the Id. D.R.P has also enumerated in their findings the functions performed by the assessee at para 1.2 of their findings, which is as follows:

“The assessee company, Velocity Tech-Sol India Pvt. Ltd., is a subsidiary of Velocity Inc. and is engaged in provision of software development services exclusively to its parent company. The parent company, Velocity Inc., ultimately provides services to the end customers in USA. As per the Transfer Pricing Analysis and report submitted by the assessee, Velocity Inc., provides Cloud hosting services, managed application services and Business Process Outsourcing (BPO) for HY/Payroll, Enterprise Performance Management (EPM) and core ERP solutions from Oracle and SAP, Velocity Inc. Serves Fortune 500 and mid market organizations. Velocity Tech-sol India Pvt. Ltd. Is engaged in provision of captive software development services to its parent company Velocity Inc., Velocity India is working in various ERP domains such as SAP, Oracle etc., and provides cloud hosting software related services. It also provides support services to the customers of Velocity Inc., through the data centres available in Velocity India or USA.

4. Now, coming to the issue of comparables, the final list finds place at page 28 and 29 of the Id. T.P.O’s order. Referring to that list, the Id. Counsel submitted that at Sr. No. 10 is Fixstream India Pvt. Ltd. and at Sr. No. 22 is Cybercom

Datamatics Information Solutions Ltd.. These have been excluded by the Id. D.R.P therefore, there is no dispute. There are certain other comparables for which the assessee wants exclusion from the final list of comparable companies.

5. **Nihilent Ltd.**

The Id. T.P.O has discussed this company at page 19 of his order. The D.R.P has dealt with this issue at page 9 para 3.2.1 onwards of their finding and had upheld the findings of the Id. A.O/T.P.O., as follows:

“3.2.1 The assessee had applied a Turnover Filter of Rs. 1 Cr. To Rs. 209 Cr. However, the TPO modified this filter to Rs. 5.11 Cr. To Rs. 5.11.14 Cr. The minimum and upper turnover filters applied by the TPO works out to 1/10th and 0 times of the turnover of the assessee, respectively.

3.2.2 We have considered the facts of the case and the submissions of the assessee In this regard, we are of the view that although there may not be a linear relationship between the profitability and turnover in the case of a service company, the size of a company reflected in terms of its turnover is one of the relevant criteria for comparability. This is because a company's ability to bear risk increases with the size of the company. It is pertinent to mention that in the case of Pentair Water India Pvt Ltd (381 ITR 216), the Hon'ble Bombay High Court upheld the decision of the Tribunal that size and turnover of a company are deciding factors for treating a company as a comparable. The CBDT has also taken note of this factor in the Safe Harbour Rules, which provide high percentage of net margin for companies whose turnover exceeds Rs.500 Cr as against those which have a turnover less than Rs.500 Cr. However, it may not be appropriate to strictly compartmentalize the. into two categories of turnover less than Rs. 500 Cr. and turnover more than R Cr. for the purpose of comparability. If it is done in that manner, it will lead anomalous situation Where a company having turnover of, say, Rs.495 Cr. Which will be held to be not comparable with a company having turnover of the tested party.

3.2.3 In this context, it is noticed that in the case of Genisys Integrating System(India) P. Ltd. vs. DCIT (IT No.1231/Bang/2010), the Hon'ble Bangalore ITAT held that the upper turnover filler for comparables car be reasonably fixe Rs. 200 Cr. in the case of the assessee which had a turnover of Rs.8.15 Cr. Thus, it is seen that the Hon'ble Tribunal considered an upper turnover filter which is approximately 25 times the turnover of the tested party as reasonable. However, In a recent decision dated 17/05/2017 in the case of Jacobs Engineering (I) Pvt. (ITA No. 7194/Mum/2012) for A. Y. 2008-09, the Hon'ble Mumbai ITAT held that the upper turnover filter can be reasonably fixed at approximately 10 times the turnover of the tested party and the lower turnover filler can be reasonably fixed approximately 1/10h of the turnover of, the tested Party. For coming lo this view, the Hon'ble Mumbai Tribunal relied upon several decisions of Hon'ble ITAT, Bangalore, which included the following:

- i) Cypress Semiconductors Technology P. Ltd. (TS-144-ITAT-2017)(Bang);*
- ii) Ketera Software India P Ltd. (TS-139-ITAT-2017)(Bang);*
- iii) Evry India P. Ltd. (TS-76-ITAT-2017)(Bang)*

3.2.4 Having regard to the discussion above and the case laws cited, we are of the opinion that application of an upper turnover filter as well as a lower turnover filter is appropriate for carrying out comparability analysis. By relying on the Principle laid down in the decision of the Hon'ble ITAT, Mumbai, in the case mentioned above, we hold that the upper turnover filter should be fixed approximately at 10 times the turnover of the tested party (assessee) and the lower turnover filter should be fixed approximately at 1/10th of the turnover of the tested

party. Accordingly, we uphold the action of the TPO in applying the minimum and maximum turnover filters at Rs. 5.11 cr. and Rs. 511.14 cr. Respectively.

3.2.5 The assessee has also raised the issue of change of stand by the TPO with regard to application of this filter. The assessee contends that the TPO had earlier proposed to apply a turnover filter of Rs. 1 Cr. to Rs.75 Cr., but later modified the same to Rs. 511 Cr. To Rs. 511.14 Cr., and assessee has objected to the said change in stand by the TPO. It is seen that in para 4.8 and para 7.3 of his order, the TPO has clearly stated that earlier (in the show cause notice), the turnover filter was inadvertently mentioned as Rs. 1 Cr. To Rs.75.6 cr and that the same was being revised to Rs. 5.11 cr. To Rs. 5.11 cr. We find that the turnover filter is invariably applied by the TPO at 1/10th and 10 times of the turnover of the tested party. In the present case, the turnover of the tested party (the assessee) is Rs. 51,11,37,020. Therefore, the correct turnover filter to be applied is Rs. 5.11 cr. To Rs. 511.14 cr. Only. We have, in the foregoing paragraphs upheld this filter. It is therefore, apparent that the figures of Rs. 1 cr and Rs. 75 cr. Had been mentioned inadvertently, which might have happened while copy pasting. Ideally, the TPO should have informed the assessee of the same, but it was not done, perhaps, due to paucity of time. However, it may be pointed out here that no prejudice has caused to the assessee on account of this action of the TPO, as the TP adjustments, if any, or, for that any adverse decision, proposed by him would only be final, subject to the u actions issued by DRP or the decision of CIT (Appeals), as the case may be, and the assessee could raise its objections in this regard before DRP/CIT (Appeals). Before this Panel, the assessee did raise its objections with regard to adoption of the turnover filter by the TPO at Rs.5.11 Cr. to Rs.511.14 Cr., and we have duly dealt with the same in the foregoing paragraphs. Therefore, the assessee cannot have any further grievance regarding non-granting of opportunity by the TPO. The assessee cannot argue that an inappropriate filter should be applied merely because such filter was inadvertently mentioned by the TPO in the show cause notice, especially since the filter finally applied by the TPO is supported by various decisions of Hon'ble ITAT (as discussed herein above) and no prejudice has caused to it by the action of the TPO in not sharing the revised filter with it before finalizing the order. Accordingly, this contention of the assessee is rejected."

5.1 The Id. Counsel for the assessee thereafter referred to the Annual Report of this company and submitted that this company should be excluded from the final list of comparables since there has been an extra ordinary event of acquisition which is demonstrated from the Annual Report as follows:

Global operations: Overview :

Being a global business consulting and IT services solutions Integration Company, our mission is to deliver organizational change systematically for our clients.

The key industries to which we provide our services include BFSI, media and entertainment, mobility and telecommunications, life sciences and healthcare, manufacturing, retail and consumer products. We have also been engaged by the government and public sector companies in several countries.

The company derived a majority of revenues from South Africa where we have long standing relations with corporate clients. As a part of our global strategy, we are expanding our operations in other geographies such as United States, United Kingdom, Australia, Ireland, India, Nigeria and Tanzania. Towards this, we acquired GNet Group LLC a business intelligence and analytics company in USA and also acquired 51 percent shareholding of Intellect Bizware Services Private Limited (Mumbai, India) specializing in ERP and enterprise innovations based on SAP and HANA to develop and strengthen our presence in the ERP space.

Our customer engagements comprise holistic analysis of problems which span across people, process, technology, as well as learning and innovation. Our service offerings include

- (a) *Process and technology;*
- (b) *Digital transformation through which we help our clients formulate and execute their digital business strategy by providing services on digital channels using analytics, statistical modeling, machine learning. Natural language processing ('NLP') and social marketing tools and techniques; and*
- (c) *Enterprise IT services wherein we develop applications across wide range of hardware and software platforms, develop solutions to integrated various applications across platforms, provide migration, re-engineering and software maintenance services.*

5.2 The Id. Counsel further referred to case laws pertaining to the same assessment year i.e. A.Y. 2016-17 in ITA NO. 194/PUN/2021, order dated 21-07-2022 in the case of Optiva India Technologies Pvt. Ltd. Vs. Asstt. CIT Cir. 3, Pune wherein, the Pune Tribunal has observed that this Company viz. Nihilent Ltd. faced extra ordinary events of acquisition wherein lot of acquisition has taken place during the year. The Tribunal had directed the A.O/T.P.O to exclude this company from the final set of comparables. That, as demonstrated by the Id. Counsel from the Annual Report of this company there has been a series of acquisitions taken place in respect of this company in view of their global business perspectives and therefore, following the same parity of reasoning in the aforesaid judicial pronouncement, we direct the Id. A.O/T.P.O to exclude this company from the final set of comparables.

6. **Aspire Systems (India) Pvt. Ltd.**

6.1 The Id. T.P.O has discussed this company at page 19 of his order. The D.R.P has discussed this issue in their findings from paras 14.1 onwards. The assessee submitted that the said company i.e. Aspire systems (India) Pvt. Ltd. is not functionally comparable with the assessee. That, before the Id. T.P.O the assessee objected regarding this company as a comparable on the ground of validity of turnover filter since it failed the initial upper turnover filter of Rs. 75.6 crores proposed by the Id. T.P.O. The D.R.P had held on this issue that the Id. T.P.O had initially proposed the turnover filter at Rs. 75 crore which was subsequently modified by him during the course of proceedings before him which was based on judicial decisions and therefore, the Id. D.R.P had approved such modified turnover filter adopted by the T.P.O. The contention of the assessee was rejected. Further, the assessee had submitted that this company is functionally not comparable with that of the assessee and at para 14.2.4 and 14.2.5 the D.R.P rejected this objection of the assessee also and upheld the inclusion of this company in the final set of comparables. The Id. Counsel for the assessee at the time of hearing demonstrated from the Annual Report of this company at page 445 in the paper book that there has been extra ordinary event

in form of amalgamation taking place in case of this company. We have gone through the said Annual Report and it is evident that there is an amalgamation which has taken place and in view of this extra ordinary event of amalgamation this particular company has to be held as not comparable with that of the assessee. Accordingly, the Id. A.O/T.P.O is directed to exclude the same from the final list of compaables.

7. **E-Infochips Ltd.**

7.1 In respect of this company, the Id. Counsel for the assessee demonstrated from the Annual Report of this company that there has been an extra ordinary event of merger where two of the wholly owned subsidiary companies of E-Infochips Ltd. were merged with the company in terms of order of Hon'ble Gujarat High Court dated 29-03-2016. The merger took effect from the appointed date i.e. 01-04-2016. The Id. D.R. conceded to these facts on record.

7.2 We have already held in respect of the earlier comparables where there has been acquisition and where there has been an amalgamation such companies cannot be held to be comparables in the event of extra ordinary events. Similarly, in this case as evident there has been a merger as per the directions of the Hon'ble Gujarat High Court and therefore, because of this extra ordinary event having taken place, we direct the Id. A.O./T.P.O on the same parity of reasonings to exclude E-Infochips Ltd. from the final list of compables with that of the assessee.

8. **AcewinAgri tech Ltd.**

8.1 The assessee has stated that this company is involved in R & D activities. The assessee contends that the company is into diversified nature of business as per the company's Website. However, the Id. A.O/T.P.O., on going through the Annual Report of this company, noticed that this company is engaged purely in software development.

8.2 That, due to these conflicting observations, the Id. Counsel for the assessee submitted that this issue may be remanded back to the file of the Id. A.O/T.P.O for detailed factual examination and re-adjudication as per law. The Id. D.R did not raise any objection if the matter is remanded to the file of the Id. A.O/T.P.O.

8.3 Having heard both the parties and considering the facts on record, we are of the considered view that the actual position has to be ascertained before

excluding or including this company, what exactly are the activities of the company has to be examined. Therefore, the issue of comparability regarding this company is remanded to the file of the Id. A.O/T.P.O for re-adjudication as per law complying with the principles of natural justice.

9. **Infobeans Technologies Ltd.**

9.1 The assessee contends that this company is functionally different. This contention was not accepted by the Id. A.O/TP.O since on perusal of the Annual Report of this company it was noticed that the company is engaged in providing the I.T. related services. The D.R.P has discussed this issue at para 13.2.1 of their findings where the first contention was that this company was not functionally comparable to the assessee. It was contended that as per the Annual Report, this company is engaged in diversified activities such as custom application development, content management system, enterprise mobility and big data analytics, besides providing development and maintenance, big data UX and UI, automation engineering services, including product engineering and business process management. As against the same, the assessee is engaged in only one type of activity of providing software services to its AE, and therefore, the company should not be included in the final set of comparables. The D.R.P on analysing this contention have held that this company is engaged in activities of providing IT Software Development Services of various types and earns entire revenue from such activity. Therefore, the contention of the assessee that this company is doing varied activities is not relevant and acceptable and therefore, the first contention of the assessee was rejected. The second contention of the assessee was that this company had earned abnormally high profits from its business operations during the year. However, this contention was rejected by the Id. D.RP. based on various judicial decisions as placed in their findings vide para 13.2.4 where it is held that the Indian Law does not permit exclusion of super profit-making companies from the list of comparable companies. The Id. D.R.P further opined that the assessee has not brought on record any evidence to demonstrate that this earning of super profits was due to some abnormal condition or difference in functions which could have been considered as sufficient reason to exclude this company from the comparable. Accordingly, the Id. D.RP upheld the findings of the Id. A.O/T.P.O and retained this company to the final list of compaables.

9.2 The Id. Counsel placed on record the decision of Pune Tribunal in ITA No. 194/PUN/2021 for A.Y. 2016-17, order dated 21-07-2022 where the Tribunal considered another decision of Co-ordinate Bench, Mumbai in ITA No. 1379/Mum/2021 for A.Y. 2016-17, order dated 25-02-2022 in the case of Red Hat India Pvt. Ltd. Vs. ACIT and in both these decisions, the contention of the assessee has been accepted that Infobeans Technologies Ltd. is functionally different and therefore, should be excluded from the final set of comparables. The relevant paras are extracted as follows:

“15.1 The assessee contends that this company is functionally different and that it has got no segmental data.

15.2 Per contra, the Id. T.P.O held that this is a service company primarily rendering software services and it does not hold any specific inventory. Further, as per the annual report of this company, 99.20% of its revenue are from software services, therefore, no segmental data is required. The company is thus held to be comparable.

15.3 The D.R.P has dealt with this comparable at page 90 clause (d) and given its finding at page 92 of their order. The Id. A.R submitted that this company should be excluded for functionality difference and in support thereof placed reliance on the decision of Bombay Bench of the Tribunal in ITA No. 1379/Mum/2021 for .Y. 2016-17 dated 25-02-2022 in the case of Red Hat India Pvt. Ltd. Vs. ACIT wherein it was observed and held as follows:

: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.”

15.4 We find that this decision pertains to the same assessment year viz. 2016-17 and respectfully following the aforesaid decision on the same parity of reasoning, we direct the A.O/T.P.O to exclude this company from the list of comparables.”

9.3 The aforesaid decision pertains to A.Y. 2016-17 and it has been held that Infobeans Technologies Ltd. has to be excluded as comparable as it is performing varied types of services and that also as per the financials of the company, its segmental financials are not available without which it is difficult to compute the correct profit margin of the relevant segment. Following the same parity of reasoning, we direct the Id. A.O/T.P.O to exclude this company from the final list of comparables.

10. **Dun and Bradstreet Technologies & Data Services Pvt. Ltd.**

10.1 Regarding this company also before the Revenue authorities it has been submitted by the assessee that the company should be excluded on the ground of functional dis-similarities. However, the revenue authorities have not accepted the submissions of the assessee and the Id. T.P.O at para 9.4 onwards and the D.R.P at para 10.2.1 onwards in their respective findings have therefore, rejected the contention of the assessee.

10.2 The Id. Counsel took us through the Annual Report of this company demonstrating the functional analyses. The Id. Counsel further submitted that on identical facts and circumstances in respect of the same assessment year i.e. 2016-17, Pune Tribunal in ITA No. 194/PUN/2021 (supra) has held that this company should be excluded from the final list of comparables on the ground of being functionally dis-similar and also acknowledging the fact this company earns abnormally high profit which has been also accepted in their decision by the Co-ordinate Mumbai Bench (supra). The relevant paras of Pune Tribunal decision are as follows:

“ 11.1 The main contention of the assessee regarding this comparable was that this is functionally different and that no break of revenue from services was available regarding its various activities and non-availability of segmental data. However, the T.P.O observed that this company is into providing predictive analysis, software development and related technology services and solutions. The principal business from which this company earns its revenue is from sale of services which is 100%. Therefore, the sale of products for this year is NIL. The company is dominantly engaged in providing software development services to its clients. Hence, the objections were rejected and the company was held to be comparable.

11.2 The Id. D.R.P has upheld the decision of the A.O/T.P.O at para 8.2(b) at page 87 of their order. The Id. A.R at the time of hearing brought to our notice the Annual Report of this company at page 1986 of the Paper Book it is totally functionally different with regard to the assessee. He even took us through the related party schedule at page 2104 of the paper book. He further submitted on functionality difference that the Co-ordinate Bench Bombay for the same assessment year 2016-17 has held that this company should be excluded from the list of comparables. The Co-ordinate Bench Bombay in ITA No. 1379/Mum/2021 for A.Y. 2016-17 dated 25-02-2022 on this issue observed and held as follows:

47. The assessee sought to exclude Dun & Bradstreet as a comparable on the ground that it is functionally dissimilar being into providing predictive analysis, software development and related technology services and solution and on the ground that this company earns abnormally high margin of 58.19% during the relevant year. This objection was raised by the assessee both before the Ld. TPO as well as Ld. DRP but they have

rejected the contention of the assessee by simply recording that "the company is engaged in technology based solution and analytic sales, hence it is functionally similar and as such assessee"s contention is rejected."

48. We have perused a transfer pricing study of the assessee available at page A305, A412 & A413 of the paper book supported with relevant financials. Dun & Bradstreet is into providing wide area of sources such as D&B analytic services, risk management solutions, sales and marketing solution services, supply management solution etc. It has also come on record that the assessee has earned abnormally high margin of 58.19% as is evident from the annual report of Dun & Bradstreet and as such is not a valid comparable vis-à-vis assessee who is a routine software development service provider to its AE working on cost + mark-up model, hence order to be excluded.

11.3 Respectfully following the aforesaid decision on the same parity of reasoning, we direct the A.O/T.P.O to exclude this company from final set of comparables."

10.3 The Id. D.R could not place on record any evidences/documents to suggest any deviance in the facts scenario. Accordingly on the same parity of reasoning as held in the earlier order, we direct the Id. A.O/T.P.O to exclude this company from the final set of comparables.

11. Now we shall adjudicate ground No. (4) where the assessee contends that the Id. A.O/T.P.O had erred in not considering the directions of the Id. D.R.P in excluding (i) Cybercom Datamatics Information solutions Ltd; and (ii) Fixstream India Pvt. Ltd. as comparable companies since such companies were having related party transactions of more than 25% of the sales. The Id. D.R.P has given their findings on Cybercom Datamatics Information solutions Ltd. from para 6.2.1 onwards and as held at para 6.2.6 that the A.O/T.P.O is directed to exclude this company from the final set of comparables if the ratio of RPT income to the total operating revenue is more than 25%. Similarly, regarding Fixstream India Pvt. Ltd. the Id. D.R.P has given their findings from para 5.2.1 onwards and as held at para 5.2.4 the Id. A.O/T.P.O is directed to exclude this company from the final set of comparables if the ratio of RPT income to the total operating revenue is found to be more than 25% after verification. Admittedly, the Id. A.O/T.P.O has not considered these findings of the Id.D.R.P. The Id. D.R also could not

bring any materials on record or evidences to demonstrate that the Id. A.O/T.P.O has complied with such directions of the D.R.P. Considering these facts in the interest of justice, this ground is remitted back to the file of the Ld. A.O/T.P.O for complying with the principles of natural justice and giving effect to the directions given by the Id. D.R.P. regarding the above mentioned companies.

12. In Ground No. 8, the assessee contends that the Id. A.O/T.P.O has erred in not considering the corrected margin computation of comparable companies as mentioned in the ground itself on record. Before the D.R.P objection raised by the assessee was as under:

“Objection Nos. 1.6 to 1.10: Incorrectly considering operating margins of Evoke Technologies Pvt. Ltd (as 6.01% instead of 4.29%), CG Vak Software and Exports (as 12.59% instead of 9.43%. Sasken Technologies Pvt. Ltd. (as 7.24% instead of 5.48%), Rheal software Pvt. Ltd. (as 15.58% instead of 15.29% and Exilant Technologies Pvt. Ltd. (as 17.10% instead of 17.01%).

12.1 The D.R.P thereafter at para 7.2.2 gave their finding as follows:

“7.2.2. Since this is a factual issue regarding the correct computation of margins of the comparable companies, the TPO is directed to verify the quantum of margin computations submitted by the assessee and adopt the correct Operating margins of the comparable companies mentioned in the above grounds and rework the adjustment accordingly.”

12.2 It is the contention of the Id. Counsel that this direction has not been followed. The Id. D.R fairly conceded to the submissions. Having heard the parties in the interest of justice, we direct the A.O/T.P.O to follow the directions of the Id. D.R.P complying with the principles of natural justice.

13. In ground No. 7, the assessee wants inclusion of two comparable companies viz. (i) Smartcloud Infoservices Pvt. Ltd. and (ii) Synerzip Softech India Pvt. Ltd.

13.1 The Id. Counsel submitted that they are not pressing the inclusion of Smartcloud Infoservices Pvt. Ltd.. Having heard his submissions, this part of the ground is dismissed as not pressed.

13.2 Regarding Synerzip Softech India Pvt. Ltd., the Id. A.O/T.P.O has discussed at page 27 para (iii) which is as follows:

“iii. Synerzip SoftechIndia Pvt. Ltd.

The assessee stated that this company should be included in the set of comparable since the Annual Report is available in public domain. However, the company is functionally dissimilar to the assessee's activities. As seen from the Revenue Recognition (page 33 of AR), of Synerzip Softech India Pvt. Ltd., it is mentioned as below:

iii. Revenue Recognition

The company is in the business of 'outsourced product development' which is different from traditional 'Software services business'. The company needs to prove to client that the software 'product' that was developed has passed the quality assurance test – which takes about one month after the date of delivery. The company has monthly deliveries and invoices are raised in a monthly cycle on the basis of hours spent on software development work. The revenue is recognised on monthly basis on raising of invoice on synerzip LLP.”

13.3 The D.R.P has given their findings regarding this company at para 17.2.1 which is as follows:

“17.2.1 This company was also identified by the assessee as an additional comparable during the course of the TP proceedings. However, the TPO rejected the company, observing that as per its Annual Report, it is engaged in product development, and, therefore, not comparable to the assessee, which is a software development service provider. Before this Panel, the assessee has contended that the company's activities are similar to the functions performed by the assessee.

*17.2.2 We have considered the contention of the assessee. As pointed out by the TPO, in Note A-19 of the Annual Report of the company for the F.Y. 2015-16, regarding **Significant Accounting Policies**, under the heading **"Revenue Recognition"**, it has been stated that, **"The company is in the business of 'outsourced product development' which is different from traditional 'Software Services business'**. Similarly, in the Directors' Report forming part of the Annual Report of the company for the F.Y.2015-16, under the heading **"State of Company Affairs & Prospects for the year and also in Note A-20 to the Accounts, regarding Significant Accounting Policies, under the heading "Corporate Information"**, it has, inter alia, been stated that, **The company is engaged in outsourced software product development and software testing.** However, as per the Statement Profit and Loss for the year ended 31/03/2016, the total revenue from operations of the company for the year amounted to Rs.71,85,18,909/- and as per Note A-15 to the Accounts, this entire revenue was from software services : software development/professional fees- export. Further in the Directors' Report (Form No. MGT 9), in the column regarding Principal Business Activities of the company, the name and description of main products / services is mentioned as, **"Software development"**. Thus, the Annual Report does not provide clarity on the activities of the company.”*

13.4 The findings of the revenue authorities are that there are no clarity of the activities of this company and even in the Annual Report is having conflicting statements where on one hand it is written that the company is engaged in

outsourcing software project development and software testing. however, as per the statement of P & L account for the year ended 31-03-2016 the total revenue were from software services. Further, in the Directors' Report the principle business activity of this company, the name and description of main product/service is mentioned as "software development". Therefore, the Annual Report does not provide any clarity regarding the correct activities of this company. Even before us also, the Id. Counsel could not produce any evidence or documents to demonstrate the actual nature of activity of this company. In absence thereof, we uphold the findings of the Id. D.R.P. This part of the ground is also dismissed.

14. In the combined result, the **appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced in the open Court on this 9th November 2022

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, the 9th day of November 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The DRP Panel 3, Bombay
4. D.R. ITAT 'C' Bench
5. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

/// TRUE COPY ///

| | | | |
|----|--|------------|----------|
| 1 | Draft dictated on | 03-11-2022 | Sr.PS/PS |
| 2 | Draft placed before author | 07-11-2022 | Sr.PS/PS |
| 3 | Draft proposed and placed before the second Member | | JM/AM |
| 4 | Draft discussed/approved by second Member | | AM/JM |
| 5 | Approved draft comes to the Sr. PS/PS | | Sr.PS/PS |
| 6 | Kept for pronouncement on | 09-11-2022 | Sr.PS/PS |
| 7 | Date of uploading of order | 09-11-2022 | Sr.PS/PS |
| 8 | File sent to Bench Clerk | 09-11-2022 | Sr.PS/PS |
| 9 | Date on which the file goes to the Head Clerk | | |
| 10 | Date on which file goes to the A.R | | |
| 11 | Date of dispatch of order | | |

