

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA-TP No.1820/Hyd/2019 & ITA No.329/Hyd/2021		
Assessment Years: 2015-16 & 2016-17		
Wissen Infotech Private Limited, Hyderabad. C/o.Prasad and Prasad, Chartered Accountants, Flat No.301, M.J.Towers H.No.8-2-698, Road No.12 Banjara Hills, Hyderabad Telangana-500 034. PAN : AAACW3027	Vs.	The Deputy Commissioner of Income Tax, Circle -17(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:		Shri P.V.S.S.Prasad, CA
Revenue by:		Shri Jeevan Lavidiya, CIT-DR
Date of hearing:		17.11.2022
Date of pronouncement:		12.12.2022

ORDER

Per Shri Laliet Kumar, J.M.

The assessee filed these two appeals feeling aggrieved by the order passed by the Learned dispute Resolution Panel-1, Bengaluru, dated 06.09.2019 & 22.02.2021 for the AY 2015-16 & 2016-17 respectively.

2. The grounds raised by the assessee for A.Y. 2015-16 read as under :

“1. The Learned Assessing Officer / Ld Dispute Resolution Panel (DRP) are erroneous in law and on the facts of the case.

2. The Ld DRP/AO ought to have accepted the Profit margin of the assessee company (as computed by the Ld.TPO himself) as complied with the arms length principle.

3. The Ld DRP/AO are not justified in law in considering wrong comparables and consequently arriving at a high operating profit margin of 27.37% as a ratio of OP/OC

4. The Ld DRP/AO is not justified in law in making an adjustment u/s. 92CA of Rs.6,20,22,458/- to the price received by the appellant.

5. The ld.DRP/AO erred in not accepting the assessee’s contention of exclusion of following 10 companies on the grounds of functional comparability, super profit, high turnover or other appropriate filter etc.

S.No.	Name of the company
1	Tata Elxsi Ltd.(Segmental)
2	Rheal Software Pvt.Ltd.
3	Mindtree Ltd.
4	Larsen & Toubro Infotech Ltd.
5	Persistent Systems Ltd.
6	Nihilent Technologies Ltd.
7	Aspire Systems (India) Pvt.Ltd.
8	Inteq Software Pvt.Ltd.
9	Infosys Ltd.
10	Cybage Software Pvt.Ltd.

6. The Ld. DRP/AO erred in not accepting the assessee’s contention of exclusion of following 3 companies on the grounds of functional comparability even though the companies were originally selected by the assessee in its TP study.

S.No.	Name of the Company
1	Kals Information Systems Ltd.
2	R.S.Software (India) Ltd.
3	Infobeans Technologies Ltd.

7.The Ld.TPO, while including the companies as comparables has erred in computations of the margins and has considered wrong margins of the companies in the final list of comparables.

8.The Ld.DRP/AO erred in not accepting the assessee's contention of inclusion of following 3 companies as a comparables.

S.No.	Name of the Company
1	Akshay Software Technologies Ltd.
2	TVS Infotech Ltd.
3	Sagar Soft (India Ltd.

9.The Ld.AO/TPO erred in not giving full effect to the directions of Ld. DRP in respect of including the company Cigniti Technologies Limited as a comparable company in computation of operating margin of comparable companies, which resulted in excess margin of 2.55% (i.e. 27.37% less 24.82%) and thereby making an excess adjustment of Rs.91,81,120/- (i.e Rs.6,20,22,458/- less Rs.5,29,04,338/-)

10. The Ld. AO erred in not considering Chapter VI-A deductions amounting to Rs.1,03,365/- while computing the Total tax payable.

11. The Ld. AO erred in levying interest u/s. 234A, 234B and 234C of the Act against legally untenable adjustment.”

3. The grounds raised by the assessee for A.Y. 2016-17 read as under :

“1. The The Learned Assessing Officer / Ld Dispute Resolution Panel (DRP) are erroneous in law and on the facts of the case.

2. The Ld DRP/AO ought to have accepted the Profit margin of the assessee company (as computed by the Ld.TPO himself) as complied with the arms length principle.

3. The Ld DRP/AO are not justified in law in considering wrong comparables and consequently arriving at a high operating profit margin of 27.89% as a ratio of OP/OC

4. The Ld DRP/AO is not justified in law in making an adjustment u/s. 92CA of Rs.8,78,93,369/- to the price received by the appellant.

5. The ld.TPO erred in not accepting the assessee's contention of exclusion of following 13 companies on the grounds of functional dissimilarity, super profit, high turnover or other appropriate filter etc.

- i. Rheal Software Pvt.Ltd.
- ii. C G-VA K Software & Exports Ltd.
- iii. Larsen & Toubro Infotech Ltd. (Segmental)
- iv. Tata Elxsi Ltd.(Segmental)
- v. Nihilent Technologies Ltd.

- vi. Inteq Software Pvt.Ltd.
- vii. Persistent Systems Ltd.
- viii. Infobeans Technologies Ltd.
- ix. Aspire systems (India) Pvt.Ltd.
- x. Infosys Ltd.
- xi. Thirdware Solutions Ltd.
- xii. Cybage Software Pvt.Ltd.
- xiii. R S Software (India) ltd.

6. The Ld. TPO erred in not accepting the assessee's contention of inclusion of following 7 companies which were earlier considered in the TP study.

- i. Akshay Software Technologies Limited
- ii. M C T India infotech Pvt.Ltd.
- iii. Celstream Technologies Pvt.Ltd.
- iv. Sagarsoft (India) ltd.
- v. Synerzip Softech India Pvt.ltd.
- vi. Maveric Systems Ltd.
- vii. Infomile Technologies Ltd.”

3.1 The assessee has also raised additional ground which reads as under :

“The Ld. TPO erred in rejecting the TP Study of the appellant company based on reasons which are factually incorrect. The ld.TPO ought to have accepted the TP study which was based on appropriate filters and valid search process.”

4. Before us, at the outset, both parties submitted that the issues raised in both the appeals are identical. In view of the aforesaid submissions, we, for the sake of convenience proceed to dispose of both the appeals by a consolidated order but however, refer to the facts in ITA No.329/Hyd/2021 for A.Y. 2016-17.

5. Brief facts of the case are that the assessee, is a company registered in India under the Companies Act, 1956. The assessee company is engaged in the business of Software Development and filed its return of income for the Assessment Year 2016-17 on 25-01-2017 admitting an income of Rs. 55,11,160/- under Normal provisions. The Assessee Company declared profit of Rs. 1,35,00,060/- under the provisions of Sec. 115JB of the Income Tax Act, 1961. The return was processed

under section 143(1) and the case was selected for scrutiny and. a notice under section 143(2) & 142(1) were served upon the assessee company. During the course of assessment, a reference under section 92CA(I) of the Income-tax Act, 1961 has been made by the DCIT Circle-17(2), Hyderabad, for determination of Arm's length price (ALP) in respect of international transactions of the assessee company. The assessee company has entered into the following international transactions during financial year 2015-16:

Sl.No.	Associated Enterprise	Nature of Transaction	Amount	Method
1	Wissen Infotech Inc USA	Software development Services	Rs.40,61,660/-	TNMM
2	Wissen Infotech In USA	Trade Receivables	Rs.3,92,31,581	Other Method

The Assessee Company submitted the relevant information, as called upon by the ld. AO/TPO, during the proceedings from time to time. Despite the submissions made by the assessee the Ld. TPO has made the following adjustments:

S.No.	Nature of Transaction	Amount of adjustment
1	Software Development Services	Rs.8,07,73,167/-
2	Interest on delayed receivables	Rs.65,035/-

The assessee company filed its objections before the Ld. DRP. The Ld. DRP has accepted assessee's arguments relating to exclusion of Cigniti Technologies Limited and Kals Information systems Pvt. Ltd. All other objections filed by the assessee company were rejected by the Ld. DRP. The assessee company therefore filed appeal before the Hon'ble ITAT.

6. The Assessee submits that relying on various independent researches and studies wishes to conclude that in the software sector, the size of a company's operations has an impact on the margins earned by the companies. The basic conclusion from the analysis shows that operating margins for companies in the software sector increase with increasing size of the company's operations (as proxied by the size of its operating assets) but at a decreasing rate. Hence, it is appropriate to apply upper turnover filter based on the classification of companies in Dun & Bradstreet. Further, as specified above the Ld. TPO rejected specifying R&D expense some percentage of sales, etc. which has not been applied by the assessee company itself in its TP documentation. The assessee company has not selected any company which is having negative net worth.

7. The Ld. DRP in his order held that applying positive net worth filter is not appropriate as it may not have direct correlation with the operational performance of the company. The Ld. TPO erred in not accepting the assessee's contention of exclusion of following 13 companies on the grounds of functional dissimilarity, super profit, high turnover or other appropriate filter etc.

- i. Rheal Software Pvt. Ltd.*
- ii. C G- V A K Software & Exports Ltd.*
- iii. Larsen & Toubro Infotech Ltd. (Segmental)*
- iv. Tata Elxsi Ltd. (Segmental)*
- v. Nihilent Technologies Ltd.*
- vi. Inteq Software Pvt. Ltd.*
- vii. Persistent Systems Ltd.*
- viii. Infobeans Technologies Ltd.*
- ix. Aspire Systems (India) Pvt. Ltd.*
- x, Infosys Ltd.*
- xi. Thirdware Solution Ltd.*
- xii. Cybage Software Pvt.Ltd.*
- xiii.R.S.Software (India) Ltd.*

8. As per the written submissions dt.15.11.2022 filed by the assessee, during F.Y 2015-16, the Assessee has earned revenue of INR 50 crores (approx.) from provision of software development services. Hence, the Assessee submits that an upper turnover threshold of INR 500 crores should be accepted based on the classification provided in the Dun & Bradstreet report under the category of small firms. Accordingly, based on the above discussion. the Assessee wishes to submit that the following comparable companies should not be accepted as comparable companies since the sales turnover for all these companies exceed the upper limit of INR 200 crores:

S.No.	Company Name	Total Revenue (Rs.In crores)	Sales Turnover (Rs.In crores)	Weighted Average OP/OC)
1	Thirdward Solutions Ltd.	227.55	221.37	39.41
2	Aspire Systems (India) Ltd.	233.05	230.81	33.74
3	Nihilent Ltd.	258.08	251.22	26.36
4	Cybage software Pvt.Ltd.	754.55	722.25	65.91
5	Tata Elxsi Ltd.	1088.5	1075.2	25.69.
6	Persistent Systems Ltd.	1542.27	1447.14	30.09
7	Larsen & Toubro Infotech Ltd.	5799.4	5568.5	23.67
8.	Infosys Ltd.	57365	54034	38.31

Thus, the Assessee submits to apply the upper turnover filter for selecting the comparable companies for a captive service provider like the Assessee. Out of 13 Companies asked for exclusion the following 8 Companies are having Turnover > 200 Crores and the same are to be excluded from the final list of comparables selected by the Ld. TPO/Ld. DRP.

9. In the written submissions filed by the assessee before us, it was submitted by the ld.AR as under :

“A. The Assessee has maintained TP Documentation u/s 92D as per the provisions of the Income Tax Act, 1961 (“Act”). Rejection of TP Documentation by TPO is not in consonance as per the provision of section 92C(3) of the Act. It is only a broad comment made by the Ld. TPO without any basis or evidence.

B. Reasons for Exclusion of comparables

1. Rheal Software Pvt Ltd

- Functionally dissimilar - custom application development, web enabling legacy applications, database solutions, outsourced product development*
- High fluctuating margins*
- No segmental details available*
- Incurred brand promotion*
- Fails RPT Filter*

Judicial pronouncements relied on:

Alcon Laboratories Pvt Ltd [TS-805-ITAT-2022(Bang)-TP]

2. R S Software (India) Pvt. Ltd.

- Functionally dissimilar – payment processors*
- High fluctuating margins*
- Extraordinary events: Strategic shift from services to products, platforms and services*
- Engaged in R&D activities*
- Presence of intangibles*
- Incurred marketing expenses*

Judicial pronouncements relied on:

Aptean India (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle-1(1)(1), Bengaluru. 132 taxmann.com 253 (Bangalore - Trib.)

3. Larsen & Toubro Infotech Limited

- *Functionally dissimilar- Banking services, financial services, Media, entertainment, Hi-Tech and consumer electronics*
- *Presence of intangibles – IPR*
- *Presence of Brand*
- *Incurred marketing expenses*
- *Extraordinary events:*

Amalgamation of L & T Infotech Ltd. with ISRC, GDA Technologies Limited.

Judicial pronouncements relied on:

- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*
- *Networks (P.) Ltd. v. ACIT 141 taxmann.com 163 (Bangalore - Trib.)*
- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*
- *Aptean India (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle-1(1)(1), Bengaluru. 132 taxmann.com 253 (Bangalore - Trib.)*

4. Tata Elxsi Ltd (Segmental)

- *Functionally dissimilar – product design & product development*
- *Engaged in R&D activities*
- *Presence of intangibles*
- *Incurred marketing expenses*

Judicial pronouncements relied on:

ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)

5. Nihilent Technologies Limited

- *Functionally dissimilar – product development, consulting*
- *Engaged in Research and development activities*
- *Extraordinary events*
- Nihilent Technologies acquired Intellect Bizware.
- *Incurred business promotion expense*

Judicial pronouncements relied on:

- *Prism Networks (P.) Ltd. v. ACIT 141 taxmann.com 163 (Bangalore - Trib.)*
- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*

6. Inteq Software Private Limited

- *Functionally dissimilar - application development, application migration, application maintenance, software validation, oracle application, Microsoft dynamics, data warehousing, EI & EDI services, consulting services and healthcare BPO.*
- *No segmental information*
- *High fluctuating margins*

Judicial pronouncements relied on:

Global Logic India (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle - 10(1) 134 taxmann.com 35 (Delhi -Trib.)

7. Persistent Systems Limited

- *Functionally dissimilar – product development*
- *Giant Company and engaged in product*
- *No segmental details*
- *Research & Development activities*
- *Presence of intangibles*
- *Incurred marketing expenses*
- *IP led solutions*
- *Fails RPT filter*

Judicial pronouncements relied on:

- *Prism Networks (P.) Ltd. v. ACIT 141 taxmann.com 163 (Bangalore - Trib.)*
- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*
- *Aptean India (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle-1(1)(1), Bengaluru. 132 taxmann.com 253 (Bangalore - Trib.)*
- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*

8. Infobeans Technologies Ltd

- *Functionally dissimilar – engaged in provision of software services which are in the nature of CAD, CMS, etc., which are not pure software development.*
- *No segmental information*
- *Incurred marketing expense*

Judicial pronouncements relied on:

- *Prism Networks (P.) Ltd. v. ACIT 141 taxmann.com 163 (Bangalore - Trib.)*
- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*

9. Aspire Systems (India) Private Limited

- *Functionally dissimilar - product engineering, enterprise solutions, independent testing services, engineering services, infrastructure & application support services, business intelligence & analytics, etc.*
- *Fails RPT filter*
- *Incurred marketing expense*

Judicial pronouncements relied on:

- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*
- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*

10. Infosys Limited

- *Functionally dissimilar - software product development activities, consulting activities*
- *Segmental information not available*
- *Huge Intangibles; Giant Company, huge client base*
- *Presence of brand, Engaged in R&D activities*
- *Sub-contractor charges*
- *Extraordinary events*

Various acquisitions are done by Infosys during the financial year 2015-16 which are as follows:

- *Noah Consulting LLC*
- *Kallidus Inc.*
- *Skava Systems Pvt Ltd*

Judicial pronouncements relied on:

- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*
- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*

11. Thirdware Solutions Limited

- *Functionally dissimilar – earns revenue from software services, sale of license and revenue from subscription and training.*
- *Incurred marketing expense*
- *No segmental details*

Judicial pronouncements relied on:

- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*
- *ADP (P.) Ltd. v. Deputy Commissioner of Income-tax, Hyderabad. 135 taxmann.com 44 (Hyderabad - Trib.)*

12. Cybage Software Private Limited

- *Functionally dissimilar - outsourced product engineering services*
- *Engaged in research & development activities*
- *No segmental details are available*

Judicial pronouncements relied on:

- *Prism Networks (P.) Ltd. v. ACIT 141 taxmann.com 163 (Bangalore - Trib.)*
- *Barracuda Networks India (P.) Ltd. v. Deputy Commissioner of Income-tax. 131 taxmann.com 337 (Bangalore - Trib.)*

C. Reason for Inclusion of comparables

1. Akshay Software technologies Limited
 - *Functionally Similar*
 - *Qualifies all the filters applied by the TPO*

2. M C T India Infotech Pvt. Ltd.
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

3. Celstream Technologies Private Limited
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

4. Sagarsoft (India) Ltd.
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

5. Synerzip softech India Private Limited
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

6. Maveric Systems Limited.
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

7. Infomile Technologies Limited.
 - *Functionally similar*
 - *Qualifies all the filters applied by the TPO*

D. *We would like to submit that our AE has been in losses on account of different market conditions in USA. Wissen Infotech Inc., USA is a risk bearing entity and deals with all the end customers. Even in such a scenario, Wissen Infotech India has been compensated for all its services on cost plus basis as per Indian market conditions.”*

10. The Id.AR during the course of argument drawn our attention to Paras 7.2 and 7.3 of the order of TPO whereby the TPO has rejected the TP.Study of the assessee on the pretext that the assessee has used the inappropriate filter with respect to turnover. However, all other filters used by the assessee were accepted by the TPO. After mentioning the rejection of turnover filter Rs.1 crore to Rs.500 crore, the TPO in Para 7.3 had mentioned as under :

“7.3 Further the examination of the TP document, the following pertinent defects have also been found in the TP analysis carried on by the taxpayer.

I. The taxpayer has used certain inappropriate filters : a) Filters such as Turnover < some limit, R & D expense < some percentage of sales etc. are not appropriate filters for a service industry according to the TPO. Use of such filters may have led to rejection of some good potential comparables. The detailed discussion on the same is given in separate paragraph below :

II. The taxpayer has not used following filters :

a) Companies that are having negative networth were excluded.

This filter is designed to eliminate companies have peculiar economic circumstances which are not in line with the growing software industry trend. Since the assessee has not used this filter, the comparables selected by the assessee may include some companies which do not reflect the industry trend.

III. The taxpayer has submitted the Transfer Pricing Study report wherein the taxpayer has not provided the margin of the comparable company and has not justified the comparables. The taxpayer in the TP report states that the margins have been provided in the statement no.4 of the TP report which is not been submitted.”

11. Besides that it was the contention of the ld.AR that during the course of argument that the assessee had challenged the inclusion and exclusion of various comparable as mentioned hereinabove and further both the ld.AR and ld.DR submitted that the issue is required to be relooked into by the TPO after considering the submissions reproduced hereinabove.

12. The ld.DR has mentioned no objection to the submissions of the assessee if the matter is remanded back to the file of TPO for denovo adjudication.

13. We have heard the rival contentions of the parties and perused the material available on record. In view of the submissions of ld. AR made hereinabove and in view of no objection given by the ld. DR for remanding the matter back to the file of TPO, we are of the opinion that the interests of justice will be done if the matter is remanded back to the file of TPO for reverification. Hence, we are remanding the matter back to the file of TPO with a direction to consider the submissions of ld. AR reproduced hereinabove and decide the issue after following due process of law and considering the binding decisions of jurisdictional Tribunal and the Hon'ble High Court and the Hon'ble Supreme Court after affording sufficient opportunities to the assessee. Needless to say, that the assessee may file any documents / evidence in support of its contentions. Thus, this appeal is allowed for statistical purposes.

14. In the result, the appeal of assessee in ITA No.329/Hyd/2021 is allowed for statistical purposes.

15. **ITA No.1820/Hyd/2021 for A.Y. 2015-16.**

16. Now coming to the other appeal of assessee i.e., ITA 1820/Hyd/2021 for A.Y. 2015-16, which is identical to the facts and issues raised in ITA 329/Hyd/2021, our decision in ITA No.329/Hyd/2021 would apply mutatis mutandis to this appeal also. Accordingly, ITA No.1820/Hyd/2021 is also allowed for statistical purposes.

17. In the result, both the appeals of assessee are allowed for statistical purposes.

Order pronounced in the Open Court on 12th December, 2022.

Sd/- (RAMA KANTA PANDA) ACCOUNTANT MEMBER	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 12th December, 2022.

Thirumalesh/sps

Copy to:

S.No	Addresses
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2	DCIT-17(2),Hyderabad
3	CIT(A), National Faceless Appeal Centre (NFAC), Delhi.
4	DRP-1, Bengaluru
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order