

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 1361/Del/2015

(Assessment Year: 2010-11)

Aptive Components India P. Ltd, (formerly known as Delphi Automotive Systems P. Ltd), P-24, Green Park Extension, South Delhi, New Delhi-110016 (Appellant) PAN:AAACD0226E	Vs.	Deputy Commissioner of Income-tax, Circle-7(1), New Delhi (Respondent)
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Assessee by :	Sh. Neeraj Jain, Adv Mr. Abhishek Aggarwal, AR Sh. Ramit Katyal, AR
Revenue by:	Sh. Rajesh Kumar, CIT DR

Date of Hearing	10/07/2023
Date of pronouncement	09/10/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.1361/Del/2015 for AY 2010-11, arises out of the order of the Id AO dated 20.01.2015 [hereinafter referred to as 'Id. AO', in short].
2. The assessee has filed concise grounds of appeal as under:-

"CONCISE GROUNDS OF APPEAL

1. *That the assessing officer erred on facts and in law in completing assessment under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act') after making addition of Rs. 26.35,60,076 in the returned income of the appellant.*
2. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 16,72.72.235 to the arm's length price of the*

international transactions of provision of software development services on the basis of order passed by the Transfer Pricing Officer (TPO) under section 92CA(3) of the Act.

2.1 That the Dispute Resolution Panel (DRP) erred on facts and in law in sustaining the action of the TPO in considering following companies in the final set of comparable companies allegedly holding them to be functionally comparable to the appellant:

- i. e-Infochips Bangalore Limited*
- ii. E-Zest Solutions Limited*
- iii. Infinite Data Systems Pvt. Ltd.*
- iv. Infosys Technologies Limited*
- v. Sonata Software Limited*
- vi. Tata Elxsi Limited*
- vii. Thirdware Solutions Limited*
- viii. Evoke Technologies Limited-*
- ix. Persistent Systems Limited*

3. That the assessing officer erred on facts and in law in making an adjustment of Rs. 1,15,08,130 to the arm's length price of the international transactions' of Business Support Services on the basis of order passed by the Transfer Pricing Officer (TPO) under section 92CA(3) of the Act.

3.1 That the DRP/TPO erred on facts and in law in not appreciating that since the Technical Assistance' and 'Human Resource Development' segment of Educational Consultant India Limited are comparable to the business support service segment of the appellant, it ought not be rejected from the final set of comparable companies.

3.2 That the DRP erred on facts and in law in sustaining the action of the TPO in considering following companies as comparable to the business support service segment of the appellant without appreciating that these companies failed the test of comparability provided under Rule 10B(2) of the Income Tax Rules:

- (1) Apitco Limited*
- (ii) HCCA Business Services Private Limited*
- (iii) Alphageo (India) Limited*
- (iv) Mitcon Consultancy Engineers Limited*
- (v) Cybermedia Online Limited*

4. That the assessing officer erred on facts and in law in making an adjustment of Rs. 63,30,719 to the arm's length price of the international transactions' undertaken in relation to Manufacturing

Segment on the basis of order passed by the Transfer Pricing Officer (TPO) under section 92CA(3) of the Act.

4.1 That the assessing officer/TPO erred on facts and in law in not appreciating that since the operating profit to sales ratio (PLI) of the appellant in its manufacturing segment at 8.41% falls within the range of +/-5% of the average operating profit to sales ratio of the comparable companies at 10.03%, in terms of second proviso to section 92C(2) of the Act, no adjustment in the arms length price was warranted.

5. That the assessing officer erred on facts and in law in making an adjustment of Rs. 62,87,498 to the arm's length price of the 'international transactions' of purchase of fixed assets on the basis of order passed by the TPO, allegedly holding that the appellant has not furnished the supporting evidence for purchase of such assets.

6. That the assessing officer erred on facts and in law in making an adjustment of Rs. 7,21,61,494 in respect of the receipt of receivable from the associated enterprise considering the same to be an 'international transaction' of loan, on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer (TPO).

6.1 That the DRP/TPO erred on facts and in law in re-characterizing the alleged delay in receipts of receivables as unsecured loans advanced to the associated enterprises and making a transfer pricing adjustment on that basis.

6.4 That the DRP/TPO erred on facts and in law in imputing interest on the opening receivables. i.e. receivables appearing in the books of accounts on 01.04.2009, for the entire financial year without appreciating that the interest, if any, is imputable, it shall be imputed only on the delay in receipt of receivable beyond the agreed credit period, up to the end of the said financial year i.e. 31 March 2010.

6.5 Without prejudice, that the assessing officer/DRP erred on facts and in law in not appreciating that after netting off the interest payable on delay in payment of royalty, imports of goods and fixed assets, payable by the appellant to the associated enterprise, applying the same methodology, there could not be a case of interest receivable on the delay in receipt of receivables.

6.6 Without prejudice, that the DRP/TPO erred on facts and in law in rejecting the delay in receipt of receivables on transaction undertaken with unrelated third parties as comparable uncontrolled price for the purpose of benchmarking the delay in receipt of receivables on transaction undertaken with associated enterprises, applying CUP method.

6.7 Without prejudice, while applying CUP method, the DRP/TPO erred on facts and in law in rejecting interest rate computed on the

basis of Libor rates, without appreciating that since the receivables outstanding from the associated enterprises were denominated in foreign currency, the interest applicable on loan available in the international market ought to be considered."

3. Apart from the above, the assessee has also raised additional grounds vide letter dated 10.01.2019 stating that the assessment framed by the Id AO is barred by limitation and therefore liable to be quashed. This additional ground was stated to be not pressed by the Id. AR. The same is reckoned as a statement made from the Bar and accordingly the additional ground raised by the assessee is hereby dismissed as not pressed.

4. The concise ground No. 1 raised by the assessee is general in nature and does not require any specific adjudication.

5. The concise ground No. 2 and 2.1 raised by the assessee are with regard to transfer pricing adjustment of Rs. 16,72,72,235/- made on account of provision of software development services rendered by the assessee.

6. We have heard the rival submissions and perused the materials available on record. The assessee is primarily engaged in the business manufacturing of automotive components. The assessee company is substantial controlled by Delphi International Holding SARL Luxembourg which holds 99.99% of share holding of the assessee company during the financial year 2009-10. The assessee provided software development support services amounting to Rs. 95,43,86,355 through its technical center ("TCI") division to its Associated Enterprises (AEs). TCI division of assessee is engaged in providing software module modification/ technical support and electronic/ independent testing and verification services to Global OEMs through its AES. Delphi Group (Indiana) and other allied entities liaise with the OEMS and develop an understanding of their specific needs. On the

basis of its understanding, Delphi Group finalizes the software to be developed/tested. On the basis of the assignments in hand and the resources available, Delphi Group (Indian) allocates work to Delphi India. For undertaking these services, Delphi India is remunerated at a mark-up of 10 percent on costs incurred for the provision of these services.

7. The assessee benchmarked these international transactions by comparing six companies whose arithmetic mean margin was worked at 12.90%. The profit level indicator (PLI) adopted by the assessee was operating profit/ operating cost (OP/OC). The assessee adopted Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for benchmarking the international transaction in the software development segment. The PLI of the assessee was 8.12% which when compared with the comparable mean margin of 12.90% fall within the range of +/-5% tolerance band and accordingly the assessee concluded that its international transaction of provision of software development services was at Arm's Length Price (ALP). The Id TPO did not agree with the contention of the assessee and made inclusion and exclusion of certain comparables of the assessee. The assessee preferred objections before the Id DRP. Based on the order of the Id DRP, the Id TPO arrived at the final set of comparable companies as under:-

SL. NO.	Name of the company	OP/OC	Working Capital Adjusted OP/OC
1.	LGS Global limited	12.78%	6.13%
2.	Thirdware Solutions Limited	33.43%	29.73%
3.	E-Infochips Bangalore Ltd.	71.38%	62.81%
4.	Evoke Technologies Ltd.	18.56%	17.20%
5.	E-Zest Solutions	18.66%	16.43%
6.	Infinite Data Systems Pvt. Ltd.	88.25%	82.22%
7.	Infosys Ltd.	45.47%	41.86%
8.	Larsen & Toubro Infotech Ltd.	19.06%	15.48%

9.	Mindtree Limited	13.92%	7.24%
10.	Persistent Systems Ltd.	29.02%	25.89%
11.	RS Software (India) Ltd.	10.18%	8.91%
12.	Sasken Communication Tech. Ltd.	17.54%	16.39%
13.	Sonata Software	35.87%	29.92%
14.	Tata Elxsi Ltd.(Segment)	20.29%	14.54%
	Average	31.03%	26.77%

8. The average margin after granting working capital adjustment of the aforesaid comparable companies was adopted at 26.77% and accordingly, the Id AO in the final assessment order proceeded to adopt the transfer pricing adjustment of Rs. 16,72,72,235/- in respect of provision of software development services as under:-

Particulars	Amount (INR)
Operating Cost	88,47,98,131
Arm's Length Margin (%)	26.77%
Arm's Length Price (ALP)	112,16,58,590
Price received	95,43,86,355
Shortfall being adjustment u/s 92CA	16,72,72,235

9. Before us, the assessee is seeking exclusion of certain comparables chosen by the Id TPO.

10. **Exclusion of Infinite Data Services Pvt. Ltd.**

10.1 This company was formed to render services only to Fujitsu Services Ltd based on contract entered into by holding company. The Annual Report of Infinite Data Systems Pvt Ltd (merged) for the year ending on 31.03.2009 is enclosed in pages 999 to 1036 of the Annual Reports Paper Book. From the perusal of the same in the Director's report under the heading "Contract with Fujutsu Services Ltd", it has been mentioned as under:-

Contract with Fujitsu Services

The Holding/Promoter Company of your Company i.e. M/s Infinite Computer Solutions (India) Limited signed an agreement (Build

Operate and Transfer model) with Fujitsu Services Limited to set up Global Delivery Center(s) in India to provide offshore delivery capabilities to Fujitsu and Fujitsu's associated companies.

In performance/execution of such contract, your Company has taken on lease the 2 Floor of Building No. A of Plot No. 157 from M/s Infinite Computer Solutions (India) Limited from their existing STPI facility in Bangalore."

10.1.1 The Annual Report of Infinite Data Services Pvt. Ltd (merged) for the year ending on 31.03.2010 is enclosed in pages 1 to 19 of the Annual Reports Paper Book. In the significant accounting policies and notes on accounts under the heading "Companies Overview", it has been mentioned as under:-

"Infinite Systems Pvt. Ltd ("IDS" or "Company") was incorporated on 26th September, 2006. The company is wholly owned subsidiary of Infinite Computer Solutions (India) Ltd. It provides solution which encompass technical consultation, design and development of software, maintenance, systems integration, implementation, testing and infrastructure management services."

10.1.2. The Id AR argued that the Id TPO in assessee's case had applied Related Party Transaction (RPT) filter of 25% i.e. the Id TPO had accepted a comparable company to have related party transaction with its associated enterprises upto the maximum of 25% of the transactions. The Id AR argued that in the instant case, Infinite Data Services Pvt. Ltd has rendered services to Fujitsu Services Ltd based on the contract entered into by the holding company of Infinite Data Services Pvt. Ltd. Moreover, the holding company holds 99.99% share in Infinite Data Systems Pvt. Ltd. Accordingly, it fails the related party filter applied by the Id TPO. This argument was buttressed by the Id DR by stating that Infinite Data Systems Pvt. Ltd had merely rendered services to Fujitsu Services Ltd which is 3rd party and hence, the holding company having stake in Infinite Data Systems Pvt. Ltd to the extent of 99.99% has got no relevance. The Id. DR argued that the

functions performed by Infinite Data Systems Pvt. Ltd are identical with functions performed by the assessee.

10.1.3 The Id AR further argued that in terms of agreement entered with Fujitsu Services Ltd, the comparable company is entitled to receive additional remuneration for under utilization of its capacity which is evident from the significant accounting policies in respect of revenue recognition enclosed in the audited financial statement of the comparable company in page 13 of the Paper Book for the year ended 31.03.2010. Accordingly, the said comparable had recognized revenue of Rs. 31.38 lacs earned towards infrastructure deficit charges from Fujitsu Services arising on account of under-utilization of its resources by them during the period 01.04.2009 to 31.03.2010 and that similar receipts were not earned by the assessee company and hence the said comparable company should be excluded. Per contra, the Id DR submitted that recovery of infrastructure deficit charges from Fujitsu Services Ltd by the comparable company is completely an independent transaction dehors the regular receipt of technical services fees. In any case, said component represent miniscule portion of the total revenue of the comparable company. Even in the absence of the segmental data for the same, the said comparable company would become functionally comparable with that of the assessee.

10.1.4. The Id AR submitted that the services rendered by comparable company to Fujitsu Services Ltd would also be deemed to be an international transaction in view of the fact that the said services were rendered based on the contract entered into by the holding company i.e. Infinite Computer Solutions India Ltd, in terms of section 92B(2) of the Act. Hence, it becomes a controlled transaction and accordingly the same cannot be compared with that of the assessee. The Id DR submitted that as per section 92B(1) of the Act, an international

transaction means a transaction between two or more associated enterprises either or both of them should be non-resident. In the case of Infinite Data Services Pvt. Ltd, its associated enterprise is Infinite Computer Solutions India Ltd (holding company), which is also an Indian entity. Hence, both the comparable company as well as its holding company are Indian resident entities. The Id DR drew our attention to the provisions of section 92B(2) of the Act and also explanatory notes in the form of CBDT Circular No. 14/2001 and the amended provision of section 92B(2) of Finance Act, 2014 for which corresponding Circular No. 1/2015 dated 21.01.2015 was issued by CBDT. The Id DR argued that considering the intention behind introduction of transfer pricing provisions and also considering the fact that both the comparable company as well as its holding company are Indian resident entities, the provisions of section 92B(2) of the Act having deeming fiction cannot be made applicable to the facts of the instant case. With regard to the decision relied upon by the Id AR in the case of PCIT Vs. Open Solution Software Services Pvt. Ltd in ITA No. 201/2018 rendered by Hon'ble Delhi High Court, the Id DR argued that in that case, City Corp USA was a holding company outside India hence, the Associated Enterprise was situated outside India. Hence, the transaction carried out by the Indian entity to a 3rd party at the behest of the foreign holding company was held to be falling within the ambit of section 92B(2) of the Act. Whereas, in the instant case as stated supra, both the comparable company as well as holding company are Indian resident entities and they do not fall within the definition of 'international transaction' as per section 92B(1) of the Act. Accordingly, he argued that the decision of the Hon'ble Jurisdictional High Court relied upon by the Id AR is factually distinguishable.

10.1.5. We are unable to comprehend ourselves to accept to this argument of the Id DR in view of the fact that once the particular comparable company transaction carried out at the behest of its Associated Enterprise does not fall within the ambit of definition of 'international transaction' u/s 92B(1) of the Act as argued by the Id DR, then the said comparable company would be automatically out of the zone of comparability with the international transaction carried out by the assessee herein. The case of the Id DR is that there was no international transaction per se carried out by the comparable company in terms of section 92B(1) of the Act. If that is so, then how the said comparable company can at all be considered as a comparable while benchmarking the international transaction of the assessee. On this limited ground itself, we hold that Infinite Data Systems Pvt. Ltd deserves to be excluded from the final set of comparables with the assessee and deserves to be excluded.

10.1.6 As per section 10B(1)(e) of the Income Tax Rules, the Arms Length Price in relation to international transaction under TNMM should be determined by comparing the net profit margin realized by the assessee from an international transaction entered into with the AE that the net profit margin realized by the unrelated or uncontrolled entity from international transaction. The case of the revenue before us is that the transaction entered into by Infinite Data Services Pvt. Ltd with Fujitsu Services Ltd at the behest of Infinite Computer Solution India Ltd (India entity which is a holding company of the comparable company) does not fall within the ambit of definition of international transaction as per section 92B(1) and 92B(2) of the Act. The logical conclusion then would be that the said comparable would become automatically outside the scope of comparability per se. Hence, even as per the Rule i.e. 10B(2) the said comparable company

cannot be treated as comparable with the assessee and deserves to be excluded.

10.2. **Exclusion of E-Infochips Bangalore Ltd**

The assessee pleaded that the said company is Information Technology (software development) and information technology enables services (ITES) i.e. BPO services company. Hence, it was pleaded that the said company is not functionally comparable with that of the assessee company which is only into software development. The Annual Report of the said comparable company for the year ended on 31.03.2010 is enclosed at pages 20 to 37 of the Annual Reports Paper Book. The assessee pleaded that as per the notes of accounts of the said comparable from audited financial statements, it had shown earnings in foreign currency as under:-

Particulars	31.03.2010	31.03.2009
Software Development	371,388,107	476,243,642
Consultancy charges	59,075,371	27,415,329

10.2.1. Further, vide Point No. 9 of the notes on accounts of the audited financial statements , it is mentioned as under:-

"Company is engaged in the development and maintenance of computer software. The production and sales of software cannot be expressed in any generic unit. Hence, it is not possible to give the quantitative details of sales and certain other information as required under para 3, 4C and 4D of the Part II of Schedule VI to the companies Act, 1956.

10.2.2. Further, vide point No. 16 of notes on accounts, containing 'Segment Information', it has been mentioned as under:-

Segment Information

Information about primary segment

The company is primarily engaged in the software development and IT enabled services. This is considered the only reportable business segment as per accounting standard AS-17 "segment reporting" issued by mandatory accounting standards prescribed in Companies (Accounting Standard) Rules, 2006 and the relevant provisions of companies Act, 1956.

Information About secondary segment

Sales by market - the company has only one geographical segment, i.e. USA.

10.2.3. Accordingly, it was pleaded that no segmental data is available from the financial statement of the comparable company for bifurcating revenue and margins of IT segment and ITES segments. This fact was duly brought to the notice of the Id DRP by the assessee. Accordingly, the assessee pleaded that the functions of the comparable company are dissimilar with that of the assessee company and the segmental data for IT segment alone is also not discernable from the audited financial statements of the comparable company. The Id AR also placed reliance on the coordinate bench decision of this tribunal in the case of Alcatel-Lucent India Ltd Vs. DCIT in ITA No. 6856/Del/2015 dated 24.08.2016 for AY 2011-12, wherein, under identical circumstances, E-Infochips Bangalore Ltd was considered to be functional dissimilar to software development services by holding that the said comparable company is engaged in diversified services like IT enables services, development of software products and solution for product design and development, quality assistance and certification, reengineering, sustenance and volume production, software consultation of manufacturing EVM and VDM electronic board etc. Further it was held that the comparable has varied revenue mix i.e. earning revenue from software development, hardware maintenance and information technology consultancy services. It was

further observed that no segmental information was available in the Annual Report of the company as it records revenue from sales of products and revenue from software development and hence the margins from software development services alone could not be deduced and the impact of the revenue from software production on overall profit from the common pool of income from both streams of software products and software services could also not be deduced. It is pertinent to note that this order of the tribunal was upheld by the Hon'ble Jurisdictional High Court in ITA No. 515/2017 dated 18.07.2017, wherein, the Hon'ble High Court did not allow the question raised by the revenue to exclude E-Infochips Bangalore Ltd from the list of comparable companies for software development companies and upheld the factual findings of the tribunal.

10.2.4. Per contra, the Id DR referred to the Annual Report of the said comparable company and drew our attention to page 27 of the PB therein containing the schedule of income from software services and stated that both income from software services and consultancy charges were grouped by the said comparable company as revenue from software services only. Accordingly, he argued that the said comparable company would be functionally comparable with the assessee. With regard to non availability of segmental data, he argued that even though it is mentioned in the segment information vide note 16 of the Annual Report, that the said comparable company is engaged in the IT and ITES, but the entire income is earned only from IT sector and accordingly, the same is comparable with that of the assessee. Further, the Id DR argued that for ITES, communication expenditure would be very high whereas from the schedule 8 of the annual financial statement under the head software development expenses, the comparable company has incurred communication expenses of Rs. 35.16 lacs only which goes to prove that there is no

ITES income earned during the year at all and accordingly, the same would be comparable with that of the assessee.

10.2.5. We are unable to accept to the contentions of the Id DR in view of the fact that in the Annual Report of the said comparable company, it is clearly mentioned that the said company is engaged in both IT as well as ITES. Further, the comparable company is also engaged in hard core reengineering apart from earning revenue from sales of computer software and products. The segmental data does not give break up of revenue bifurcating the revenue as well as the margins earned from aforesaid different streams of income. Hence, the margin on software development segment alone cannot be properly deduced from the data available in the audited financial statements of the comparable company. Hence, the reliance placed by the Id AR on the decision of the Delhi Tribunal in the case of Alcatel-Lucent referred (supra) is squarely applicable to the facts of the case. It is also pertinent to note that the said decision has been approved by the Hon'ble Jurisdictional High Court. Hence, we hold that in view of the aforesaid observations and respectfully following the judicial precedents relied upon hereiabove, we hold that E-Infochips Bangalore Ltd should be excluded from the final set of comparables while benchmarking the software development services of the assessee.

10.3. Exclusion of Sonata Software Ltd

As stated earlier, the Id. TPO had applied related party transaction (RPT) filter up to 25% to include the particular comparable. The Id TPO for the instant case had applied RPT filter upto 25% for both the expenses and income side in aggregate. Accordingly, the entire expenses and income side vis a vis the transactions of the comparable company with its related parties are as under:-

Nature of related party transaction	Amount (in INR)
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<i>Purchase</i>	24,293,864
<i>Deputation expenses</i>	110,782,495
<i>Service charges</i>	130,664,264
<i>Services rendered</i>	1,005,194,944
<i>Living / sustenance allowance</i>	43,555,884
<i>Travelling expenses</i>	6,542,614
Total related party transactions (A)	1,321,034,065
<i>Service revenue (B)</i>	2,360,942,195
RPT as a % of sales (A/B)	55.95%

10.3.1. The Annual Report for the year ended 31.03.2010 of Sonata Software Ltd from where the aforesaid figures could be verified is enclosed in pages 38 to 122 of the Annual Reports Paper Book. This fact was also pointed out by the assessee before the Id TPO. But the Id TPO ignored the components of services rendered of 100.51 crores and living / sustenance allowance of Rs. 4.35 crores from the aforesaid table, arrived at the related party transaction as a percentage of sales of 11.93% and included this comparable company to have passed the RPT filter applied by the Id TPO.

10.3.2. The Id AR placed on record the details of value of services rendered to each of its AEs as under:-

Name of the AE	Transaction undertaken during the year
Sonata Software North America Inc.	56,62,32,408
Sonata Software GmbH	5,33,46,999
Sonata Europe Limited	1,46,59,668
TUI InfoTec,	29,57,40,182
Sonata Software FZ LLC,	7,52,15,687
Total Related party transaction with AE (A)	1,00,51,94,944
Service revenue (B)	2,360,942,195
RPT as a % of sales (A/B)	42.57%

10.3.3. However, there is no factual finding by the lower authorities with regard to aforesaid table submitted by the Id AR. Hence, we deem

it fit to restore the inclusion of this comparable alone to the file of the Id AO/ TPO for verification of the facts of the aforesaid table i.e. partywise details submitted by the Id AR herein above. If on verification, it is found that the aforesaid details mentioned by the Id AR are correct, then the said comparable should be excluded from the final list of comparables while benchmarking the international transaction of software development segment of the assessee.

10.4. Exclusion of Infosys Ltd

The turnover of the assessee in software development segment is Rs. 95,43,86,355/-. The Id AR pleaded that Infosys Ltd is a giant in the software industry having a big brand and premium brand of its own and practically dominates the software market. Accordingly, it owns lot of intangibles and is able to expand its valuable trademark namely Infosys. The assessee before us does not own significant intangibles like Infosys and accordingly, the Id AR pleaded Infosys to be excluded from the final set of comparables. Further, the Id AR stated that assessee herein is a captive service provider to its AEs in the software development segment, whereas Infosys is providing software development services to various parties and is enjoying huge economies of scale because its brand, volume of business and its years of existence in the software field. Accordingly, it would be able to enjoy the advantage of premium in its pricing eventually leading to higher profitability. These facts are conspicuously absent in the assessee company. Further the Id. AR submitted that Infosys Ltd is also into diversified activities having diversified products. The total revenue earned by Infosys from products was Rs. 925 crores for the relevant year. The Id AR before us though conceded that having higher turnover may not be a relevant consideration for the purposes of ignoring a particular comparable company, further pleaded that the fact of existence of the said comparable company in the IT field for

almost three decades would certainly given them an edge in the overall pricing of the services to be rendered and for the software products developed by them. This would certainly make the assessee company incomparable with Infosys.

10.4.1. Per contra, the Id DR submitted that the assessee did not object to the inclusion of L&T Infotech Ltd having turnover Rs. 1800 crores approximately and Mindtree Consultancy having turnover of Rs. 1232 crores approximately. Even these two companies are in the field for more than two decades and enjoying huge brand value and economies of scale and always would have edge over the pricing. The Id DR vehemently relied on the comparison chart made by the Id TPO in his order mentioning the margins earned by Infosys from 1997-2012 wherein, it could be seen that the margin from the software segment remain almost same despite huge turnover earned by the said company. With regard to non availability of brand with the assessee company, the Id DR vehemently argued that Delphi has huge brand value in automotive sector having presence in 32 countries. Hence, the assessee company would be entitled to be compared with Infosys Ltd.

10.4.2. In rebuttal, the Id AR stated that under similar facts and instances to consider the fact that Infosys Ltd is inter alia engaged in development and sales of various software products, the coordinate bench of Delhi Tribunal in the case of Agniti India Technology Pvt. Ltd Vs. ITO in ITA No. 3856/Del/2010 dated 04.11.2010 for AY 2006-07 held that Infosys Ltd is not good comparable with the company which is low risk captive service provider due to giant size and existence in the field for several years enjoying premium in pricing. We have gone through the said decision of the Tribunal relied upon by the Id AR and we find that this decision was appealed by the revenue before the

Hon'ble Delhi High Court and the Hon'ble Jurisdictional High Court in ITA No. 1204/2011 dated 10.07.2013 had held that reasoning given by the Tribunal for exclusion of Infosys Ltd to be correct and accordingly Infosys should not be treated as good comparable with a captive service provider in software segment. Similar view was also expressed by the Hon'ble jurisdictional High Court in the case of PCIT Vs. Oracle (OFCS) BPO Services Pvt. Ltd in ITA No. 124/2018 dated 05.02.2019 wherein, Wipro Technologies Ltd was excluded on the basis of premium brand existing with them which would certainly play a significant role to have a premium in pricing and would enhance the ability to garner profits and negotiate contract more in their favour. It is also pertinent to note that Special Leave Petition was preferred by the revenue against this contention which was dismissed by the Hon'ble Supreme Court in SLP(Civil) Diary No. 32469/2018 dated 30.11.2018. We are conscious of the fact that though the aforesaid decisions were not rendered for the AY 2010-11, still it would hold the field in view of the fact that functions performed by Infosys Ltd and assessee company had not changed substantially from AY 2006-07 to AY 2010-11. Respectfully following the said decisions, we hold that Infosys Ltd should not be treated as a comparable with low risk Captive Service Provider like that of the assessee company. Accordingly, we direct the Id AO/ TPO to exclude Infosys Ltd from the final set of comparables while benchmarking the international transaction of software development segment.

10.5. Exclusion of Thirdware Solution Ltd

The copy of the Annual Report of this comparable company for the year ended 31.03.2010 is enclosed in pages 361 to 420 of the Annual Reports Paper Book. This company is engaged in software product development, implementation and consulting services of software

based on ERP and Business Intelligence. The Id AR pleaded that the said company is functionally dissimilar with the assessee company. We find from the audited financial statements in Schedule 12 under the head "sales", the said comparable company has derived revenue from subscription, sales of license, software services amongst others. This goes to prove that this comparable company is selling software products license apart from software services and on perusal of the audited financial statement containing the segmental data, we find that there is no break up of revenue from subscription, sales of license and software services and the related margins thereon. Hence, in the absence of segmental data for each category of income, this comparable deserves to be excluded from the final set up comparables. Further, we notice from the profit and loss account, a sum of Rs. 11.40 crores was paid as outsourcing charges by the said comparable company which goes to prove that the services are rendered by the said comparable companies to its AEs by outsourcing the activity. No such outsourcing activity is done for the assessee. Hence, the business model of the said comparable company to this extent becomes incomparable with that of the assessee.

10.5.1. The Id DR vehemently pleaded that the Hon'ble Delhi High Court in the case of JCIT Vs. Steria India Pvt. Ltd reported in 255 Taxmann 110 had included Thirdware Solution to be a good comparable. However, he fairly stated that Id TPO had taken entire margins of this comparable company and pleaded that Id TPO be directed to take the financials of only overseas segment qua the software development and derive the margins and include the same in the list of comparables with the assessee. With regard to reliance placed by the Id AR on the decision of the Hon'ble Delhi High Court in the case of Open Solutions Software Services Pvt. Ltd in ITA No. 201/2018 dated 18.05.2020, the Id DR stated that in that case, the

revenue had not disputed the factual position. Here the revenue had disputed the factual position before the Tribunal and hence no reliance should be placed on the said decision of the Hon'ble High Court.

10.5.2. We find that the Hon'ble Delhi High Court in the case of PCIT Vs. Open Solution Software Service Pvt. Ltd in ITA NO. 201/2018 dated 18.05.2020 had upheld the findings of the Tribunal that in the absence of segmental data to work out the separate margins from software services, Thirdware Solutions cannot be held to be comparable with any assessee engaged in software development. Similar view was also taken by the Hon'ble Delhi High Court in the case of PCIT Vs. FISERV India Pvt. Ltd in ITA NO 17/2016 dated 06.01.2016. Hence respectfully following the aforesaid decisions of Hon'ble Jurisdictional High Courts, we hold that Thirdware Solution Ltd should be excluded from the final list of comparables while benchmarking international transaction of software development segment of the assessee.

10.6 **Exclusion of Persistent Systems Ltd**

10.6.1 Persistent Systems Ltd is engaged in the business of development and sale of software products. The audited financial statements of this comparable company for the year ended on 31.03.2010 are enclosed in pages 421 to 600 of the Annual Report Paper Book. In the Annual Report of the said company it has been mentioned that the said comparable company had released 3000 plus products in the last five years and catered to 300 customers across the globe. Further, Outsourced Software Products Development (OPD) is being developed by this comparable company and this comparable is a clear leader in the world of OPD, an emerging category in the outsourced software industry. The Annual Report of the said comparable company also categorically states that OPD is completely

different from outsourced IT service. The Annual Report clearly goes to prove that the said comparable is into the business of software products apart from software development and their focus is more on product development. The revenue model of the said comparable company clearly shows software services produce (export) of Rs 4739.62 million and software service and product (domestic) of Rs 304.31 million for the year under consideration. There is no absolutely break-up of the revenue earned out of software services and out of product development. Segmental data to that effect is not available in the Annual Report.

10.6.2. Per Contra, the Id DR argued that the Delhi Tribunal in the case of Steria India Pvt. Ltd dated 28.09.2020 in ITA No. 5745/Del/2018 for AY 2014-15 after considering the similar lines of arguments had held that this comparable company to be a good comparable with software development. Further, the Id DR relied on the decision of the Delhi Tribunal in the case of Motherson Sumi Infotech & Design Ltd. Vs. Assistant Commissioner of Income-tax reported in 112 taxmann.com 300 for AY 2007-08 in which case, the Id AO had sought information 133(6) of the Act wherein, the concerned comparable company had reported that software product solutions constitute only 0.73% of turnover of that comparable company. With these arguments, the Id DR insisted that the Id TPO was justified in considering Persistent Systems Ltd as good comparable.

10.6.3. First of all, we find that the decision of Motherson Sumi Infotech & Design Ltd is factually distinguishable as the information was obtained by the AO in that case u/s 133(6) of the Act from the comparable company for AY 2007-08 and we are in AY 2010-11 here. No factual details were available from the side of the revenue to prove

what is the revenue earned from software products sales by the said comparable company during the year under consideration. As stated earlier, it is a fact that no segmental data of revenue from software services and revenue from software products sales (both export and domestic) is available from the financial statement or any other information in public domain. With regard to reliance placed by the Id DR on the coordinate bench decision in case of Steria India Ltd for AY 2014-15 dated 28.09.2020, we find that this Tribunal for the same assessee for AYs 2010-11 and 2011-12 in ITA No. 512 and 511/Del/2016 respectively dated 17.11.2020 had categorically held that Persistent Systems Ltd is a product development company and cannot be compared with routine software development provider. It is also pertinent to note that this decision dated 17.11.2020 has been rendered subsequent to the decision relied by the Id DR which was rendered on 28.09.2020. Further, we also find that this Tribunal in the case of Saxo India Pvt. Ltd Vs. ACIT in ITA No. 6148/Del/2015 dated 05.02.2016 had categorically held that Persistent Systems Ltd is functionally different from a regular software service provider and there was insufficient segmental information with regard to sale of software services and sale of software products. It is pertinent to note that the revenue had carried this matter before the Hon'ble Jurisdictional High Court and Hon'ble Delhi High Court in ITA 682/2016 dated 28.09.2016 had upheld the findings of the Tribunal. Further, the Hon'ble Delhi High Court in the case of PCIT Vs. Open Solutions Software Services Pvt. Ltd in ITA No. 201/2018 dated 18.05.2020 had also held that Persistent Systems Ltd had upheld findings of the Tribunal which held this comparable company is predominantly engaged in the product development and hence cannot be compared with routine software services provider. Further, the Tribunal had also held that segmental data is not available in the public domain. This

finding of the Tribunal has been upheld by the Hon'ble Delhi High Court.

10.6.4. In view of the aforesaid observations and respectfully following the judicial precedents relied upon herein above more particularly the decisions of Hon'ble Jurisdictional High Court, we hold that Persistent Systems Ltd to be functionally not comparable with that of the assessee company and also in the absence of segmental data. Accordingly, we direct the Id AO/ TPO to exclude the same from the final set of comparables while benchmarking international transaction of the assessee in respect of software development segment.

10.7. **Exclusion of E-Zest Ltd**

This comparable company is engaged in development and sale of software products. The audited financial statements of this comparable company for the year ended on 31.03.2010 are enclosed in pages 601 to 632 pages of the Annual Report Paper Book. The Id AR argued that from the Annual Report of the comparable company, it could be seen that it is engaged into diversified range of software activities and more into product engineering and product development. He drew the attention of the bench the submissions made before the Id DRP explaining the various functions performed by the said comparable company which makes it incomparable with a routine software service provider like that of the assessee.

10.7.1 Per contra, the Id DR argued that broader functionally comparability is to be seen under TNMM. The Id DR referred to the observations made by the Id TPO in this regard. The Id TPO had stated that this comparable company is providing specialized services within the field of software development services but these are services and development of product design. The inventory of products reflected in the financial statement just represent 7.8% of the sales and observed

that it is not a product development company. We find that this Delhi Tribunal in the case of JCIT Vs. Steria India Pvt Ltd for AY 2010-11 in ITA No. 512/Del/2016 dated 17.11.2020 had considered the identical observations made by the Id TPO and the arguments advanced by the Id DR before us in the instant case and held that the said comparable company is engaged into diversified range of software activities and is ISO-9001:2008 certified product engineering and software development company, having special expertise in emerging technology such as cloud computing, business intelligence and mobility and it has been serving client of more than 8 industries across the globe with over 2000 professionals on board. The product engineering services/ outsourced product development services of this company include the product design and development, product feature enhancement, product volume migration, software product testing, product maintenance and support, produce release and license management, SAAS/ SOA services, Web 2.0 services etc; enterprises application development services include customer relationship management, enterprises resource planning, business intelligence, knowledge management, enterprises application integration, consulting etc; ID Services include global offshore software development, custom software development/ bespoke software development, intelligent software testing RIA/ AJAX application development etc and technology expertise of this company include the technology competency centre in relation to Microsoft Competency Centre, Sun Java Competency Centre, Open Source Competency Centre, Cloud Computing practice, mobility practice and BI practice. Accordingly, this Tribunal have concluded that this comparable company is rendering product development services and high end technology services which come under the Knowledge Process Outsourcing (KPO) services and cannot be comparable with Captive Software Development company like assessee. Respectfully following

the said decision, we hold that this comparable company is functionally different from the assessee company and accordingly, we direct the Id AO/ TPO to exclude the same from the final set of comparables while benchmarking the international transaction by the assessee in respect of software development segment.

10.8. **Exclusion of Tata Elxsi**

This company is engaged in the business of systems integration and support services by catering to the domestic market and offers integrated hardware and packaged software solutions from principles, apart from rendering software development and services. The Annual Report for the year ended 31.03.2010 of this comparable company is enclosed in pages 633 to 708 of the Annual Report Paper Book. In the directors report, the activities carried out by this company are described as under:-

"Software Development & Services:

The businesses constituting this segment are Product Design Services (Design & Development of Hardware and Software), Innovation Design Engineering (Mechanical Design with a focus on Industrial Design) and Visual Computing Labs Division (Animation and Special Effects). For the reasons mentioned above, the business in this segment dropped to Rs 336.94 crs during 2009-10 from Rs. 378.43 cr. in the previous year with corresponding decrease in the segment results to Rs 57.67 cr. from Rs.70.55 cr

Product Design Services:

Your Company's Product Design Services (PDS) Division provides offerings in multiple domains such as Broadcast, Wireless Transportation, Convergence, DSP, Graphics and Imaging and Semicon and services markets such as automotive, aerospace, consumer products, networking, semiconductors, multimedia, telecom and instrumentation with cost effective and timely product engineering services. Your Company is also moving towards solutions based offerings rather than point service engagements with a view to increasing its value proposition thereby Your Company sees growth opportunities in the telecommunication and broadcasting domains where there have been good breakthroughs achieved during 2009-10, apart from accelerating its growth in the other key domain of transport electronics. Your Company has identified new business in defence and public safety, avionics and utilities and smartgrid applications which should drive its future growth.

Innovation Design Engineering Services:

This Division supports global corporations in the area of new brand/product introduction from concept to market. Its expertise lies in the areas of consumer insights, product/service innovation, industrial design, functional prototyping and engineering. It also engages in brand development and retail design. It services diverse industries ranging from FMCG, automotive, electronics and appliances to healthcare.

During the year, the Division entered into an alliance with a leading hospital to jointly develop innovative healthcare devices with an emphasis on user and functional efficiencies: It also further strengthened its range of services in the areas of branding, signages and virtual marketing. It was involved in the creation of the marketing content for the launch of a new vehicle for one of India's leading automotive companies and also won a significant order for signages and graphic design from a metro transport operator. This is a testimony of the Division's capabilities to address emerging areas of design where design is adding exponential value to the end product. Another area of growth for the Division is the defence and aerospace sector, considering the potential of design services for these industries. The expertise in these areas are scalable and the Division is hopeful of similar future opportunities.

Visual Computing Labs:

This Division delivers 3D computer graphics, animation and special effects in the pre-production, production and post-production of content for the film, television, gaming and advertising industry.

During the year, an overseas VFX studio was set up at Santa Monica near Hollywood, which is the heart of the global film industry, and staffed with local industry veterans to address the VFX requirements of the Hollywood industry. The studio represents a strategic move by the VCL Division to establish its capabilities and credibility in the local markets of Hollywood and overcome the constraint of having a remote studio located in India which was perceived as an obstacle to getting more business from the Hollywood industry. Hence, while the studio in Santa Monica would 3D animation Industry has remained challenging in 2009-10, with no new project announcements. During the year, this Division also won several prestigious awards for its technical expertise, the most notable of which were the National awards from the President of India for the work done on the films "Roadside Romeo" and "Mumbai meri Jaan Some of the other international awards include Cairo International Film Festival, Golden Panda Award and London International Creative Competition

Systems Integration & Support

This Segment is involved in value-added reselling involving systems integration and support for a wide range of technical computing hardware and software solutions involving high-end computing

platforms, mechanical design automation tools, enterprise storage solutions, digital media and life sciences solutions through its tie-ups with global leaders in these respective areas. During year, the segment turnover and results were Rs 39.43 crs, and Rs 3.08 crs, respectively, compared to Rs.40.09.crs, and R\$2.34 0 respectively during 2008-09.

Due to the low margins on hardware products, the Segment is focusing on a solutions centric approach which includes more of software and services and reducing its dependence on pure hardware business. The segment has geared itself to tap business opportunities in the high growth areas of security and surveillance, videoconferencing solutions, storage and server virtualization software and services etc.”

10.8.1. The revenue stream indicates that this comparable had earned income from sales and support of Rs. 3167.51 lacs and income from service of Rs. 35469.53 lacs for the year under consideration. However, segmental data is available in the software development and services vide note 29 of the Notes of accounts. The Id DR drew our attention to the Director’s report in page 663 of the Annual Report Paper Book and submitted that this company is predominantly a software development company and that the other activities carried out by the company is only 10% of total revenue and software development services constitutes 90% of the total revenue. The Id DR relied on the decision of the Delhi Tribunal in the case of Toluna India Pvt. Ltd. VS. ACIT (2014) 151 ITD 177 which is rendered for AY 2007-08 dated 26.08.2014 wherein, it was held in para 20.2 that this company is functionally comparable with the software development as predominantly services rendered by this company is only routine software development services.

10.8.2. The Id AR relied on the coordinate bench’s decision of the Delhi Tribunal in the case of Agilis Information Technologies International Pvt. Ltd Vs. ITO in ITA No. 787/Del/2015 dated 26.06.2015 rendered for AY 2010-11 (i.e. year under consideration before us in the case of the assessee herein) which inturn had relied on the decision of

Hyderabad Tribunal in the case of Adaptech India (P) Ltd Vs. ITO in ITA No. 481/Hyd/2011 and held that this comparable company is engaged in the development of Niche product and had to be considered incomparable with the routine software service provider. It is pertinent to note that this order of the Hyderabad Tribunal was upheld by Hon'ble High Court of Andhra Pradesh and Telangana in ITA No. 638 of 2014. Similar view was taken by the Mumbai Tribunal in the case of Telcordia Technologies India Pvt. Ltd Vs. ACIT 7821/Mum/2011. It is further pertinent to note that this decision of the Tribunal in case of Agilis Information Technologies International Pvt. Ltd referred (supra) has been approved by the Hon'ble Jurisdictional High Court in ITA No. 907/2015 dated 08.02.2016 wherein, the Tribunal order has been upheld and appeal of the revenue was dismissed. In view of the decision of the Hon'ble Jurisdictional High Court referred (supra) which has got more binding force than the decision of the Delhi Tribunal relied upon by the Id DR referred (supra), we direct the Id AO/ TPO to exclude Tata Elxsi Ltd from the final set of comparables treating it as functionally not comparable with the assessee while benchmarking the international transaction in respect of software development segment.

10.9. **Exclusion of Evoke Technologies Ltd**

Exclusion of Evoke Technologies Ltd was stated to be not pressed by the Id AR at the time of hearing. Same is reckoned as a statement made from the bar and accordingly, we hold that the exclusion of Evoke Technologies Ltd has been rightly done by the Id TPO in the instant case.

11. The ground raised by the assessee in Ground Nos. 2 and 2.1 are disposed of in the above mentioned terms.

12. Ground No. 3.1 and 3.2 raised by the assessee are challenging the transfer pricing adjustment of Rs. 1,15,08,130/- to the Arm's Length Price of international transaction of business support services rendered by the assessee.

13. We have heard the rival submissions and perused the materials available on record. During the financial year 2009-10, the assessee provided Business Support Services amounting to Rs. 7,82,10,694/- to its associated enterprise. The company provides low end back-office administrative support services to its AEs. These services primarily include procurement support activities to its AEs for sourcing automotive components from India and other countries. In this respect, the assessee maintains contact and product details of various suppliers of automotive components in India as well as overseas, and provides these details to its AEs on the basis of which the AEs contact its vendors/suppliers and enter into discussions for sourcing components directly from such vendors. The assessee is not involved in the transaction between the AE and the supplier at all, and does not secure orders or negotiate on behalf of its AES. It only provides basic preliminary information about the vendors to its AES. The assessee also provides payroll support for its employees sent on secondment to its AES. Additionally, the assessee renders other administrative support activities like public relations and corporate communication services to its AES. For rendering the aforesaid risk free services, the assessee is remunerated for the functions performed and risks assumed on a cost plus mark-up of 5%.

14. The assessee benchmarked this international transaction by adopting TNMM method as the Most Appropriate Method (MAM). The Profit Level Indicator (PLI) adopted by the assessee was OP/OC. The

assessee considered four comparables who are engaged in similar line of activities as under:-

S.No.	Name of the company	Weighted average of operating profits on operating costs (%)
1.	Asian Business Exhibition & Conferences Ltd.	18.10 %
2	Educational Consultants (India) Limited (Segmental)	4.37%
3.	IDC India Limited	12.30%
4.	Times Innovative Media Ltd (Segmental)	-2.21%
	Arithmetic mean	8.14%

15. Since, the average margin of comparable companies was 8.14%, this when compared with assessee margin of 5% was well within the +/- 5% tolerance band and the assessee concluded that its international transaction of rendering business support services to its AE were at arm's length. The Id TPO pursuant to the directions of the Id DRP considered the following final set of comparables as under:-

S. No.	Name of the company	OP/OC (%)	WC Adjusted OP/OC
1.	Apitco Limited	40.09	29.25
2.	Alphageo (India) Limited	23.70	22.14
3.	Mitcon Consultancy Services Limited	37.07	40.15
4.	HCCA Business	20.22	18.73
5.	ICRA Management Consulting Services Limited	4.06	-5.09
6.	Cyber Media Online	35.14	26.63
7.	IDC (India) Limited	14.85	11.33
	Average	25.02%	20.45%

16. Accordingly, the Id TPO made an adjustment of Rs. 1,15,08,130/- as under:-

Particulars	Amount (INR)
<i>Operating Cost</i>	7,44,86,280
<i>Arm's Length Margin (%)</i>	20.45%
<i>Arm's Length Price (ALP)</i>	8,97,18,724
<i>Price received</i>	7,82,10,594
<i>Shortfall being adjustment u/s 92CA</i>	1,15,08,130

17. The assessee seeks to exclude certain comparables chosen by the Id. TPO in this appeal.

18. Exclusion of Apitco Ltd

The Id AR submitted that Apitco Ltd is one of the 18 TCOs formed by the key national level financial institutions in association with state level institutions and banks. Accordingly, being a Govt. enterprise, Apitco Ltd was established to provide high end and technical consultancy services to other Govt. Companies and body corporate. This company was also involved in high end technical consultancy related to asset reconstruction and management services, micro enterprises development, skill development, entrepreneurship development, cluster development among other activities. The financial statements of Apitco Ltd for the year ended on 31.03.2010 are enclosed in pages 709 to 746 in Annual Report Paper Book. There is absolutely no dispute that this comparable company is a Govt. company and is subjected to audit and review by Comptroller and Auditor General (C&AG) of India u/s 619(4) of the Companies Act, 1956. This fact goes to prove that the said comparable is indeed a Govt. Company. Now the short issue that arises is whether a Govt. company could be considered as a comparable company with that of the private ITES service provider. It is a known fact that Govt enterprises operate on a model of zero risk with no profit intent, hence, the Govt. company cannot be compared with the private enterprises. This issue is no longer res integra in view of the decision of the Hon'ble Jurisdictional High Court in the case of PCIT Vs. International SOS Services India Pvt. Ltd in ITA 454/2016 dated 30.05.2017 wherein, it was held as under:-

"7. The Assessee's appeal before the ITAT was allowed in part by the impugned order. After discussing the comparables as finally approved by the DRP, the ITAT drew a distinction between 100% government owned companies and private companies and gave its reasons why the government companies would not be appropriate comparables when the ALP of international transaction involving private companies is being examined. The ITAT, therefore, held that ECIL, ITDCL and Apitco being 100% government companies are to be excluded as

comparables. The final list of comparables as approved by the ITAT included just four of the comparables.

8. Mr. Ruchir Bhatia, learned counsel appearing for the Revenue, submitted that there was no logic in excluding 100% government owned companies from the list of comparables only because the profit motive is not the only relevant consideration in the case of a government undertaking. He submitted that no reasons whatsoever have been given by the ITAT for excluding Apitco Limited as a comparable.

9. Mr. Neeraj Jain, learned counsel for the Assessee, on the other hand pointed out that the Mumbai Bench of the ITAT has in an order dated 27th February, 2013 in the case of ThyssenKrupp Industries India Pvt. Ltd. excluded 100% government owned companies as comparables for the same reasons given by the ITAT in the present case. That decision of the Mumbai Bench of the ITAT was affirmed by the Bombay High Court in its judgment dated 28th March, 2016 in ITA No. 2218 of 2013 (CIT v. ThyssenKrupp Industries India Pvt. Ltd.).

10. The Court on perusing the aforementioned judgment of the Bombay High Court finds that in para 4(a) and 4(b) of the said order the Bombay High Court has held that the view taken by the Mumbai Bench of the ITAT "is a reasonable and plausible view." It noted that the ITAT, Mumbai Bench had held that the Engineers India Ltd. could not be considered to be comparable for the reason "that contracts between Public Sector Undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable." Interestingly in the present case the Assessee itself picked up two of the 100% government owned companies namely ECIL and ITDCL as its comparables but that was not accepted by the TPO or the DRP. The reason for the ITAT excluding Apitco as a comparable is also for the same reason that it was a 100% government owned company.

11. The Court finds that the view taken by the ITAT in the present case, which is consistent with the view expressed by the Mumbai Bench of the ITAT and which has been affirmed by the Bombay High Court, is indeed a plausible one to take.

12. Whether taking up a 100% government owned company as a c would be justified or not would depend on the facts and circumstances of the case. The basic rule as contained in Rule 10B of the Income Tax Rules would apply. In the facts of the present case, however, the Court finds tha the view taken by the ITAT does not give rise to any substantial question of law.

13. The appeal is dismissed."

18.1. It is also pertinent to note that against this decision, the revenue carried the matter before the Hon'ble Supreme Court and the Special Leave Petition in Civil Appeal No. 18255/2018 dated 03.07.2018 was dismissed by the Apex Court.

18.1.1. Per contra, the Id DR vehemently argued that the assessee itself had included Educational Consultants (India) Ltd as one of the comparable in its TP Study report, which is also a public sector undertaking. In principle, we hold that the Govt. company cannot be compared with private enterprises at all in view of the reasons mentioned hereinabove. Hence, merely because the assessee itself included a particular public sector undertaking as a comparable company, it cannot be held that company would become a proper comparable with that of private enterprises. Moreover, this aspect is also considered by the decision of the Hon'ble Jurisdictional High Court referred (supra). Accordingly, we have no hesitation in directing the Id AO/ TPO for excluding Apitco Ltd from the final set of comparables while benchmarking the international transaction of ITES services of the assessee.

18.2. **Exclusion of Alphageo (India) Ltd**

This company's business consists of one of the reportable business and geographical segment of seismic data acquisition and its relates to services within India. The company also conducts 2D seismic and 3D seismic operations. The audited financial statements of this comparable company for the year ended 31.03.2010 are enclosed in pages 747 to 846 of the Annual Report Paper Book. From the perusal of the same, we find that the revenue has been generated predominantly out of six projects which was related to 3D seismic and 2D project seismic surveys which is a high value business and whereas, the assessee herein is engaged in providing low risk captive

ITES services to its AEs. Hence, this comparable company becomes functionally not comparable with that of the assessee. Further, we find that this comparable company is held not a proper comparable with low end ITES service provider by the decision of the Hon'ble Bombay High Court in the case of PCIT Vs. Sygenta Bioscience Pvt. Ltd in ITA No. 753/2017 dated 16.09.2019. Further, we find that the coordinate bench of Delhi Tribunal in the case of DCIT Vs. Siemens Power Engineering Pvt. Ltd in ITA No. 4754/Del/2014 dated 15.04.2019 had also taken the same view. Respectfully following the aforesaid decisions, we hold that Alphageo (India) Ltd deserves to be excluded as functionally not comparable from the final set of comparables while benchmarking the business support services of the assessee.

18.3. Exclusion of Mitcon Consultancy Services Ltd.

The audited financial statements of this comparable company for the year ended 31.03.2010 are enclosed in pages 547 to 912 of the Annual Report Paper Book. From the perusal of the same, it is found that the said company provides wide range of services in diversified fields such as corporate, industry, banking and the Govt. The nature of services provides by this comparable company varies from the power project to even serving entrepreneurs from small and medium enterprises in their startup efforts. This company is more into EPC consultancy services for 12 cogen power plants along with concurrent sugar factory modernization of Tamil Nadu Electricity Board; EPC consultancy services and Environment clearance for two integrated sugar, cogen power & ethanol plants in Bihar for Hindustan Petroleum Corporation Ltd., a major public sector client; Successful commissioning of 8 MW cogen power plant of Kranti SSK & 16 MW Cogen power plant of Yashwantrao Mohite Krishna SSK; Introduction of additional business lines like ESCo, Conditioning & Monitoring, Wind Resource Assessment & Micro sitting, Carbon Foot Printing etc.; Start

of project management consultancy services for Solar PV & Thermal and Small Hydro Electric Projects; Project Monitoring Consultancy (PMC) work bagged from Tamilnadu Mega Food Park.; Assignment received from Kolhapur Foundry Cluster under IIUS scheme of Govt. of India.; Environmental Clearance to Khed Economic Infrastructure Private Ltd., for about 100000 sq. feet construction area.; During the year, company carried out Environmental Monitoring, Analysis of Air, Water, Soil, Biogas Samples, Environmental Audits, Environmental Due Diligence/ESR, Consent to Establish / Consent to Operate, ELA/EMP/Environmental Clearances for various clients. During the year, company carried out various vocational training programmes under Prime Minister Employment Generation Programme (PMEGP), Special Component Plan (SCP), Swarnjayanti Gram Swarozgar Yojana (SGSY), Swarna Jayanti Shahari Rozgar Yojana (SJSRY) and Entrepreneurship Development Programmes for GOI. During the year, company provided services for promoting various Loan Schemes Training Programmes for Maulana Azad Minorities Financial Development Corporation Ltd. (MAMFDC), Mumbai. During the year, Vocational Training activities started at Delhi. Assignment received for conducting Training activities in North-Eastern States (Sponsored by Forward Market Commission, Govt. of India); Consultancy services provided successfully to Hand Made Paper Institute (HMPI) to lease out the production wing to private sector which helped the old and prestigious unit to retain its existence on profitable lines. Company provided consultancy for setting up of Indian Grape Processing; Board under Ministry of Food Processing Industries, Gol, New Delhi. During the year, Biotechnology Laboratory has started physical incubation in TBI, introduced Diploma in Industrial Biotechnology Course and launched franchisee model in Biotechnology courses. MITCON e-school, a franchisee model of the company has successfully launched Online Examination System. During the year, company has provided

consultancy services to various nationalized, private & co-operative Banks to recover their non-performing assets (NPA's).

18.3.1. The above wide range of services clearly proved that this comparable company is involved in high end consultancy services whereas, the assessee herein is low end captive service provider to its AEs. Hence, we hold that the said company is functionally not comparable with that of the assessee herein. Accordingly, we direct the Id AO/ TPO to exclude this comparable company from the final list of comparables while benchmarking the international transaction of the assessee in respect of its ITES segment.

18.4. Exclusion of HCCA Business

The audited financial statements of this comparable company for the year ended 31.03.2010 are enclosed in pages 913 to 931 of the Annual Report Paper Book. From the perusal of the same, the activities carried out by the said comparable company are not discernable at all. Functions performed by the assessee company is not discernable from the information available in the public domain such as audited financial statements. Then it would not be appropriate on the part of the Id AO/ TPO to refer to the information contained in the website of the comparable company. We find from the perusal of the Id TPO order, the assessee had provided information about the functions performed by the said comparable company based on the data available in the website of the comparable company. In principle, we do not uphold the view of placing reliance on any information that is available in the website of the company as it may not depict the true picture. Be that as it may, the Id TPO had already taken cognizance of the said information provided by the assessee by placing reliance on the website of the comparable company. From the perusal of the said information which are reproduced in pages 127 to 128 of

the order of the Id TPO, we find that the said company is involved in providing high end activities which required professional skill and domain expertise to render those services and accordingly would apparently fall under the category of Knowledge Process Outsourcing (KPO), thereby making it incomparable with the assessee company as it is low end Business Processing Outsourcing (BPO) services provider to its AEs. However, some of the activities carried out by this comparable company also falls within the ambit of BPO services. However, there is no segmental data available to ascertain the segmental margins from KPO services and BPO services separately. Hence, we hold that the said comparable company is required to be excluded from the final set of comparables while benchmarking the international transaction of the assessee in respect of its ITES segment.

18.5. Exclusion of Cyber Media Online Ltd

The Annual Report of this comparable company is enclosed in pages 932 to 998 of the Annual Report Paper Book for the year ended 31.0.2010. As per notes of accounts of this company enclosed in the audited financial statements, this company is engaged in the business management of online portal and which is identified as only primary business segment. Beyond this, no information is available in the audited financial statements to understand the detailed functions performed by this comparable company. But one fact is very clear that this company is engaged in media and media services, thereby making it completely functionally incomparable with that of the assessee company which is engaged in low risk captive ITES service provider to its AEs. Hence, we direct the Id TPO to exclude this company from final set of comparables while benchmarking the international transaction of the assessee in respect of its ITES segment of the assessee company.

18.6. The assessee also seeks to include Educational Consultants India Ltd as a comparable which was excluded by the Id TPO. It was pointed out by the Id DR that though this company is engaged in the business of provision of support services, it is also a company under the control of Govt. of India. As we have already held that the Govt company cannot be compared with the private concern like that of the assessee, we hold that this comparable company had been rightly excluded by the Id TPO.

18.7. With these above observations the grounds Nos. 3, 3.1 and 3.2 raised by the assessee are disposed of in the above mentioned terms.

19. Ground No. 4 and 4.1 raised by the assessee are challenging the transfer pricing adjustment of Rs. 63,30,719/- to the ALP of international transaction undertaken in relation to manufacturing segment of the assessee.

19.1. We have heard the rival submissions and perused the materials available on record. We find that the Id AO/ TPO pursuant to the directions of the Id DRP had arrived at the final set of comparables in the manufacturing segment of the assessee and after granting working capital adjustment thereon as under:-

SNo	Name of the company	Companies considered after DRP OP/OI (WC adjusted)
1	A N G Industries Ltd.	6.37%
2	Banco Products (India) Ltd.	20.36%
3	Precision Camshafts Ltd.	20.13%
4	Rane Engine Valve Ltd.	4.71%
5	Roots Industries India Ltd.	-
6	Talbros Automotive Components Ltd.	3.74%
7	Remsons Engine Valve Limited	4.87%
	Arithmetic mean	10.03%
	Assessee's Margin	8.41%

19.2. The Id AR submitted that based on the aforesaid table, it could be easily concluded that the operating profit of the assessee is 8.41% which is well within the range of +/-5% range of average margin of comparable companies at 10.03%. Accordingly, we hold that international transaction carried out by the assessee in the manufacturing segment is to be considered at Arm's Length price. Accordingly, ground No. 4 and 4.1 raised by the assessee are allowed.

20. The Ground No.5 raised by the assessee is challenging the Transfer Pricing Adjustment of Rs.62,87,498/- to the Arm's Length Price of International Transactions of import of fixed assets.

20.1. We have heard the rival submissions and perused the materials available on record. During the year under consideration, the assessee imported tools amounting to Rs.62,87,498/- from its AEs for its manufacturing segment. In the transfer pricing documentation maintained by the assessee, the transactions of purchase of tools was benchmarked applying TNMM method, by using combined transaction approach since the transaction was found to be inextricably linked to the manufacturing operations of Delphi India. The assessee had imported these tools from its AEs and sold to Tata Motors Ltd. It was pleaded by the assessee that this transaction is already considered by the assessee in its manufacturing segment. It was submitted that the operating profit margin of the assessee was at 8.41% and the average

margin of comparable companies was 10.03% which falls within the +/- 5% range of tolerance band and accordingly, the international transaction of purchase of tools from AEs were considered to be at Arm's Length Price. The Ld. TPO however, determined the value of international transaction at Rs. Nil by holding as under:-

“The taxpayer in its reply merely stated that the tools imported by it from its AE were sold to third parties who reimbursed the cost of purchase from the AE to it. The taxpayer has failed to provide the basis of the cost of the fixed assets in the hands of its AEs. No contemporaneous documents evidence was submitted by taxpayer for deducing the expenses of sale department/corporate department/packing cost + transportation cost/interest cost/profit margin or the cost of manufactured in case the tools were manufactured by the AE.”

20.2. The assessee placed 3rd party purchase order in page 353 of the PB. The assessee also filed copy of invoice of Tata Motors Ltd and back to back invoice raised by Delphi Automotive System, LLC before the Ld. DRP. The Ld. DRP directed the Ld. TPO to reconsider the issue after examining the documents filed by the assessee. This fact is evident from para 15.3 of the directions of the Ld. DRP. We find that the Ld. AO/TPO passed the order without adhering to the said binding directions of the DRP by stating that the same evidence was furnished before the Ld. TPO in the original proceedings and that no new fact or evidence has been brought on record by the assessee.

20.3. At the outset, we find that the Ld. TPO had not referred to any of the prescribed methods in section 92C of the Act to determine the ALP of international transaction in respect of import of fixed assets to be at

Rs. Nil. The Ld. TPO is bound to follow any of the prescribed six methods as the most appropriate method for benchmarking the international transactions of the assessee. Without following any of the prescribed method, the Ld. TPO is prohibited from benchmarking the international transaction of the assessee. This issue is no longer *res-integra* in view of the decision of Hon'ble Bombay High Court in the case of *CIT vs. Johnson & Johnson Ltd. in ITA No.1291/2014 dated 03.04.2017* reported in 80 taxmann.com 269 (Bombay). Even though the Ld. TPO had mentioned that he is following CUP method as the most appropriate method for benchmarking this transaction, in effect, he had not adopted CUP method as per Rule 10B of the Rules. This is because of the fact that he had not brought on record any comparable uncontrolled transactions to justify the basis of adoption under CUP. In view of the same, the benchmarking carried out by the TPO for import of fixed assets is hereby directed to be deleted. Accordingly, the ground no.5 raised by the assessee is allowed.

21. The ground No.6 to 6.7 by the assessee is challenging the Transfer Pricing Adjustment of Rs.7,21,61,494/- in respect of delayed receipt of outstanding receivables from the AEs.

21.1. We have heard the rival submissions and perused the materials available on record. During the year under consideration, the assessee raised invoices on account of provision of software development

services, provision of business support services and export of sales to its associated enterprises. The TPO, in the order re-characterized the delay in receipt of receivables as unsecured loans advanced to the associated enterprise and imputed notional interest on the delay in receipt of receivable, at a rate of 14.88% being prevailing Prime Lending Rate issued by State Bank of India at 11.88% plus a mark-up of 300 bps. While doing so, since the invoice wise receipt of receivable was not available for the invoices raised against provision of business support services, the TPO charged interest at the rate of 14.88% on the entire value of sale for the entire year. Similarly, since the invoice wise details for outstanding receivable with corresponding date of payment, as appearing on 01.04.2009 was not readily available with the assessee, the TPO imputed interest at the rate of 14.88% on the opening receivables for the entire year. Accordingly, the TPO imputed notional interest amounting to Rs.7,21,61,494/- on account of delay in receipt of receivable from the associated enterprises.

21.2. The Ld. AR argued that the Ld. TPO is not permitted to re-characterize actual transaction of accounts receivable from AEs into loan given to AE so as to impute notional interest income. Further, assessee argued that working capital adjustment has been given by the TPO for the outstanding receivable from AE. Hence, the interest costs which is sought to be imputed gets subsumed in the working capital adjustment itself. Hence, there is no need for separate imputation of interest on outstanding receivables. Reliance was placed on the decision of the Hon'ble Jurisdictional High Court in the case of

Pr. CIT vs. Kusum Healthcare Pvt. Ltd. in ITA No.765/2016 dated 25.04.2017 reported in 398 ITR 66.

21.3. The Id AR before us filed an application before us in terms of Rule 29 of the Income Tax Appellate Tribunal Rules, 1963 furnishing the following details:-

- a. Details in respect of realization of invoices raised during the year by the assessee in the business support services segment;
- b. Details in respect of realization of invoices outstanding as on 01.04.2009 from the AEs; and
- c. Details of amounts payable to the AEs as on 31.03.2010.

21.4. The Id AR prayed for admission of these additional evidences and requested for remanding back the issue to the file of Id. AO/ TPO to readdress the issue in dispute in the light of the aforesaid additional evidences.

21.5. The Id AR also argued that details of closing receivables from AEs as on 31.03.2010 were furnished by the assessee before the Id TPO. The Id AR argued that the agreed credit period with the AEs for receiving the trade debts was 30 days from the date of receipt of goods. The Id AR submitted that even though the trade debts were realized from the AEs beyond the agreed credit period, it does not

have any impact on the profits of the assessee herein as assessee is a debt free company and had not suffered any interest cost.

21.6. The Id AR also argued that the Id AO had considered only the interest to be imputed on the outstanding receivables from the AEs. However, the assessee had to make huge payments to its AEs on which no interest is paid by it. Accordingly, if the payables to AEs are set off with receivables from AEs, since the payables are more than the receivables there would be no requirement for imputing interest on outstanding receivables from the AEs. The Id AR also submitted that the Id TPO had committed calculation mistake while working out the imputation of interest on outstanding receivables.

21.7. Per contra, the Id DR vehemently opposed the admission of additional evidences filed by the assessee in as much as no sufficient cause has been shown by the assessee in its application for admission of those additional evidences. Further, no explanation has been given by the assessee as to why these evidences were not furnished by the assessee before the lower authorities despite the fact that sufficient opportunities were given to the assessee.

21.8. Further the Id DR argued that the Id AR make a gross misleading statement that assessee is a debt free company and that no interest is paid by them. He drew the attention of the bench to schedule 16 of the Audited balance sheet of the assessee company for the year ended

31.03.2010 wherein, a sum of Rs. 1,03,81,500 has been debited on account of interest payment. The Id DR also submitted that as per the related party disclosure made by the assessee in its audited financial statements, it could be seen that balance receivables at the end of the year from the AEs was Rs. 16.16 crores and balance payable to the AEs at the end of the year was Rs. 16.80 crores. The Id DR further argued that even if a particular company is debt free, it cannot be given free hand by extending more credit period on the receivables from AEs, which in normal circumstances, no person would do it in a comparable uncontrolled transaction. This constitutes indirect funding made by the assessee to its AE. It requires to be separately benchmarked.

21.9. In rebuttal, the Id AR argued with regard to additional evidences, the opening balance of receivables as on 01.04.2009 was never asked by the Id TPO in the show cause notice. Whatever details that were called for were duly furnished before the Id TPO. The Id AR also submitted in rebuttal that details of amounts payable to AEs were duly furnished by the assessee before the Id TPO.

21.10. Considering the aforesaid submissions of both the parties, we deem it fit and appropriate that this is a fit case for admission of the additional evidences filed by the assessee. Accordingly, we admit the additional evidences and restore the entire issue in toto to the file of Id AO/ TPO for denovo adjudication in accordance with law after

considering the entire additional evidences and decision of Hon'ble Delhi High Court in the case of Kusum Healthcare referred (Supra). The assessee is also at liberty to adduce further evidences, if any, in support of its contentions. With these directions, the ground No. 6 is allowed for statistical purposes.

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

Order pronounced in the open court on 09/10/2023.

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated:09/10/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi