

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES "B", BANGALORE**

**Before Shri N.V.Vasudevan, Vice President  
&  
Shri Laxmi Prasad Sahu, Accountant Member**

IT(TP)A No.293/Bang/2022 : Asst. Year 2017-18

NTT DATA Information Processing Services Private Limited Plot No.178, EPIP Phase II Whitefield, Industrial Area Bengaluru-560 066  <b>PAN : AADCD 9895 L</b>	v.	The Dy. Commissioner of Income-tax, Circle-3(1)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri Chavali Narayan, CA  
Respondent by : Sri Sunil Kumar Singh, CIT-DR

Date of Hearing	:	10.01.2023
Date of Pronouncement	:	28.02.2023

**ORDER**

**Per Laxmi Prasad Sahu, AM :**

This is an appeal by the assessee against the final assessment order passed by the National Faceless Appeal Centre (NFAC), Delhi, u/s.143(3) r.w.s.144C(13) r.w.s. 144B of the I.T.Act, DIN & Order No. ITBA/AST/S/143(3)/2021-22/1040073422(1) dated 24.02.2022 for the assessment year 2017-18 on the following grounds of appeal:-

- 1. impugned order of the Ld. AO/Transfer Pricing Officer ("TPO") and directions of the Hon'ble DRP are based on incorrect appreciation of facts and incorrect interpretation of law and therefore, are bad in law.*
- 2. Impugned order of Ld. AO pursuant to directions of Hon'ble DRP, erred in assessing the total income at INR 1,76,11,99,090, as against returned income of INR 73,75,47,110.*

**Transfer pricing grounds**

3. Ld. AO/TPO pursuant to the directions of the Hon'ble DRP, erred in making addition of INR 78,56,31,349 to total income of Appellant alleging that prices charged by the Appellant for software development services and IT enabled services rendered to its associated enterprises ("AEs") and outstanding receivables thereon were lower than the arm's length price ("ALP") determined by the learned TPO;

4. Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by not accepting economic analysis undertaken by Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("the Rules"), and in conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transactions and holding that the Appellant's international transactions are not at arm's length;

5. Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by incorrectly applying the following quantitative and qualitative filters:

- a) Rejecting certain comparable companies for having different accounting year (i.e., companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months);
- b) Rejecting certain comparable companies using employee cost greater than 25% of the total operating revenues as a comparability criterion;
- c) Rejecting certain comparable companies using export services income greater than 75% of the sales as a comparability criterion;
- d) Applying only the lower turnover limit filter of less than INR 1 crore as a comparability criterion and not applying an appropriate higher threshold for turnover filter;
- e) Applying incorrect modified related party transaction ("RPT") filter to reject companies, which included application of the filter in two separate legs as provided below:

An RPT filter for the revenue transactions only (RPT revenue greater than 25% of total revenue)

An RPT filter for the expense transactions only (RPT expenses greater than 25% of total expenses);

f) Rejecting comparable companies forming a part of the Appellant's search process merely on the ground that the same was not appearing in the Ld. TPO's search matrix wherein the search was undertaken by the Ld. TPO using a single database with limited keywords.

6. Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by accepting/rejecting the following companies based on unreasonable comparability criteria:

6.1 Software development services:

- a) Accepting the following companies that cannot be considered as comparable to the Appellant in law and fact, on one or more basis:
  - i. Nihilent Technologies Private Limited
  - ii. Persistent Systems Limited
  - Hi. Infosys Limited
  - iv. Cybage Software Private Limited

- v. Infobeans Technologies Limited
- vi. Great Software Laboratories Private Limited
- vii. Aptus Software Labs Private Limited
- viii. Cygnet Infotech Private Limited
- ix. OFS Technologies Limited
- x. Threesixty Logica Testing Services Private Limited
- xi. Consilient Technologies Private Limited
- xii. Mindtree Limited
- xiii. Larsen & Toubro Infotech Limited
- xiv. R System International Limited
- xv. Tata Elxsi Limited

b) Rejecting the following comparable companies selected by the Appellant in its TP documentation even though the companies are functionally comparable to the Appellant:

- i. Kals Information Systems Limited
- ii. Evoke Technologies Limited
- Hi. Saskaen Communications Technologies Limited
- iv. RS Software (India) Limited
- v. Jindal Intellicom Limited

c) Rejecting companies additionally proposed by the Appellant during the assessment proceedings even though they are functionally comparable to the Appellant:

- i. Sybrant Technologies Private Limited
- ii. Akshay Software Technologies Limited
- Hi. Isummation Technologies Private Limited
- iv. Celstream Technologies Private Limited

## 6.2 IT enabled services

a. Accepting the following companies that cannot be considered as comparable to the Appellant in law and fact, on one or more basis:

- i. Infosys BPM Services Private Limited**
- ii. Ultramarine and Pigments Limited
- Hi. SPI Technologies India Private Limited
- iv. Manipal Digital Systems Private Limited
- v. Vitae International Accounting Services Private Limited
- vi. Datamatics Financial Services Limited
- vii. CES Limited

b. Rejecting the following comparable companies selected by the Appellant in its TP documentation even though the companies are functionally comparable to the Appellant:

- i. Cosmic Global Limited
- ii. Allsec Technologies Limited
- Hi. R System International Limited

7. Without prejudice to ground of appeal at si. No. 6.1 and 6.2, the Ld. AO/TPO pursuant to the directions of the Hon'ble DRP, erred in computing the operating margins of the companies considered as comparable by the Ld. A O/ TPO for the software development and IT enabled services, respectively;

8. Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by not making suitable adjustments on account of differences in the risk profile of the Appellant visa-vis the comparables, while conducting comparability analysis:

**9. Interest on alleged delayed collection of receivables**

9.1 Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, in determining separate transfer pricing adjustment on account of interest on outstanding receivables amounting to INR 1,09,74,490;

9.2 Without prejudice to our ground of appeal no. 9.1 above, Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by not appreciating that the outstanding trade receivables from its AEs arise from the provision of software development services

and IT enabled services transactions which are to be considered as closely linked to such transactions and should not be tested separately from arm's length perspective;

9.3 Without prejudice to our ground of appeal no. 9.1 above, Ld. AO/TPO pursuant to the directions of the Hon'ble DRP erred, in law and facts, by re-characterizing the outstanding receivables as on 31 March 2017 as a loan transaction;

9.4 Without prejudice to our ground of appeal no. 9.1 above, Ld. AO/TPO/DRP have erred, in law and facts, by adopting SBI interest rates on short term deposits for FY 2016-17, for computing notional interest on the outstanding trade receivables and arriving at an adjustment amounting to INR 1,09,74,490.

**Corporate tax grounds:**

10. The Ld. AO has erred in granting short deduction to the extent of INR 4,42,700 under section 80G of the Act.

11. Without prejudice to the above grounds, the Ld. AO pursuant to the directions of the Hon'ble DRP erred in law and in fact, by making an adjustment to the total income assessed as per the original return filed by the Appellant for the AY 2017-18 and not taking into consideration the revised return filed by the Appellant while determining the total taxable income in the final assessment order issued to the Appellant u/s 143(3) of the Act

12. Without prejudice to the above grounds the Ld. AO pursuant to the directions of the Hon'ble DRP erred in law and in fact, by arriving at the total income of INR 1,76,11,99,090 instead of INR 1,52,31,78,459 provided in the computation sheet accompanying the final assessment order issued to the Appellant u/s 143(3) of the Act for the AY 2017-18.

**Other grounds:**

13. *The Ld. AO has erred, in law and in facts, by levying interest of INR 8,15,66,025 under section 234B of the Act.*

14. *The Ld. AO has erred in initiating penalty proceedings under section 274 read with section 270A of the Act.*

*The Appellant submits that each of above grounds is independent and without prejudice to one another.*

*The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.*

2. The brief facts of the case are that the assessee filed return of income on 30.11.2017 declaring total income of Rs.73,88,46,030/-. The case was selected for scrutiny and statutory notices were issued to the assessee. In response, the assessee submitted requisite documents through ITBA on different dates. On observation of the documents, it was noticed by the AO that the assessee had undertaken international transactions with its associated enterprises (AEs), accordingly, the case was referred to the Ld.TPO as per para 3.3(b) of Instruction No.3/2016 with the prior approval of the Pr.CIT, LTU, Bangalore. From the documents furnished before the Ld.TPO, it was observed that the assessee is providing software development solutions and IT consultancy services to NTT DATA Group Companies such as Application Management and development, and installation and commissioning services to the AEs of the group which in turn use these services to provide services to end customers and it was also noticed that the taxpayer is providing Back-Office Support services through its AEs, which includes patient's access, claims processing, billing and coding services, accounts receivables management. It is also claimed that NTT DATA IPSIP (NTT DATA Information Processing Services India Pvt.Ltd. hereinafter referred as assessee) helps the physicians

and hospitals get paid from the patients and insurance companies through its AEs. Further, the Ld.TPO observed that from the Master Services Agreement, which is effective from 02.11.2016. The service provider is Dell business Process Solutions India Pvt.Ltd., the erstwhile name of the taxpayer before the acquisition by the NTT Group. As per the agreement, the following services are provided by the taxpayer to its various AEs at 15% markup.

- i. Information technology outsourcing, development, support and maintenance services ,
- ii. Business process outsourcing services
- iii. Information technology enabled services

3. As per this agreement the taxpayer is the buyer of the Information technology outsourcing, development, support and maintenance services at 5% mark-up and Research and Development services at 10% mark-up from NTT DATA China Co.Ltd. Apart from that the taxpayer has entered into an Master Service Agreement with NTT DATA Services, LLC, USA for the receipt of monitoring, networking, application and infrastructure services (IT services), etc, at a mark-up of 7%. Apart from that Dell Business Process Solutions India Pvt. Ltd which also become part of NTT DATA IPSIP entered into a service agreement with Dell USA ALP with effect from 01.04.2014 to provide IT& ITES services at the markup- of 15%. During the year as per form No.3CEB, the following international transactions were undertaken by the assessee and method was adopted as under:-

<b>International Transactions</b>			
<b>Particulars</b>	<b>Receivables/Received</b>	<b>Payables/Paid</b>	<b>Method</b>
<i>Provision of software development services</i>	7,33,02,03,300		TNMM
<i>Provision of IT enabled services</i>	2,73,96,80,000		TNMM
<i>Trade receivables consider closely linked to the transaction of software development services</i>	408817742		TNMM
<i>Trade receivables considered closely linked to the transaction of ITeS</i>	13,62,72,580		TNMM
<i>Trade payables considered closely linked to software development services</i>		10,01,29,080	TNMM
<i>Trade payables considered closely linked to ITeS</i>		3,89,39,086	TNMM
<i>Unbilled revenue closely linked to software development services</i>	2,07,61,78,788		TNMM
<i>Unbilled revenue closely linked to IT enabled services</i>	33,16,46,532		TNMM
<i>Purchase to capital assets closely linked to transaction of software development services</i>		5,91,715	TNMM
<i>Purchase to capital assets closely linked to transaction of ITeS</i>	13,058		TNMM
<i>Reimbursement of expenses to AE for software development services</i>		15,73,99,431	TNMM

<i>Reimbursement of expenses to AE for IT enabled services</i>		4,81,44,765	TNMM
<i>Issue of equity shares</i>		5,02,50,00,009	Other Method
<i>Issue of equity shares</i>		46,62,00,280	Other Method
<b>Total</b>	<b>13,02,36,29,617</b>	<b>5,83,55,86,749</b>	<b>18,85,92,16,366</b>

4. The financials computed by assessee and ld. TPO were the same which is as under:-

<b>P&amp;L as per TP Document</b>		
	<b>SWD</b>	<b>ITES</b>
<b>Particulars</b>	<b>Amount (INR)</b>	<b>Amount (INR)</b>
<i>Income</i>		
<i>Revenue from Operations(net)</i>	7,34,58,90,423	2,86,58,48,390
<i>Other Income</i>	-	-
<b>Total revenue</b>	<b>7,34,58,90,423</b>	<b>2,86,58,48,390</b>
<i>Expenses</i>		
<i>Employee benefit expenses</i>	4,27,29,78,829	1,66,70,14,996
<i>Depreciation and amortization expense</i>	34,75,85,523	13,56,03,358
<i>Other expenses</i>	1,73,16,00,349	67,55,60,813
<i>Less:</i>		
<i>Corporate Social Responsibility</i>	13,20,309	5,15,091
<b>Total expenses</b>	<b>6,35,08,44,392</b>	<b>2,47,76,64,076</b>

<b>Profit before tax</b>	<b>99,50,46,031</b>	<b>38,81,84,314</b>
<b>OP/OC</b>	<b>15,67%</b>	<b>15.67%</b>

5. As per the letter issued by the Id.TPO, the assessee filed documents maintained u/s. 92D of the Act and which was examined. As per the documents for both the segments, the taxpayer applied certain filters and TNMM was applied as the most appropriate method, the taxpayer selected certain comparables, after examining the details furnished by the assessee the Id.TPO observed some defects and rejected the taxpayer's TP study report and he started fresh search for comparables after applying following filters .

- i. Use of current year data wherever available.*
- ii. Companies having different financial year or data of the company which does not filed within 12 month period were rejected*
- iii. Companies whose income was less than 1 crore were excluded*
- iv. Companies whose SWD/IT service income is less than 75% of its total operating revenue were excluded*
- v. Companies who have more than 25% related party transactions were excluded*
- vi. Companies who have export service income is less than 75% of the sales were excluded*
- v. Companies with employee cost less than 25% of turnover were excluded*

5.1 The TPO selected 25 companies for SWD segment and calculated median at 26.32%. The TPO issued show-cause notice to the taxpayer. The taxpayer furnished the reply against the show-cause notice on different dates. The assessee filed objections which were dully considered by the Id. TPO. The following companies were accepted by the Id.TPO from the taxpayer's selection for the SWD segment of the comparable companies.

- i. CG-VAK Software & Exports Ltd.*

- ii.Haribinger Systems Pvt.Ltd.
- iii.Infomile Technologies Ltd.
- iv.Larsen & Toubro Infotech Ltd.
- v. R Systems International Ltd.
- vi. Tata Elxi Ltd.

5.2 The Id. TPO after considering the objections the following companies were finally selected as comparables and calculated the Median at 26.32%.

Sl. No.	Name of comparable company	Weighted average unadjusted margin
1.	Infomile Technologies Limited	10.43%
2.	Harbinger Systems Pvt Ltd.	14.10%
3.	CG- VAK Software & Exports Ltd	15.09%
4.	Larsen & Toubro Infotech Ltd	21.14%
5.	Great Software Laboratory Pvt Ltd.	21.24%
6.	Mindtree Ltd.	24.17%
7.	R Systems International Ltd.	24.40%
8.	Persistent Systems Ltd.	26.17%
9.	Tata Elxsi Ltd.	26.19%
10.	Infobeans Technologies Ltd.	26.44%
11.	Aptus Software Labs Pvt. Ltd	26.46%
12.	Nihilent Ltd	29.82%
13.	OFS Technologies Ltd.	29.93%
14.	Cygnnet Infotech Private Limited	30.19%
15.	Infosys Ltd.	39.50%
16.	ThreesixtyLogica Testing Services Pvt Ltd.	41.94%
17.	Cybage Software Pvt Ltd.	57.82%
18.	Consilient Technologies Pvt Ltd	65.14%
<b>35th Percentile</b>		<b>24.40%</b>

Sl. No.	Name of comparable company	Weighted average unadjusted margin
	Median	26.32%
	65th Percentile	29.82%

Accordingly the arm's length price calculated by the TPO and proposed adjustment made as under:-

Particulars	Amount (INR)
Arm's length median margin as per comparable set	26.32%
Operating Cost (OC)	635,08,44,392
Arm's Length Price ('ALP')= 126.32% of OC	802,23,86,636
Price Received	734,58,90,423
<b>Short fall being adjustment u/s. 92CA</b>	<b>67,64,96,212</b>

6. The assessee in his TP study selected '14' companies for the ITeS segment with a range of 6.25% to 18.34% and a median of 8.09% for ITeS segment. The ld. TPO rejected the T P study in the case of ITeS segment also and started fresh search after applying certain filters as noted above. The TPO selected 17 companies and calculated median at 26.26%.out of which the following companies were accepted by the ld.TPO from the taxpayer's comparable companies.

- i. *Sundaram Business Services Ltd.*
- ii. *Jindal Intellicom Ltd.*
- iii. *Mitroland Ltd.(seg)*
- iv. *Manipal Digital Systems Pvt.Ltd.*
- v. *Vitae International Accounting Services Pvt.Ltd.*
- vi. *Datamatics Business Solutions Ltd.*
- vii. *CES Ltd.*

7. The TPO issued show cause notice to the assessee and the assessee submitted objections which were dully considered by TPO and finally he selected '13' companies after including the above seven companies and calculated Median at 24.37% which is as under:-

Sl. No.	Name of comparable company	Weighted average unadjusted margin
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Sl. No.	Name of comparable company	Weighted average unadjusted margin
1.	Sundaram Business Services Ltd.	2.08%
2.	Jindal Intellicom Ltd	7.41%
3.	Fuzen Software Pvt. Ltd	15.93%
4.	Microland Ltd. (seg)	17.53%
5.	Tech Mahindra Business Services Ltd.	22.37%
6.	Datamatics Business Solutions Ltd.	22.64%
7.	Infosys BPM Services Pvt Ltd.	24.37%
8.	Vitae International Accounting Services Pvt Ltd	27.13%
9.	Manipal Digital Systems Pvt Ltd.	27.41%
10.	CES Ltd	31.45%
11.	Ultramarine & Pigment Ltd	34.41%
12.	SPI Technologies India Pvt Ltd.	36.95%
13.	Inteq BPO Services Private Limited	39.51%
<b>35th Percentile</b>		<b>22.37%</b>
<b>Median</b>		<b>24.37%</b>
<b>65th Percentile</b>		<b>27.41%</b>

**B.1. Accordingly the arm's length price calculated by the TPO and the proposed adjustment made as under :**

Particulars	Amount (INR)
Arm's length median margin as per comparable set	24.37%
Operating Cost (OC)	247,76,64,076
Arm's Length Price ('ALP') = 126.32% of OC	308,14,70,811
Price Received	286,58,48,390
<b>Short fall being adjustment u/s. 92CA</b>	<b>21,56,22,421</b>

8. The ld.TPO further observed that the assessee has not making any adjustment on outstanding receivables. During the course of proceedings, the assessee was asked to furnish invoice details of all the trade receivables from the AEs during the year and also asked for detail in particular format: Amount raised in invoice, date of invoice, date of receipt, delay in no. of days. However, the assessee failed to submit the required data in the format asked by the ld.TPO. In absence of detail as

required by the ld.TPO, the ld.TPO calculated, using LIBOR-6 months+450 basis points on outstanding receivable which works out to 5.975% and made adjustment of Rs.94,21,347/-. Accordingly, he passed order on 29.01.2021. After receipt of the order from the ld.TPO, the AO passed order u/s. 144C on 23.04.2021 confirming the adjustment as suggested by the ld.TPO and made addition of Rs.90,15,39,980/-(SWD Segment-Rs.67,64,96,212 + ITeS Segment-Rs.21,56,22,421/- + Interest on delayed receivables-Rs.94,21,347/-) towards international transactions.

9. Feeling aggrieved from the draft assessment order, the assessee filed objection before the ld.DRP. Before the ld.DRP, the assessee contested three more companies for inclusion which were considered as comparables and accepted and in respect of others no relief was granted, accordingly '21' companies were considered as a comparable companies for SWD segment and calculated Median at 25.20% and accordingly, adjustments were restricted to Rs.60,53,66,756/-. The name of the comparable companies after ld. DRP directions are as under:-

<i>Sl.No.</i>	<i>Name of comparable company</i>	<i>Weighted average unadjusted margin .</i>
1)	<i>Sagarsoft (India) Limited</i>	4.22%
2)	<i>Maverick Systems Limited</i>	6.59%
3)	<i>Inteq Software Pvt Ltd</i>	8.77%
4)	<i>Harbinger Systems Pvt Ltd.</i>	9.09%

5)	<i>Infomile Technologies Limited</i>	10.38%
6)	<i>CG- VAK Software &amp; Exports Ltd</i>	15.09%
7)	<i>Larsen &amp; Toubro Infotech Ltd</i>	21.14%
8)	<i>Great Software Laboratory Pvt Ltd.</i>	21.24%
9)	<i>Mindtree Ltd.</i>	24.17%
10)	<i>R Systems International Ltd.</i>	24.40%
11)	<i>Infobeans Technologies Ltd,</i>	25.20%
12)	<i>Persistent Systems Ltd.</i>	26.17%
13)	<i>Tata Elxsi Ltd.</i>	26.19%
14)	<i>Aptus Software Labs Pvt. Ltd</i>	26.46%
15)	<i>Nihilent Ltd</i>	29.82%
16)	<i>OFS Technologies Ltd.</i>	29.93%
17)	<i>Cygnnet Infotech Private Limited</i>	30.19%
18)	<i>Infosys Ltd.</i>	39.33%
19)	<i>Threesixty Logica Testing Services Pvt Ltd.</i>	41.94%
20)	<i>Cybage Software Pvt.Ltd.</i>	27.82%
21)	<i>Copnsilient Technolgies Pvt.Ltd.</i>	65.14%
<b>35<sup>th</sup> Percentile</b>		<b>21.24%</b>
<b>Median</b>		<b>25.20%</b>
<b>65<sup>th</sup> Percentile</b>		<b>26.46%</b>

10. The ld. TPO after direction of the ld. DRP calculated the adjustment made as under:

Particulars	Amount (INR)
Arm's length median margin as per comparable set	25.20%
Operating Cost (OC)	635,08,44,392
Arm's Length Price ('ALP') = 125.20% of OC	795,12,57,179
Price Received	734,58,90,423
<b>Short fall being adjustment u/s. 92CA</b>	<b>60,53,66,756</b>

11. In respect of the ITeS segment the '16' comparables were considered and Median calculated at 22.50% as under:-

Sl. No.	Name of comparable company	Weighted average unadjusted margin
1)	Informed Technologies India Ltd	-13.79%
2)	Sundaram Business Services Ltd	2.08%
3)	Suprawin Technologies Ltd	3.10%
4)	Jindal Intellicom Ltd.	7.41%
5)	iSNGlobal Solutions Pvt Limited	8.38%
6)	Fuzen Software Pvt Ltd	15.93%
7)	Microland Ltd	17.53%
8)	Tech Mahindra Business Services Ltd.	22.37%
9)	Datamatics Business Solutions Ltd.	22.64%
10)	Infosys BPM Services Ltd.	24.37%
11)	Vitae International Accounting Services Pvt Ltd.	27.13%
12)	Manipal Digital Systems Pvt Ltd.	27.32%
13)	CES Ltd.	31.45%
14)	Ultramarine & Pigment Ltd	34.41%
15)	SPI Technologies India Pvt Ltd	36.95%
16)	Inteq BPO Services Pvt Ltd.	39.51%
<b>35th Percentile</b>		<b>15.93%</b>
<b>Median</b>		<b>22.50%</b>
<b>65th Percentile</b>		<b>27.13%</b>

11.1 The adjustment made post Hon'ble DRP directions as under:

Particulars	Amount (INR)
Arm's length median margin as per comparable set	22.50%
Operating Cost (OC)	247,76,64,076
Arm's Length Price ('ALP') = 122.50% of OC	303,51,38,493
Price Received	286,58,48,390
<b>Short fall being adjustment u/s. 92CA</b>	<b>16,92,90,103</b>

11.2 Accordingly, the adjustment u/s. 92CA was restricted to Rs.16,92,90,103/-

11.3 After direction received from the Id. DRP, the AO/TPO in respect of for interest on outstanding receivable was calculated at Rs.1,09,74,490/-. Accordingly, the total adjustment calculated at Rs.78,56,31,349/- ( SWD segment RS. 60,53,66,756+ ITeS segment Rs. 16,92,90,103+Interest on Receivables Rs. 1,09,74,490) towards international transaction. Accordingly the AO passed the final assessment order.

12. Aggrieved the final assessment order, the assessee filed the appeal before the Income tax Appellate Tribunal.

### 13. **Software Development Segment**

Ground No.6.1(a) – The assessee has challenged 15 companies for exclusion. Since he has not contested all the 15 companies, we decide the comparables of the companies only the Id.AR contested which is as under:

13.1 The Id. AR of the assessee reiterated the submissions made before the lower authorities. The Id. AR of the assessee also contested in his written synopsis that the following companies are required to be excluded from software development(SWD) segment because these are not comparables on different grounds with the assessee company.

#### **1. Infosys Limited.**

##### **1. Functionally different**

*Infosys ('the Company') is a leading provider of consulting, technology, outsourcing and next-generation services. Along with its subsidiaries, Infosys*

provides business IT services (comprising application development and maintenance, independent validation, infrastructure management, engineering services comprising product engineering and life-cycle solutions and business process management); consulting and systems integration services (comprising consulting, enterprise solutions, systems integration and advanced technologies); products, business platforms and solutions to accelerate intellectual property-led innovation including Finacle®, its banking solution; and offerings in the areas of analytics, cloud, and digital transformation. **(Page 2131 of PB-II- Part 2)**

These services are not comparable to the services provided by the Appellant.

### **2. Derives revenue from sale of products as well.**

The company has derived revenue from sale of product to the tune of INR 32 crores **(Page 2161 of PB-II-Part 2)**, However, the Appellant does not derive any such revenue from sale of products implying that Infosys's business model different from the Appellant.

### **3. Revenue Recognition**

The Company derives revenues primarily from software development and related services and from the licensing of software products. Arrangements with customers for software related services are either on a fixed-price, fixed-timeframe or on a time-and-material basis. **(Page 2132 of PB-II-Part 2)**.

On account that Infosys is engaged in sale of products it is clearly understood that the same is functionally different from Appellant which is engaged in rendering software development services to its AEs.

### **4. No segmental information**

Infosys has revenue from both software services and software products. Segment details are unavailable. Industry segments for the company are Financial Services (FS), Manufacturing (MFG), Energy, Utilities, Communication and Services (ECS), Retail, Consumer packaged goods and Logistics (RCL), enterprise in Hi-Tech (Hi-Tech) and Life Sciences, Healthcare and Insurance (HILIFE). The segment details are based on industry they service and geographical segments wise and not based on the nature of revenues/activities (business segments). The geographic segment is based on the business outsource from both on-site and offshore. **(Page 2171 of PB-II-Part 2)**

### **5. Brand Value**

Infosys brand is a key intangible asset of the company. It is observed that Infosys spent INR 276 crores in brand building and marketing exercise. **(Page 2036 and 2162 of PB-II-Part 2)**.

### **6. Market Leader**

On a review of the annual report, we observe that Infosys is a market leader and has won accolades in almost every industry in which it provides its services. **(Page 2036 of PB-II-Part 2)**

### **7. Huge selling and marketing expenditure**

Infosys has incurred significant expenditure in relation to sales and marketing. In this regard, we wish to mention that the high selling and marketing expenditure has been substantiated by way of high revenue and profit margins for Infosys. On account of Infosys having significant selling and marketing expenditure, it is evident that the same cannot be comparable to

Appellant which is a low-risk captive service provider to its AEs.(Page 2085 of PB-II-Part 2)

**8. Full-fledged risk bearing entity**

On perusal of the annual report of Infosys, we note that Infosys is a high-risk bearing entrepreneur and the high revenues/ profits can be said to be commensurate to the kind of risks undertaken by Infosys. Hence, Infosys should not be compared to a risk mitigated entity like NTT Data IPS.(Page 2091 of PB-II-Part 2)

**9. Significant Foreign expenditure**

In this regard, we wish to submit that Infosys has incurred significant foreign expenditure which works out to 67%, 73.95% and 64.36% of total expenditure incurred for FY 2016-17, FY 2015-16 and FY 2014-15 respectively. Considering this, it is clearly evident that Infosys has significant onsite activities outside India. Accordingly, given that the Appellant predominantly carries out its operations within India and does not incur any significant foreign expenses, it is evident that Infosys follows a different operating model (which also impacts the profitability) and hence, could not be compared with the Appellant.(Page 2072 of PB-II-Part 2, Page 60 of AR for FY 2015-16 and Page 54 of AR for FY 2014-15)

**Judicial precedents relied upon:**

**Functional comparability-**

1) Yahoo Software Development India Pvt. Ltd. vs JCIT [IT(TP)A No. 178/Bang/2022 for AY 2017-18] (Page 6268-6275 of Paperbook III)

2) SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17] (Page 6306-6308 of Paperbook III)

3) ADP Pvt. Ltd Vs. DCIT [ITA Nos. 227 & 228 /H/2021 for AY 2016-17] (Page 6341-6344 of Paperbook III)

4) Infor (India) Private Limited vs DCIT [I.T.A-TP. No. 198/HYD/2021 for AY 2016-17] (Page 6426-6427 of Paperbook III)

5) Citrix R&D India Pvt Ltd vs DCIT [IT(TP)A No.2428/Bang/2019 for AY 2015- 6474-6475 of Paperbook III]

6) Cypress Semiconductor Technology India Pvt Ltd [IT(TP)A No.2427/Bang/2019 for AY 2015-16] (Page 6495-6497 of Paperbook III)

7) M/s. Microsoft Research Lab India Pvt. Ltd. [IT(TP)A No.3131/Bang/2018 for AY 2014-15] (Page 6521-6522 of Paperbook III)

8) M/s. Hewlett Packard (India) Software Operation Pvt. Ltd., [IT(TP)A

9) ARM embedded Technologies Private Limited [IT(TP)A No 3374/Bang/2018 for AY 2014-15] (Page 6660-6661 of Paperbook III)

**2. Larsen & Turbo Infotech Limited.**

**1. Functionally dissimilar**

The Company is engaged in provision of wide range of services to Banking, Financial services, Insurance, Media and Entertainment, Travel, Logistics and Healthcare sectors.(Page 3838 of PB-II-Part 4)

L&T is engaged in providing a host of services and all these services are not comparable to Appellant's routine software development services. **(Page 3767 of PB-II-Part 4)**

**2. Cost of Bought out items for resale**

The company is engaged in trading of goods which is apparent from its annual report. **(Page 3817 of PB-II-Part 4)**

**3. No proper segmentation**

While L&T is engaged in host of services and also in sale of products (as discussed above), there is no segmental break-up for such services/products. **(Page 3838 of PB-II-Part 4)**

**4. Brand Value**

The company is specifically engaged in building brand image and the relevant extract of the same is as below:

Digital disruption is challenging enterprises the world over to transform to newer business models by leveraging emerging technologies. In line with the pioneering role which LTI plays in bridging the convergence of the physical and digital world, your Company has also undergone a brand re-boot based on the brand idea 'Pioneering solutions in a converging world'. The tagline - 'Let's Solve' encapsulates the ability and willingness to solve complex challenges for the clients through your Company's real-world expertise and technological prowess. The new brand is truly a brand for the converging world. **(Page 3722 of PB-II-Part 4)**

Whereas the Appellant, being a captive service provider, does not own any brand value like L&T, the brand image if any is of the parent and the same has no impact on the revenue of the Appellant as the Appellant does not cater to 3rd parties. Further, the company owns huge intangibles including intangibles under development. **(Page 3789, 3799 and 3800 of PB-II-Part 4)**

**5. Acquisition and Amalgamation**

During the year, the scheme of Amalgamation for "GDA Technologies Limited" was sanctioned by the High Court. Thus, we believe that the synergies obtained through this acquisition would have an impact on the overall margin of the company and thus L&T should not be considered as comparable to the Appellant for the FY 2016-17. The company was amalgamated with L&T with effect from September 2, 2016 and entire assets were transferred with effect from April 1, 2016 (relevant extracts reproduced below) Pursuant to the Scheme of Amalgamation sanctioned by the Hon'ble High Court of Bombay vide its order dated April 01, 2016 and by the Hon'ble High Court of Madras vide its order dated August 3, 2016, GDA Technologies Limited ('GDA'), wholly-owned subsidiary of the Company was amalgamated with the Company with effect from September 2, 2016 with appointed date being April 01, 2016. Consequently, the entire business, assets, liabilities, duties and obligations of GDA have been transferred to and vested in the Company with effect from April 1, 2016. **(Page 3732 of PB-II-Part 4)**

**6. Investment in technology absorption**

L&T has made great investment in technology absorption. It operates Centers of Excellence in emerging technologies such as Big Data, Analytics,

Internet of Things, Cloud, UserExperience etc. This has in turn helped the company in improving the productivity of the company. Also, the benefits are achieved in the form of product improvement, which indicates that the company is engaged in product development. **(Page 3747 & 3748 of PB-II-Part 4)**

The company has also carried out extensive R&D in the areas of latest technologies such as machine learning, Internet of things, Big Data, Analytics, Mobility, Cloud, Next generation. User Experience, service automation, manufacturing execution systems, etc. During the FY 2016-17 the company has incurred R&D expenditure amounting to INR 270 million. **(Page 3748 of PB-II-Part 4)**

#### **7. Global presence**

The operations of L&T are spread across the globe and the same is validated by the corporate governance report in page 83 of the annual report for FY 2016-17. **(Page 3685 & 3762 of PB-II-Part 4)**

#### **8. Significant foreign expenditure**

In this regard, we wish to submit that L&T has incurred significant foreign expenditure which works out to 53.32%, 55.02% and 56.08% of total expenditure incurred for FY 2016-17, FY 2015-16 and FY 2014-15 respectively. Considering this, it is clearly evident that L&T has significant onsite activities outside India. Accordingly, given that the Appellant predominantly carries out its operations within India and does not incur any significant foreign expenses, it is evident that L&T follows a different operating model (which also impacts the profitability) and hence, could not be compared with the Appellant. **(Page 3748 of PB-II-Part 4).**

#### **Judicial precedents relied upon:**

##### **Functional comparability-**

- 1) Yahoo Software Development India Pvt. Ltd. vs JCIT [IT(TP)A No. 178/Bang/2022 for AY 2017-18] (Page 6268-6272 of Paperbook III)**
- 2) SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17] (Page 6308 of Paperbook III)**
- 3) ADP Pvt. Ltd Vs. DCIT [ITA Nos. 227 & 228 /H/2021 for AY 2016-17] (Page 6331-6333 of Paperbook III)**
- 4) Infor (India) Private Limited vs DCIT [I.T.A-TP. No. 198/HYD/2021 for AY 2016-17] (Page 6416-6419 of Paperbook III)**
- 5) Citrix R&D India Pvt Ltd vs DCIT [IT(TP)A No. 2428/Bang/2019 for AY 2015-16] (Page 6452-6458 of Paperbook III)**
- 6) Cypress Semiconductor Technology India Pvt Ltd [IT(TP)A No. 2427/Bang/2019 for AY 2015-16] (Page 6498-6499 of Paperbook III)**
- 7) M/s. Microsoft Research Lab India Pvt. Ltd. [IT(TP)A No. 3131/Bang/2018 for AY 2014-15] (Page 6525-6526 of Paperbook III)**
- 8) GlobalLogic India Pvt. Ltd. vs. DCIT [ITA No. 868 (Delhi) of 2021 for AY 2016-17] (Page 6679-6681 of Paperbook III)**

**9) M/s. Hewlett Packard (India) Software Operation Pvt. Ltd., [IT(TP)A No.2866/Bang/2017 for AY 2013-14](Page 6585-6595 of Paperbook III)**

**10) ARM embedded Technologies Private Limited [IT(TP)A No 3374/Bang/2018 for AY 2014-15](Page 6661-6662 of Paperbook III)**

### **3. Mindtree Limited.**

#### **1. Functionally different**

*Without prejudice to the transfer pricing report maintained by the Appellant, we wish to submit as below:*

*Based on a review of the company's annual report for FY 2016-17, it is seen that the company offers services in wide areas of agile, analytics and information management, application development and maintenance, business process management, business technology consulting, cloud, digital business, independent testing, infrastructure management services, mobility, product engineering and SAP services, which are not similar to the routine software development services provided by the Appellant. (Page 3536 of PB-II-Part 4)*

*Additionally, Mindtree is also engaged in rendered business transformation, digitalization, automation and integrated services to its customers. From page 21 of the annual report for FY 2016-17, it is observed that Mindtree was ranked in Top 20 IT-BPM employers in India. (Page 3442 of PB-II-Part 4)*

*Mindtree is also engaged in product development activities, the same is evident from page 55 of the annual report for FY 2016-17. (Page 3476 of PB-II-Part 4)*

#### **2. Insufficient segmental information**

*In the presence of diversified activities as above, including Business Process Management related services, the company is structured into four reportable business segments based on the industry, for the purpose of disclosure in the annual report viz. . However, though the company provides a wide range of services and solutions the annual report of the company neither provides segmental break-up, nor provides the revenue break-up from the various activities undertaken. (Page 3533 of PB-II-Part 4)*

#### **3. Significant R&D activities**

*Mindtree is engaged in performing significant R&D activities which has led to greater profitability. During the year 2016-17, Mindtree has spent INR 32.14 crores on research and development activities. (Page 3479 of PB-II-Part 4)*

#### **4. Mergers and Acquisitions**

*During the years 2014-15 to 2016-17, Mindtree has undertaken several acquisitions, the synergy from which has impacted the profitability for the respective years. (Page 3612-3614 of PB-II-Part 4)*

*Given that no such transactions were undertaken in the case of NTT Data IPS which would impact the margins earned by the Appellant, considering the tainted margins of Mindtree would distort the benchmarking analysis. Accordingly, we humbly wish to submit that Mindtree be excluded from the final set of comparable companies.*

#### **5. Investment in Technology absorption**

We observed that Mindtree is focused on strategic and emerging technologies and innovation and has continued to invest in technologies. During the FY 2016-17, these efforts have strengthened the Centre of Excellences ('CoEs') of Mindtree. In these CoEs, the emerging technologies such as Internet of Things, Cognitive Computing and Deep learning, Automation, Blockchain, Augmented/Virtual Reality, Collaboration Solutions etc. were explored in depth and several re-usable assets were built to enable delivery (refer annual report extracts below). However, we wish to submit that no such activities were undertaken by the Appellant, accordingly, given that the above investments in technology would impact the profitability of Mindtree, the same could not be considered for comparability analysis. **(Page 3474 to 3477 of PB-II-Part 4)**

In addition to the above, Mindtree also provides solutions/ platforms for various industries and service lines which includes insurance, banking and financial services, infrastructure and managed services, digital solutions and integrated services. These solution/ platforms include digital engagement platforms, IT infrastructure management and service delivery platforms, machine learning based solutions, predictive analytics, automated platforms etc. **(Page 3476 to 3478 of PB-II-Part 4)**

From the above, it is clear that Mindtree is engaged in provision of high-end solutions and platforms, hence, could not be considered as a comparable to a routine software development services provider such as NTT Data IPS.

#### **6. Significant foreign expenditure**

In this regard, we wish to submit that Mindtree has incurred significant foreign expenditure which works out to 68.86%, 57.82% and 56% of total expenditure incurred for FY 2016-17, FY 2015-16 and FY 2014-15 respectively. Considering this, it is clearly evident that Mindtree has significant onsite activities outside India. Accordingly, given that the Appellant predominantly carries out its operations within India and does not incur any significant foreign expenses, it is evident that Mindtree follows a different operating model (which also impacts the profitability) and hence, could not be compared with the Appellant. **(Page 3479 of PB-II-Part 4)**.

Given the above, we humbly wish to submit that Mindtree be excluded from final set of comparable companies.

#### **Judicial precedents relied upon:**

##### **Functional comparability-**

1) **Yahoo Software Development India Pvt. Ltd. vs JCIT [IT(TP)A No. 178/Bang/2022 for AY 2017-18] (Page 6268-6272 of Paperbook III)**

2) **Infor (India) Private Limited vs DCIT [I.T.A-TP. No. 198/HYD/2021 for AY 2016-17] (Page 6426-6427 of Paperbook III)**

3) **Citrix R&D India Pvt Ltd vs DCIT [IT(TP)A No.2428/Bang/2019 for AY 2015-16] (Page 6448-6452 of Paperbook III)**

4) **M/s. Microsoft Research Lab India Pvt. Ltd. [IT(TP)A No.3131/Bang/2018 for AY 2014-15] (Page 6526-6527 of Paperbook III)**

5) **M/s. Hewlett Packard (India) Software Operation Pvt. Ltd., [IT(TP)A No.2866/Bang/2017 for AY 2013-14] (Page 6595-6599 of Paperbook III)**

#### **4.Persistent Systems Ltd.**

##### **1. Functionally different**

*Persistent is not comparable to NTT Data IPS since it is predominantly engaged in outsourced product development. The Annual Report of Persistent clearly mentions the key products and services which company deals with, which includes (i) Enterprise Digital Transformation (ii) Product engineering services and solutioning for Internet of things (iii) Product and Engineering services to ISV's and enterprises and (iv) IP products. (Page 1709 of PBII- Part 1)*

*Given the above it is evident that the company's major portion of income is derived from both sale of **software services and products**. Further, page 302 of Annual Report FY 2016-17 also clarifies that the company specializes in software products, services and technology innovation and that the company offers complete product life cycle services, as opposed to Appellant's routine software development services. (Page 1850 of PB II Part 1)*

#### **Notes forming part of consolidated financial statements**

##### **1. Nature of operations**

Persistent Systems Limited (the "Company" or "PSL") is a public Company domiciled in India and incorporated under the provisions of the Companies Act, 1956 (the "Act"). The shares of the Company are listed on Bombay Stock Exchange and National Stock Exchange. The Company is a global company specializing in software products, services and technology innovation. The Company offers complete product life cycle services.

*The above extracts clearly distinguish Persistent's offerings vis-à-vis the Appellant's offerings. From page 56 of the FY 2016-17 annual report, it is observed that Persistent has witnessed good growth in the product suite on account of IBM Watson IoT Alliance (Page 1620 of PB-II Part 1)*

*As per page 55 of the FY 2016-17 annual report, Persistent has earned more than 50% of its revenue for the year 2016-17 from Outsourced Product Development ('OPD') and IP Led revenues. (Page 1619 of PB-II Part 1)*

*Based on the above differentiation provided by the company, we can conclude that the services provided by Persistent are not software services, and hence cannot be compared to the Appellant's activity profile.*

##### **2. Insufficient segmental information**

*In this regard, while the segmental details are available in relation to the Services, Digital Alliance and Accelerite (Products), however, the same are in relation to the consolidated financials and not standalone financials (relevant extracts reproduced below). Further, the Annual Report for FY 2015-16 and FY 2014-15 doesn't not provide details in terms of revenue derived from sale of services vis-à-vis products separately (even in the consolidated financials). Accordingly, the company should also be rejected on account of insufficient segmental information. (Page 1892 of PB-II Part 1)*

*Page 205 of Annual Report FY 2016-17*

**Notes forming part of consolidated financial statements (Contd.)****31. Segment Information**

Operating segments are components of an enterprise for which discrete financial information is available that is evaluated regularly by the chief operating decision maker, in deciding how to allocate resources and assessing performance. The Group's chief operating decision maker is the CEO and Managing Director.

The Group reorganised itself into 4 business units during the year, which form the operating segments for segment reporting.

The operating segments are:

- Services
- Digital
- Alliance
- Accelerite (Products)

Particulars		Services	Digital	Alliance	Accelerite (Products)	Total
Revenue	Year ended Mar-31-2017	13,086.58	4,704.91	8,466.11	2,526.79	28,784.39

(In ` Million)

*It is important to note that Persistent has generated approximately 55% of its revenue for FY2016-17 from activities other than services. Accordingly, given the non-availability of segmental information at standalone level for FY 2016-17, FY 2015-16 and FY 2014-15, Persistent shall be excluded from the final set.*

**3. Acquisitions during the year**

*During the FY 2016-17, Persistent has acquired one of the leading salesforce partner and cloud application development firm viz. PRM Cloud Solutions and a digital solutions-based start-up viz. GenWi, which has augmented the capabilities of Digital Unit. (Page 1620 of PB-II Part 1)*

**4. Significant Foreign expenditure**

*In this regard, we wish to submit that Persistent has incurred significant foreign expenditure which works out to 37.94%, 22.15% and 26.83% of total expenditure incurred for FY 2016-17, FY 2015-16 and FY 2014-15 respectively. Considering this, it is clearly evident that Persistent has significant onsite activities outside India. Accordingly, given that the Appellant predominantly carries out its operations within India and does not incur any significant foreign expenses, it is evident that Persistent follows a different operating model (which also impacts the profitability) and hence, could not be compared with the Appellant. (Page 1641 of PB-II Part 1)*

**5. Significant RPT**

With respect to modified application of the RPT filter. Please find below the workings of RPT filter below:

Particulars	FY 2016-17	FY 2015-16	FY 2014-15
Total revenue (A)	17,329,640,000	14,471,360,000	12,424,980,000
Related party transaction (B)	6,576,800,000	4,636,950,000	3,891,930,000
<b>Percentage to total revenue (B/A)</b>	<b>37.95%</b>	<b>32.04%</b>	<b>31.32%</b>

*As captured above, during the FY 2016-17, FY 2015-16 and 2014-15, Persistent has entered into related party transactions amounting to 37.95%, 32.04% and 31.32% on sales and accordingly, fails the RPT filter of less than 25% of Sales for all the years under consideration. Thus, Persistent has to be excluded from the final set of comparables.*

**Judicial precedents relied upon:****Functional comparability-**

- 1) **Yahoo Software Development India Pvt. Ltd.vs JCIT[IT(TP)A No. 178/Bang/2022 for AY 2017-18](Page 6268-6272 of Paperbook III)**
- 2) **SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17](Page 6306-6308 of Paperbook III)**
- 3) **ADP Pvt. Ltd Vs. DCIT [ITA Nos. 227 & 228 /H/2021 for AY 2016-17](Page 6336-6338 of Paperbook III)**
- 4) **Infor (India) Private Limited vs DCIT [I.T.A-TP. No. 198/HYD/2021 for AY 2016-17](Page 6426-6427 of Paperbook III)**
- 5) **Citrix R&D India Pvt Ltd vs DCIT [ IT(TP)A No.2428/Bang/2019 for AY 2015-16](Page 6461-6469 of Paperbook III)**
- 6) **Cypress Semiconductor Technology India Pvt Ltd [IT(TP)A No.2427/Bang/2019 for AY 2015-16](Page 6499-6501of Paperbook III)**
- 7) **M/s. Microsoft Research Lab India Pvt. Ltd.[IT(TP)A No.3131/Bang/2018 for AY 2014-15](Page 6524-6525 of Paperbook III)**
- 8) **Optiva India Technologies Pvt. Ltd. [ITA No. 194/PUN/2021 for AY 2016-17]6548-6550 of Paperbook III)**
- 9) **M/s. Hewlett Packard (India) Software Operation Pvt. Ltd.,[IT(TP)A No.2866/Bang/2017 for AY 2013-14](Page 6600-6613 of Paperbook III)**
- 10) **ARM embedded Technologies Private Limited [IT(TP)A No 3374/Bang/2018 for AY 2014-15](Page 6662-6665 of Paperbook III)**

#### **4. Nihilent Technologies Private Limited**

##### **Functionally Different**

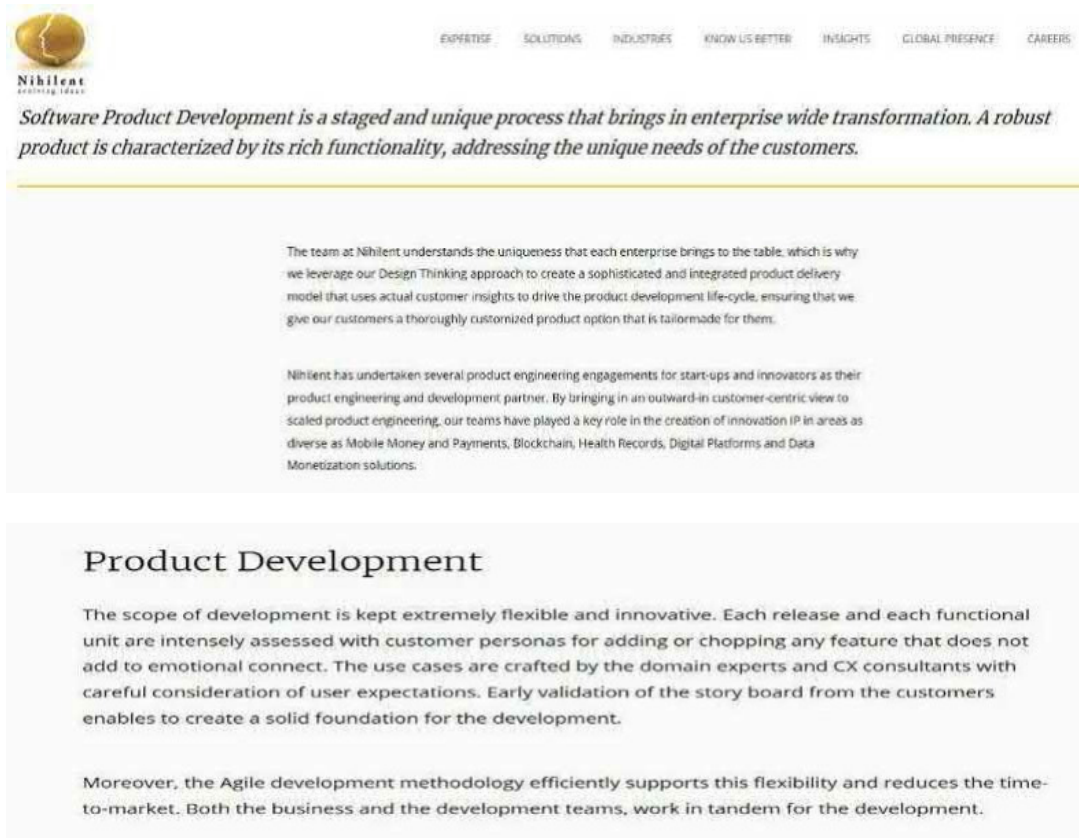
*Based on a review of the company's annual report for FY 2016-17, it is seen that the company services cover a broad spectrum of services, which include enterprise transformation and change management, digital transformation services and enterprise IT services.(Page 1442 of PB-II-Part 1)*

*Further, the website of the company provides that Nihilent is engaged in providing high-end IT services in the area of business transformation, digital transformation, brand and marketing transformation, platform and technology transformation etc., which is not comparable to the activities undertaken by the Appellant. The following is the relevant extract from company website(<https://nihilent.com/our-services/>)*

*The service portfolio of company includes Consulting, Analytics and provision of technology related assistance. From a review of company's profile in public domain it nowhere mentions that it is engaged in the provision of software development services.*

*The company is engaged in analytics: data monetization, data and cloud platform, datascience, internet of things, blockchain, solutions.*

*The company undertakes product development and product engineering for startups. The following is the relevant extract from the company website:*



The screenshot shows the Nihilent website with a navigation bar containing: EXPERTISE, SOLUTIONS, INDUSTRIES, KNOW US BETTER, INSIGHTS, GLOBAL PRESENCE, CAREERS. Below the navigation is a section titled "Software Product Development is a staged and unique process that brings in enterprise wide transformation. A robust product is characterized by its rich functionality, addressing the unique needs of the customers." This section contains two paragraphs of text describing their Design Thinking approach and their experience with product engineering for startups in various industries like Mobile Money and Payments, Blockchain, Health Records, Digital Platforms and Data Monetization solutions.

## Product Development

The scope of development is kept extremely flexible and innovative. Each release and each functional unit are intensely assessed with customer personas for adding or chopping any feature that does not add to emotional connect. The use cases are crafted by the domain experts and CX consultants with careful consideration of user expectations. Early validation of the story board from the customers enables to create a solid foundation for the development.

Moreover, the Agile development methodology efficiently supports this flexibility and reduces the time-to-market. Both the business and the development teams, work in tandem for the development.

## Product Development Team

We put in place a multi-disciplinary team that combines the best of Design Thinking and product engineering expertise. With a clear line of sight of the end customer, this team focus on designing for the customer, steering away from a product centric approach that limits the appeal and desirability of typical product engineering efforts. Our CX and Design Leads play a major role in driving the voice of the customer throughout the product lifecycle.

*Though the company provides a wide range of services, the annual report of the company neither provides the segmental break-up, nor does it provide the revenue break-up from the various activities undertaken.*

***(Page 1568 of PB-II-Part 1)***

### ***2.Significant Foreign expenditure***

*In this regard, we wish to submit that Nihilent has incurred significant foreign expenditure which works out to 42.73%, 43.58% and 47.17% of total expenditure incurred for FY 2016-17, FY 2015-16 and FY 2014-15*

*respectively. Considering this, it is clearly evident that Nihilent has significant onsite activities outside India. Accordingly, given that the Appellant predominantly carries out its operations within India and does not incur any significant foreign expenses, it is evident that Nihilent follows a different operating model (which also impacts the profitability) and hence, could not be compared with the Appellant.(Page 1448 of PB-II-Part 1)*

**Judicial precedents relied upon:**

**Functional comparability-**

- 1) SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17](Page 6309-6310 of Paperbook III)**
- 2) Red Hat India Private Limited [ITA No.1379/M/2021 for AY 2016-17](Page 6746-6747 of Paperbook III)**
- 3) Optiva India Technologies Pvt. Ltd. [ITA No. 194/PUN/2021 for AY 2016-17](Page 6554-6555 of Paperbook III)**
- 4) Citrix R&D India Pvt Ltd vs DCIT [ IT(TP)A No.2428/Bang/2019 for AY 2015-16](Page 6469 of Paperbook III)**

14. During the course of arguments the ld. AR did not argue on the Aptus Software Labs Private Limited & Tata Elxsi, therefore, whereas it was noted in his written synopsis and chart submitted, therefore are not to be considered for adjudication.

14.1 Further he submitted that for the Software Development segment the Infosys Limited, Larsen & Turbo Infotech Limited, Persistent Systems Ltd & Mindtree Limited are required to be excluded on various grounds and these companies are covered by the judgment of co-ordinate bench of the Hon'ble Tribunal in the case of Synamedia India Pvt. Ltd. vs DCIT Circle 6(1)(2) in IT(TP)A No. 350/Bang/2021 order dated 21.10.2022.

14.2 Further in the case of "Nihilent Technologies Private Limited the ld.AR submitted that this company is functionally not comparable as per the annual report for financial year 2016-17, it was seen from the

financial statement that the company services cover a broad spectrum of services, which include enterprise transformation and change management, digital transformation services and enterprise IT services significant R&D activities and Mergers and Acquisitions were taken place , significant Foreign expenditure incurred& major parts of revenue is derived from out of India. He further submitted that the issue is covered by the judgement of co-ordinate bench of Tribunal in the case of SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17](Page 6309-6310 of Paperbook III).

14.3 Further in case of Infobeans Technologies Ltd. Id.AR submitted that the company is not functionally comparable since –

- a) Functionally different - it is engaged in high end services such as custom application development, content management systems, enterprise mobility and data analytics which are classified as high-end KPO services not comparable to the assessee.
- b) Investment in Technology absorption – High investment in technology investment in turn has helped the company in improving the productivity of the company. Also the benefits are achieved in the form of product improvement, which indicates that the company is engaged in product development.
- c) Abnormal year of operations – FY 2015-16 – It has witnessed a growth in revenue around 76% and growth in PAT of around 14.7% in FY 2015-16
- d) Full pledged risk bearing entity.

14.4 The Id.AR further submitted that Infobeans Technologies Ltd has launched 2 New Segments viz. Automation engineering and not functionally similar in FY 2015-16 and 2014-15.

14.5 Accordingly the Nihilent Technologies Private Limited & Infobeans Technologies Ltd should be excluded from the comparables. The Id. AR of the assessee also requested that the matter may be send back to the Id. TPO for re-examination on the basis of functional profile & in the light of the case law cited by him in his written synopsis and chart submitted.

15. The Id. DR. in case of SWD segment relied on the order of the lower authorizes and submitted that both the authorities have rightly examined the issue in detail and rejected the objections filed before them on various grounds. As per MGT return it has been classified as SWD companies and income tax return the assessee has itself classified under the head of SWD. The SWD functions may contains different works according to the business practice adopted. He also submitted that the Ld. DRP has disposed off the objections filed by the assessee after discussing in each point. He further submitted that in the audit report under t5he head of Revenue Recognition the companies have been classified as software development service and revenue is recognized on the basis of Percentage of completion method.

16. After hearing both the sides & perusing the entire materials on record , we note that the assessee company is engaged in Software Development Services as observed by us, noted supra. On perusal of written synopsis filed by the Id.AR of the assessee, he has contested for

exclusion of the Infosys Ltd., Persistent Systems Ltd., Larsen & Toubro Infotech Ltd. & Mindtree Ltd. on different grounds and submitted that these four companies have been excluded on different grounds in the case of Synamedia India Pvt. Ltd., Vs. DCIT, Circle-6(1)(2) cited supra in which it has been held as under:-

4. The Ld.AR submitted that Coordinate Bench of this Tribunal in assessee's own case in IT(TP)A No. 2657/Bang/2018 & IT(TP)A No. 2365/Bang/2019 for A.Ys. 2014-15 & 2015-16 by order dated 28.02.2020 excluded Infosys Ltd., Mindtree Ltd., L&T Infotech Ltd. and Persistent Systems Ltd. by observing as under:

"32. At the time of hearing, the ld. counsel for the assessee has prayed for exclusion of 4 comparable companies that remain after the order of the DRP viz., Persistent Systems Ltd., Infosys Ltd., Mindtree Ltd. and L&T Infotech Ltd. He brought to our notice that as far as Persistent Systems Ltd. is concerned, the reasoning given for excluding this company for AY 2014-15 will equally hold good for the present year as well. In this regard, our attention was drawn to page 601 of the assessee's PB wherein in the annual report of this company, Notes forming part of financial statement in Note (i) which gives the description of income from software services, there is a reference to revenue from licensing & software, which sufficiently indicates that the assessee is not a pure SWD services provider. It was also brought to our notice that the profit & loss account which is at page 596 read with Notes forming part of the financial statement at page 604 wherein the segmental reporting is not based on different segments and the statement presents a consolidated financial statement without any segmental reporting. This company has also significant RPT transaction of 25% on sales. He pointed out that the TPO & DRP on the application of RPT filter has not expressed any opinion. The ld. DR relied on the order of DRP wherein the DRP has made extensive reference to each of the objections regarding absence of segmental revenue in the accounts and has also noticed that the software products segment had an insignificant revenue and that the ownership of intangibles by the assessee has had no effect whatsoever.

33. We have considered the rival submissions. We find that on the question of application of RPT filter, the assessee had made the following submission before the DRP:-

4. Fails the Related Party Transaction to Sales filter applied by the learned TPO In the show-cause notice issued, the learned TPO has excluded companies for which the ratio of RPT to sales exceeds 25% during the current year i.e., during FY 2014-15. The relevant extract from the show-cause notice is reproduced below for ease of reference:

e) Companies who have more than 25% related party transactions of the sales were excluded.

Companies having related party transactions of more than 25% are proposed to be excluded. A threshold of 25% is being applied following the provisions of Section 92A(2)(a) which provides a limit of 26% of the equity capital carrying voting rights for treating an enterprise as Associated Enterprise. if the limit is reduced further it would only result in eliminating more and more companies, on the other hand if the limit is relaxed then companies with predominantly related party transactions would get included which would not represent uncontrolled transactions. Therefore, on a balancing note, 25% is a proper threshold limit for related party transactions. The companies having more than 25% related party transactions should therefore be rejected as comparables. The Hon'ble IT.AT has upheld the application of this filter by the TPO in its order in the case of M/s. Supporisoft India Pvt. Ltd for AY 2005-G6 in IT

(TP)A 1372/B/11 & 20/2012 dated 28.03.2013 following its own decision in the case of M/s. Actis Advertisers Pvt. Ltd vide ITA No.5277/De1/2011 dated 12.10.2012.

On perusal of the Annual Report of Persistent, we observe that the company has RPT in excess of 25% of the sales. The calculation of the same has been provided below for your ease of reference:

RPT to Sales ratio for FY 2014-15 Particulars	Amount (INR Million)
Sale of services	2,410.02
Commission received	10.26
Purchase of software	1.49
Cost of technical professional	1,339.1
Commission paid on sales	111.79
Traveling and conveyance	19.27
Total related party transactions (A)	3,891.93
Total Sales (B)	12,424.98
RPT % of Sales (A/B)	31.32%

From the above computation, it is clear that the controlled transactions of Persistent constitutes 31.32% of sales. Based on the above, it can be seen that Persistent fails the 'RPT to sales ratio' filter applied by the learned TPO and should therefore not be considered as a comparable."

34. This argument has been addressed by the DRP in its order as follows:-

"4.4.9 We note that the approach of the TPO in treatment of related party transaction into two sets, are for revenue transactions and other for expense transaction is logical and correct. We also note that the RPT filter was adopted by the TPO was with the above conditions and has adopted consistently. Hence, we do not find any infirmity the approach. Hence, we reject the assessee's plea. We hold that onsite expenses do not adversely affect comparability and hence, such plea is rejected."

35. Further, the assessee had also raised plea with regard to onsite revenue filter by pointing out that onsite revenue is substantial and therefore this company should not be regarded as a comparable company with a company which does not have any onsite revenue. In this regard, the ld. counsel for the assessee placed reliance on the decision of the ITAT Bangalore Bench in the case of Trilogy e-business Software India P. Ltd. v. DCIT, ITA No.1054/Bang/2011 for AY 2007-08 dated 23.11.2012 wherein this Tribunal took the following view:-

"64. The next objection of the Assessee is that when the most appropriate method selected for determining ALP is the TNMM there is no reason as to why one should look at price difference in offshore software development and onsite software development. It is no doubt true that in TNMM it is only the margins in an uncontrolled transaction that is tested with reference to the controlled transaction but it is not possible to ignore the fact that pricing will have an effect on the margins obtained in a transaction. The argument that if pricing structure were to be considered as criteria, then it will have to be seen as to what is the pricing structure of all the comparable for various projects cannot be accepted because the TPO has not chosen any other onsite software service provider with a revenue composition of more than 75% from onsite software services as comparable. As rightly observed by the TPO, the pricing is different in onsite when compared to offshore operations. The further observations of the TPO that the reasons for the same lie in the fact that while in the case of OFFSHORE projects most of the costs are incurred in India; an ONSITE project has to be carried out abroad significantly increasing the employee cost and other costs.

65. The next objection of the Assessee is with regard to Assets employed. The companies, which predominantly generate revenues from onsite activity, do not have significant assets as most of the work is carried on the site of customer outside India. The argument that the TPO has himself observed that software service providers do not require much assets cannot be basis to accept the Assessee's plea. Those observations

are made by the TPO in the context of application of turnover filter and have been quoted out of context by the Assessee.

66. The next argument of the Assessee is that TPO has held that margins are lower in onsite software services and that margin is not a criteria to select or reject a comparable under Rule 10B(2) of the I.T. Rules. We are of the view that this argument again ignores the fact that the approach of the TPO has been to highlight the fact that there can be no functional comparability, if the assets employed and risks assumed are taken into consideration. It is in that context the TPO has referred to the margins.

67. The companies who generate more than 75% of the export revenues from onsite operations outside India are effectively companies working outside India having their own geographical markets, cost of labour etc., and also return commensurate with the economic conditions in those countries. Thus assets and risk profile, pricing as well as prevailing market conditions are different in predominantly onsite companies from predominantly offshore companies like the taxpayer. Since, the entire operations of the tax payer are taking place offshore i.e. in India; it is but natural that it should be compared with companies with major operations offshore, due to the reason that the economics and profitability of onsite operations are different from that of offshore business model. As already stated the Assessee has limited its analysis only to functions but not to the assets, risks as well as prevailing market conditions in which both the buyer and seller of services located. Hence, the companies in which more than 75% of their export revenues come from onsite operations are to be excluded from the comparability study as they are not functioning in similar economic circumstances to that of the tax payer. Hence, it is held that this filter is appropriately applied by the TPO.

68. Admittedly the onsite revenue in the case of the following comparable companies identified by the Assessee was more than 75% of its export revenues viz., a) Visu International Ltd. b) Maars Software International Ltd. c) Akshay Software Technologies Ltd. d) VJIL Consulting Ltd. e) Synfosys Business Solutions Ltd. The above companies were therefore rightly not considered as comparable by the TPO. We hold accordingly."

36. It is seen that the TPO in coming to the conclusion that the onsite revenue filter is not applicable has placed reliance on the decision of the ITAT Mumbai Bench in the case of Capgemini as quoted in para 16 in para 14 of the TPO's order, but that decision does not deal with a case of onsite revenue filter and the decision was rendered on the facts of its own case.

37. On the issue of RPT filter, we notice that the TPO in para 16 has accepted that the RPT filter should be @ 25%. In the case of Persistent Systems Ltd., the RPT is at 31.32% as extracted in the earlier part of this order and therefore this company should be excluded by application of RPT filter. In view of the above, we do not wish to go into other grounds on which this company is sought to be excluded viz., that it is a product company and there is no segmental data between product and services segment, presence of onsite activity and the impact of extra-ordinary event of acquisition during the relevant previous year. Therefore, this company is directed to be excluded from the list of comparable company.

38. As far as L&T Infotech Ltd. is concerned, the ld. counsel for the assessee brought to our notice the decision of ITAT Delhi Bench in the case of Saxo India Pvt. Ltd. v. ACIT, ITA No.6148/Del/2015 for AY 2011- 12, order dated 5.2.2016, wherein the Tribunal took note of the fact that this company was also trading in software and owned insignificant intangible assets. The company was excluded from the list of comparable companies with reference to SWD services provider such as the assessee. The ld.Counsel pointed out that though this decision was rendered with reference to AY 2011-12, the same reasoning would apply to AY 2015-16 also and in this regard, he drew our attention to page 696 of assessee's PB, which gives the details of the revenue generated by this company without any segmental break-up. Our attention was also drawn to page 682 of PB which shows that there is substantial onsite revenue activity as well as cost incurred

on onsite software development. We notice from page 676 of assessee's PB that this company as part of its operating profit in Schedule- O of profit & loss account contains expenditure for 'cost of bought out items for resale' and this is a significant part of the operating expenditure. When we see the revenue in Schedule M of the profit & loss account, there is no break-up of the revenue with regard to software services and software product. In our opinion, this distinction is enough to exclude this company from the list of comparable companies as held by the Hon'ble Delhi ITAT in the case of Saxo India Pvt. Ltd. (supra) which decision was also confirmed by the Hon'ble Delhi High Court.

39. The next company which the assessee seeks to exclude is Infosys Ltd. As far as this company is concerned, it is seen that the following are the functional dissimilarities brought to our notice:-

"Functionally dissimilar - owns intellectual properties, incurs significant R&D costs & onsite activity. –

Engaged in diversified business activities. –

Involved in development of software products in addition to software services. –

Owns intellectual property rights. –

Incurs significant research and development costs. –

Carries out significant activities based on onsite business. –

Owns products such as Finacle, Edge Verve and other product based solutions.

Extra-ordinary event of merger with Infosys Consulting India Ltd.

Segmental profit & loss account not available.

Commands substantial brand value.

40. The DRP, however, has not thought it fit to exclude this company by observing that this company has substantial pre-dominant revenue from software services and the growth was not attributable to any brand value. Presence of onsite activity and the expenses on R&D have all been brushed aside. In our view, the difference pointed out by the ld. counsel for the assessee before us show that this company cannot be compared with that of the assessee basically because of its business model, presence of onsite revenue generation and other reasons cited before us. Besides, the reason that turnover of this company is huge and more than 10 times that of the assessee.

41. The next company sought to be excluded is Mindtree Ltd. The submissions made before us were as follows:-

"Functionally dissimilar, diversified operation, significant R&D spend, ownership of intangibles. –

Also engaged in business of rendering IP-Led revenue, infrastructure management, package implementation, consultancy services, etc. constituting 45% of overall revenue during FY 2014-15.

- Diversified operation i.e. engaged in infrastructure management services, business process management, technology consulting, product engineering and SAP services. Also lacks segmental data.

- Significant research & development activity. By incurring R&D expenses, it was able to deliver IP based video surveillance management, recording and analytic products and solutions. It has filed 4 patents in India and US so far in the area of Video analysis.

- Ownership of intangibles in the form of intangible property.

Significant onsite activity:

- 46% of revenue earned under Onsite model. –

Incurred overseas branch office expenses amounting to INR 1582 crores –

Receives incentives from State of Florida in relation to the development center located overseas.

Lack of segmental data

- Does not maintain segmental information in respect of profitability reported from business activities in the nature of infrastructure management services, technology consulting and SAP services.

*- Acquisition of subsidiary - Discoverture Solutions LLC.*

*42. The DRP while dealing with the aforesaid objections has merely taken the view that the presence of IPR revenue was insignificant and so also expenses of brand value, R&D & intangibles. More importantly, the DRP did not dispute the presence of 46% of revenue from onsite model, but went on to hold that the presence of revenue is not sufficient to exclude a company, when it is otherwise functionally comparable. On this aspect, we have already referred to the decision of the ITAT Bangalore Bench in the case of Trilogy e-business Software India P. Ltd. (supra) and in the light of this decision and the admitted factual position regarding presence of onsite revenue over and above the threshold limit of 25% of total revenue, we are of the view that this company should be excluded from the list of comparable companies. We hold and direct accordingly.”*

*5. The revenue has not placed anything on record contrary to the above observations. Further admittedly the functions, assets owned and risks assumed by the assessee under the segment is similar with A.Ys. 2014-15 & 2015-16 (supra). Respectfully following the above view, we direct the Ld.AO to exclude Infosys Ltd., Persistent Systems Ltd., Mindtree Ltd. and L&T Infotech Ltd. from the final list.*

16.1 Respectfully following the above judgment, we direct the AO/TPO for exclusion of Infosys Ltd., Persistent Systems Ltd., Larsen & Toubro Infotech Ltd. & Mindtree Ltd. from the final list of comparables.

17. In the case of two companies named Nihilent Technologies Private Limited & Infobeans Technologies Ltd the ld. AR of the assessee has relied on the judgments of the co-ordinate benches of the Tribunal cited supra, we noted from the judgment of SanDisk India Device Design Centre Pvt. Ltd vs JCIT [IT(TP)A No. 288/Bang/2021 for AY 2016-17] placed at paper book page No. 6309-6310 the co-ordinate bench has directed to exclude these two companies . Since this judgment relates to the AY 2016-17 and case on hand relates for the AY 2017-18, therefore we think fit to send back to the file of the AO/TPO/DRP for the re-consideration in light of the above judgment for de-novo consideration and decide the issue as per law. In the result this ground No. 6.1(a) is partly allowed for statistical purpose. Ground No.6.(1)(b) and 6(1)(c) did not argued by the assessee, hence it is dismissed as not pressed.

## **ITES Segment**

18. Ground No.6. 2(a) – The assessee has challenged 7 companies for exclusion. Since he has not contested all the 7 companies, we have decided the comparables of the companies only the Id.AR contested.

18.1 The Id.AR reiterated the submissions made before the lower authorities. He further submitted that the Infosys BPM Services Private Limited and S P I Technologies India Private Limited should be excluded on FAR basis and he submitted that in assessee's own case in ITA No. 297/Bang/2021 for the AY 2016-17 it has been excluded from the list of comparables, and filed written synopsis which is as under:-

**Re: Ground 6.2 (a) in the appeal**

### **Infosys BPM Services Private Limited**

#### **1. Significantly higher turnover when compared to Appellant**

In this regard, the Appellant wishes to bring to your goodself's attention that the turnover of Infosys BPM is INR 2,940 crores for FY 2016-17, which is more than 10 times that of the turnover of the Appellant for the year under consideration. **(Page 5179 of PB-II-Part 7)** *In the case of ACIT v. McAfee Software (India) Pvt Ltd [IT(TP)A No. 1388/Bang/2011 and IT(TP)A No. 04/Bang/2012-AY 2005-06], the Hon'ble ITAT has pronounced that the turnover filter is adopted to avoid selection of high end companies (big companies) with that of 'minnows' in a similar line of business....The Hon'ble Tribunal also held that based on broad parameters what one has to consider is the turnover/ receipts of Appellant and the range of upper limit at ten times as well as the lower limit at ten times i.e. the turnover filter be capped at ten times the turnover of the tax payer as the upper limit...*

#### **2. Functionally not comparable**

Infosys BPM is an end-to-end outsourcing service provider with integrated IT and business process outsourcing solutions that address critical business functions. Further, the annual report lays down that the company is committed to providing best-in-class services to both horizontal and vertical focus areas.

The horizontal solutions comprise of Sourcing and Procurement ("S&P"), Customer Service ("CS"), Finance and Accounting ("F&A"), Analytics ("AT"), Legal Process Outsourcing ("LPO"), Human Resources ("HR"), Sales and Fulfilment ("S&F"), Industry Solution ("IS") and Digital Business Services ("DBS"). While vertical solutions include Financial Services ("FS"), Manufacturing ("MFG"), Energy and Utilities, Communication and Services ("ECS"), Retail, Consumer packaged goods and Logistics ("RCL") and Healthcare, Insurance and Life Sciences ("HIL"). From the above services, it is apparent that Infosys BPM is not comparable to the functions performed by the Appellant.

The Annual Report of Infosys BPM for FY 2016-17 also mentions that it has wide array of services which it delivers to its clients. The extracts from the annual report for FY 2016-17 are reproduced below for your goodself's easy reference:

*"The Company is committed to provide best-in-class services in both horizontal and vertical focus areas. Horizontal solutions comprise Sourcing and Procurement (S&P), Customer Service (CS), Finance and Accounting (F&A), Analytics (AT), Legal Process Outsourcing (LPO), Human Resources (HR), Sales and Fulfilment (S&F), Industry Solution (IS) and Digital Business Services (DBS), while Vertical (Industry) solutions include Financial Services and Insurance (FSI), Manufacturing (MFG), Energy & Utilities, Communication and Services (ECS), Retail, Consumer packaged goods and Logistics (RCL) and Life Sciences and Healthcare (LSH)."*

### **3. Market Leader**

Infosys BPM is an established player in the BPO industry and also a market leader and is constantly ranked as the leading BPO companies in India by industrial bodies such as Global Outsourcing 100, FAO Today and Nelson Hall. The rewards and recognition obtained by the company over the years are evident of the leadership position of the company. **(Page 5034 of PB-II-Part 7)**

Considering the above, a market leader in existence from a long period of time and having won many awards and accolades is not comparable to the Appellant.

### **4. Significant selling & marketing expenses and brand building expenses**

Infosys BPM has incurred huge sales and marketing expenditure to the tune of INR 156 crores and have also invested significant amounts in brand building expenses amounting to INR 6 crores during the year. **(Page 5034 of PB-II-Part 7)**

### **5. Brand Value**

Your goodself would appreciate that Infosys BPM is an industry giant and commands a very high brand value in the market and cannot be compared to the Appellant which is a risk mitigated entity. A reference maybe drawn to the annual report of Infosys Limited, the holding company of Infosys BPM which suggests that the Infosys brand is one of the most important and valued intangible assets owned by the company. Infosys BPM being a subsidiary enjoys the associated benefits of the Infosys brand, which has a significant impact on its pricing in the market and consequently on the margins earned. Presence of brand commands premium price and the customers would be willing to pay any price for the services offered by such companies. **(Page 5178 of PB-II-Part 7)**

### **6. Significant Intangibles**

The fixed assets schedule of the company suggests that it owns significant intangibles in the form of goodwill.

Thus, we wish to submit that Infosys BPM should be rejected on account of the difference in functions performed and levels of risk assumed by Infosys BPM vis-à-vis the Appellant, huge revenues derived from BPM services in comparison to the Appellant and the fact that it is a market leader owning significant amount of intangible assets and incurring huge selling & marketing expenditure and brand building expenses.

### **Judicial Precedents**

#### **Functional comparability-**

**1. Appellant's own case in AY 2016-17- NTT Data Information Processing Services Pvt Ltd vs. The Deputy Commissioner of Income Tax- IT(TP)A No. 297/Bang/2021-AY 2016-17 (Page 6774-6780 of Paperbook III)**

2. **Swiss Re Global Business Solutions India Pvt. Ltd., vs. The Addl./Jt./Dy./Asst. Commissioner of Income Tax/ITO, National Faceless Assessment Centre (NFAC)-IT(TP)A No.397/Bang/2021- AY 2016-17 (Page 6819-6822 of Paperbook III)**
3. **Unisys India Private Ltd vs The DCIT Circle 7(1)(1)- M.P. No. 29/Bang/2022 in ITA No. 584/Bang/2019- AY 2012-13 (Page 6906 - 6907 of Paperbook III)**
4. **COWI India Pvt. Ltd. vs Income Tax officer, E-Assessment Centre, Circle-I, Gurgaon- ITA No. 443/Del/2021- AY 2016-17 (Page 6918 - 6919 of Paperbook III)**
5. **Infor (India) Private Limited vs DCIT Circle 2(1), Hyd - ITA-TP. No. 198/Hyd/2021-AY 2016-17**

**High-end KPO service uncomparable-**

1. **Rampgreen Solutions private Limited Vs Commissioner of Income tax(ITA 102/2015)(Page 6921-6966 Of Paperbook III)**

**SPI Technologies India Pvt Ltd**

**1. Significant Intangibles**

SPI Technologies has significant intangible assets. It consists of internally generated intangible assets, those arising from business combinations and acquisitions. **(Page 5351 to 5353 of PB II-Part 7)**

Further, the company's website also highlights the cutting-edge technology that it has developed and is being used in delivering of services to its customers.

**2. Extra ordinary event**

The wholly owned subsidiary of SPI Technologies, Laserwords Private Limited was amalgamated with SPI Technologies with the appointed date being April 01, 2014. LaserWords Private Limited provides comprehensive pre-press data processing services like typesetting, composition and copy editing to educational and professional publication houses across the globe. Pursuant to the scheme of amalgamation, assets and liabilities of the amalgamating company were vested in SPI Technologies at their respective fair values. Such amalgamation is expected to lead to economies of scale. The amalgamation is in the nature of an extraordinary event having an impact of the operating margins. In this regard, we wish to place reliance on the ruling of Sony Mobile Communications International ABVs DDIT (ITA No. 769/Del/2014) wherein the Hon'ble Tribunal held that, once acquisition and merger etc. has taken place, it is always likely to affect the profitability due to such merger etc. Further, it was held that there cannot be any standard yardstick to measure the impact of such a factor on the overall profitability of such company. Accordingly, we wish to submit that SPI Technologies should be excluded from the final list of comparables. **(Page 5375 of PB-II-Part 7)**

**3. Incorrect reporting under RPT schedule**

In the financial statements of the company for the FY 2016-17, the company has reported related party transactions at 2 sections. Pages 80 to 85 of the annual report provides the first set of the RPT schedule reporting and Pages 87 to 89 of the annual report provides the second set of the RPT schedule reporting. However, it is observed that the amounts reflected in the first set is not in line with the reporting under the second set. For eg. the related party revenue disclosed under the company SPI Technologies Inc. under the first set of the reporting for FY 2016-17 is INR 17,35,00,960. However, the revenue reported for the same company in the second set of the RPT schedule is INR 20,31,81,482. It is not clear from the financial statements as to whether both the amounts are to be considered in determining the total related party transaction or whether the transaction amounts have been wrongly disclosed. **(Page 5386 to 5390 of PB-II-Part 7 & Page 5393 to 5395 of PB-II-Part 7)**

Similar is the reporting for the other related party transactions.

Given the above, the financial statements do not provide a reliable source of information as the transaction disclosed at one place contradicts the transaction reported in another place. In selecting a comparable company for the purpose of testing the arm's length, the data of such company should be reliable. Given the above inconsistencies in reporting, the data of the company may not be reliable for comparison purposes.

#### **4. Functionally not comparable**

SPI Technologies is engaged in the provision of database services including data processing & tabulation services, on-line information and data retrieval services, Electronic Data Interchange (EDI) service, web search portal content services, Code and protocol conversion services etc. Entire revenue of the company is derived from data processing, hosting & related activities. It primarily provides services in the typesetting business, including transformation of unedited manuscripts into final print-ready files, supply of structured data for electronic publishing and providing end-to-end project management services. The above mentioned services are not comparable to the support services provided by the Appellant and hence SPI Technologies shall be rejected as a comparable. **(Page 5307 & 5375 of PB-II-Part 7)**

Based on the above, it can be concluded that the technological solutions provided by the market leader is not comparable to a risk mitigated entity like that of the Appellant. Accordingly, the company is functionally not comparable due to the difference in the risk profile of the Appellant vis-à-vis the comparable company.

Based on all of the above detailed reasons, the Appellant humbly submits that SPI Technologies should be rejected as a comparable company for the FY 2016-17. Since the same is not comparable for the FY 2016-17, the same shall be rejected for the FY 2015-16 and FY 2014-15 also.

#### **5. Sub-contracting cost**

The company incurs subcontracting charges which indicates it outsources part of its activity. The cost of such subcontracting charges is INR 31.53 crores for FY 2016-17 hence, SPI's business model is different from NTT Data IPS as it does not outsource its work. **(Page 1031 of Paperbook II- Part 1, Page 5405 of Paperbook II-Part 7)**

#### **Judicial Precedents**

##### **Functional comparability-**

##### **High-end KPO service non-comparable-**

**1. Rampgreen Solutions private Limited Vs Commissioner of Income tax (ITA 102/2015) (Page 2461 - 2506 of Paperbook II- Part 4- Caselaws) (Page 6921-6966 Of Paperbook III)**

**2. Appellant's own case in AY 2016-17- NTT Data Information Processing Services Pvt Ltd vs. The Deputy Commissioner of Income Tax- IT(TP)A No. 297/Bang/2021-AY 2016-17 ( Page 6784-6787 of Paperbook III)**

18.2 On the other hand, the Id.DR relied on the order of the lower authorities.

18.3 The Id.AR of the assessee challenged these two companies named Infosys BPO Ltd. & SPI Technologies India Pvt. Ltd., for exclusion. We note that these 2 companies have been excluded from the comparables in ITes segment for the assessment year 2016-17 in assessee's own case vide order dated 7/7/2022 in ITA No.297/Bang/2021 and the objections of the Hon'ble coordinate bench is as under:-

*“(a) Infosys BPO Limited Functionally different*

*5. We have heard both the parties and perused the material on record. This comparable has been considered as not comparable in Swiss Re Global Business Solutions India P. Ltd. for AY 2014-15 in IT(TP)A No. 3181/Bang/2018 dated 21.5.2020 wherein it was observed as under:-*

*"We have perused submissions advanced by both sides in light of records placed before us. We note that this company is providing services in various areas of sourcing and procurement, customer services, finance and accounting legal process outsourcing, sales and fulfilment, analytics, business platforms, business transformation services, human resource outsourcing and technology solution optimisation. It is noted that this comparable also provides services in financial services and insurance, manufacturing, energy utilities communications and services and retail, consumer packaged foods, logistics and life services. Further in the annual report it has been mentioned that this comparable provides services that are different from routine back-office services. This noting itself makes this comparable not functionally similar with that of assessee. Accordingly we direct this comparable to be excluded from finalist."*

*5.1 In view of the above order of the Tribunal, we are inclined to direct the AO/TPO to exclude Infosys BPO Ltd. from the list of comparables to determine the ALP.*

*(c) SPI Technologies India Pvt. Ltd. Functionally dissimilar*

*11. We have heard the rival submissions and perused the materials available on record. The main contention of the Ld. A.R. is that TPO rejected the NPS Ltd. which is engaged in the business of providing publishing solutions namely typesetting, data digitisation commission for overseas publisher and support international publisher through every stage of the author to reader publishing process and provides the digital first strategy for publishing contents, production and transformation, delivery and customer support. Thus, NPS Ltd. Has been rejected based on functional incomparability. Hence, on the same logic SPI Technologies Ltd. to be excluded.*

18.4 Respectfully following the above judgments, we also direct AO/TPO for exclusion of this company from the final set of comparables. Accordingly, ground No. 6.2(a) is partly allowed for statistical purpose.

19. **Ground No.6.2(b)** was not argued by the Id.AR, hence it is dismissed as not pressed.

### **20. Ground No.7**

The assessee has raised issue that AO/TPO has not followed the direction of Id.DRP for computing the operating margin of the companies considered as comparable by the Id.AO/TPO for the software development and IT enabled services.

20.1 On going through the order of Id.DRP, at para No.9.1, they have given direction to verify and adopt the figures as per the annual report of these companies and their operating margin may be computed. We are also giving the direction to the TPO in line with the Id.DRP. Accordingly, this ground is allowed for statistical purposes.

21. **Ground No. 8** also not argued by the Id.AR, hence it is dismissed as not pressed.

### **INTEREST ON RECEIVABLES**

#### **22. Ground No.9.1 to 9.4**

The Id. TPO observed from the submissions that the assessee has not made adjustment towards outstanding receivables , he after

discussing the legal position treating it as international transactions after allowing credit period as per agreement the assessee was asked to produce in the particular format : amount raised in invoice, date of invoice, date of receipt, delay in No. of days. However, the assessee failed to provide in particular format asked. In absence of details he calculate the net average receivables from AEs for the entire years and interest was calculated , using LIBOR-6 months + 450 basis points applicable for the FY 2016-17 and which works out to 5.975% and made adjustment of RS. 94,21,347/-. Before the DRP the assessee also could not file the details as asked for and the Id. DRP directed to assessee for providing details within 10 days from the receipt of order and they further directed to TPO for the interest rate, opportunity cost should be considered i.e. SBI short term deposit rate on outstanding receivables. The assessee could not file the same.

22.1 The Id. AR of the assessee filed written synopsis which is as under

**Re: Ground No. 9 (9.1 to 9.4) in the appeal:**

*The Appellant wishes to submit that the delayed / outstanding receivables should not be considered as a separate international transaction. Further, it is humbly submitted that determination of ALP in respect of delayed receivables from inter-company transactions is not required since ALP of inter-company transactions of provision of services has been already determined and no separate adjustment is necessary in this regard.*

*Outstanding receivables cannot be treated as a separate international transaction*

*The Appellant has provided Software Development services and IT enabled services to its AEs and amount outstanding as trade receivables merely represent the dues which are to be received by the Appellant against the services provided. As a business practice, the Appellant did not charge any interest on delayed realisation of invoice from AEs nor paid any interest on delayed payables.*

*Early or late realization of service proceeds is incidental to the transaction of sale/ service, and not a separate transaction in itself. In other words, these represent the consequence of an international transaction and not an international transaction per-se. If the ALP in respect of an international transaction of service is determined, then there can be no question of treating non-receipt of interest in such transaction as separate international transaction warranting any further adjustment. Once ALP is determined in respect of the sale/ service transaction, it would be deemed to be covering all the elements and consequences of such transaction of sale/ service.*

*Aggregation approach - all service related costs are embedded in the remuneration received from the AEs*

*Without prejudice to above, it is to be appreciated that where companies are aware of the fact that customer will take longer than the agreed time to pay the outstanding dues,*

*the same is factored in the price/ mark-up charged for the services rather than to levy of actual interest when the payment is eventually made by the customer. The principle of aggregation is well established rule in the transfer pricing analysis. This principle seeks to combine all functionally similar transactions wherein arm's length price can be conducted for a number of transactions taken together. The said principle is enshrined in the transfer pricing regulation itself.*

*Comparing the average credit period allowed by the Appellant with the average receivable days of the comparable companies and non AE segment proposed by the Appellant*

*Without prejudice to all the above contentions, the Appellant wishes to submit that if receivables adjustment needs to be quantified, it should be done by comparing the average credit period allowed by the Appellant with the average receivable days of the comparable (i.e.,) adjustment should be made only in cases where the average credit period allowed is over and above the average receivable days of comparables and not in respect of cases where actual credit period allowed is less than the normal credit period extended in the similar industry.*

*On analyzing the average receivable collection of the Appellant, it was observed that the average number of days for which the invoices remained overdue during the year worked out to **14 days**.*

*On comparing the same with the average receivable days computed for the comparable companies proposed by the Appellant, it was observed that the credit period extended by the Appellant is lesser than the comparable companies whose average came to **70 days**.*

*Without prejudice to our contentions that the comparable set considered by the learned TPO is incorrect, we did a similar analysis on the comparable set proposed by the learned TPO. It was observed that the average receivable days of the learned TPO's set came up to **72 days**. On comparing the same with the Appellant's data, it was observed that the comparable companies are allowing higher credit days than the Appellant.*

*Determination of ALP is based on uncontrolled (third-party) scenario*

*The Appellant wishes to submit that it is engaged in provision of services to AE as well as non-AEs. The Appellant would like to draw your attention to the fact that the Appellant does not charge any interest from third party customers. Also, it does not pay any interest to its creditors (including the AE) hence no interest should be charged on inter-company receivables balance of the AE as well.*

*Outstanding receivables from AEs cannot be re-characterised as loan advanced to AEs*

*The Appellant wishes to humbly submit that outstanding/ delayed receivables from AEs cannot be treated as unsecured loans advanced to AEs and interest cannot be imputed on the same.*

*Account receivables arising from an international transaction are closely linked to the main transaction and should be benchmarked using a combined transaction approach*

*Without prejudice to our contention that outstanding receivables is not an international transaction, we would like to submit that if outstanding receivables is treated as a separate international transaction by the learned TPO, the same should be benchmarked using a combined transaction approach, by combining the outstanding receivables with the main international transaction of provision of services due to the fact that receivables are a result of the international transactions of the Appellant.*

22.2 The Id.AR of the assessee has filed a chart, in which he has calculated the average receivables period of the comparables as well as assessee's AE, which is placed on record.

22.3 The Id.DR relied on the order of the lower authorities and he submitted that during the course of TP proceedings, the assessee was asked to file details in specific format but the assessee did not file as required by the TPO. Therefore the lower authorities have rightly treated the interest on outstanding receivables as international transactions beyond the credit period as per the agreement. He further submitted that many courts have settled the issue that it is international transactions. The Id. TPO has rightly applied the LIBOR 6 months + 450 basis points as applicable for the Financial Year 2016-17. Before the TPO the assessee was unable to file as required by him.

22.4 After hearing rival contention, we found substance on the arguments of the Id. DR that the interest on receivables is an international transactions, therefore we reject the arguments of the Id. AR on this issue. We further noted from the order of the Id.DRP, the assessee did not provide the details and also could not comply the direction of the Id.DRP for filing the document before the Id.TPO within 10 days. Considering the totality of facts we also direct to the assessee for following the direction of the Id. DRP. The TPO is directed to calculate interest, using LIBOR-6 months+300 basis points. The Id. AR will decide the issue as per law. The Id. AR of the assessee has relied the recent judgment of the co-ordinate bench of the Tribunal in IT(TP)A No. 291/Bang/2021 for the AY 2016-17 and other judgments quoted in his written synopsis is not applicable in present facts of the case. This ground of appeal is allowed for statistical purpose.

23. In **ground No.10**, the Id.AR of the assessee raised issue that the AO has not given deduction U/s 80G for donation of Rs. 9,17,700/-

without giving any reason. This issue is remitted back to the AO for the eligibility of the deduction u/s 80G and the assessee shall provide necessary documents. The AO is directed to decide this issue as per law. This ground is allowed for statistical purposes.

24. **Ground No.1 & 2** is general in nature, hence does not require any adjudication.

25. **Ground No.3 to 5** not argued by the Id.AR of the assessee, hence dismissed as not pressed.

26. **Ground No.11 and 12** though it was incorporated in the written synopsis, the same was argued by the Id.AR, hence it is dismissed as not pressed.

27. **Ground No.13 and 14** is consequential in nature.

28. In the result, appeal of the assessee is partly allowed.

Order pronounced in court on 28<sup>th</sup> day of February, 2023

Order pronounced on this 28<sup>th</sup> day of February, 2023.

Sd/-  
(N.V.Vasudevan)  
VICE PRESIDENT

Sd/-  
(Laxmi Prasad Sahu)  
ACCOUNTANT MEMBER

Bangalore; Dated : 28<sup>th</sup> February, 2023.  
Thirumalesh, Sr.PS/Vms

Copy to :

1. The Appellant.
2. The Respondent.
3. The NFAC, Delhi
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst. Registrar / ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	08.02.2023		Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	Date of uploading the order on website			
8.	If not uploaded, furnish the reason			
8.	File sent to the Bench Clerk			Sr.PS
9.	Date on which file goes to the AR			
10.	Date on which file goes to the Head Clerk.			
11.	Date of dispatch of Order.			
12.	Draft dictation sheets are attached			Sr.PS