

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL,
'D' BENCH, CHENNAI

श्री जॉर्ज जॉर्ज के, उपाध्यक्ष एवं श्री एस.आर.रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI S.R. RAGHUNATHA, ACCOUNTANT MEMBER

आयकर अपीलसं./IT(TP)A No.: 17/CHNY/2024
निर्धारण वर्ष / Assessment Year: 2018-19

Hitachi Solutions India Private Limited, Block 5, 10 th Floor, 1/124, DLF IT Park, Shivaji Gardens, Mount Poonamallee Road, Chennai – 600 089.	Vs.	The Deputy Commissioner of Income Tax, Corporate Circle- 1(1), No.121, M.G.Road, Chennai – 600 034.
[PAN:AAACZ-1544-R] (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकर अपीलसं./ITA No.: 1715/CHNY/2024
निर्धारण वर्ष / Assessment Year: 2018-19

Assistant Commissioner of Income Tax, Corporate Circle 1(1), Chennai.	V.	Hitachi Solutions India Pvt.Ltd., Block 5, 10 th Floor, 1/124, DLF IT Park, Shivaji Gardens, Mount Poonamallee Road, Chennai – 600 089.
(अपीलार्थी/Appellant)		[PAN:AAACZ-1544-R] (प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Assessee by : Shri Darpan Kirpalani, Advocate by Virtual
प्रत्यर्थी की ओर से/Department by : Shri A. Sasikumar, C.I.T.

सुनवाई की तारीख/Date of Hearing : 20.03.2025
घोषणा की तारीख/Date of Pronouncement : 06.06.2025

आदेश / O R D E R

PER S. R. RAGHUNATHA, AM:

These cross appeals filed by the Assessee and the Revenue are arising out of order of Commissioner of Income Tax (Appeals), Chennai u/s. 143(3) r.w.s. 144C

of the Income Tax Act, 1961 (hereinafter the 'Act') for the assessment year 2018-19 dated 12.03.2024. Since, facts are identical and issues are common, for the sake of convenience, the appeal filed by the revenue and assessee are being heard together and disposed off, by this consolidated order.

2. At the outset, we find that there is a delay of 23 days in appeal filed by the revenue, for which petition for condonation of delay along with reasons for delay has been filed. After considering the petition filed by the revenue and also hearing both the parties, we find that there is a reasonable cause for the revenue in not filing appeal on or before the due date prescribed under the law and thus, in the interests of justice, we condone delay in filing of appeal and admit appeal filed by the revenue for adjudication.

3. The assessee has raised the following grounds of appeal in

IT(TP)A No.: 17/CHNY/2024:

1. Procedural irregularity and violation of principles of natural justice.

- 1.1. *The Learned Assessing Officer ("Ld. AO") has grievously erred, in law by making a reference to the Learned Transfer Pricing Officer ("Ld. TPO") after the original limitation period of 18 months. As per the first proviso to section 153(1) of the Income-tax Act, 1961 (the "Act") no assessment shall be made by the Ld. AO after 18 months from the end of the relevant assessment year (for assessment years commencing on 1 April 2018). Since the Ld. AO has made a reference to the Ld. TPO (23 February 2021) after the original limitation period of 18 months, the proceedings are time barred and liable to be quashed.*
- 1.2. *The Ld. AO has grievously erred in law, since the reference to the Ld. TPO made after the original limitation period of 18 months for the assessment proceedings had already expired (i.e., on 30 September 2020) and no assessment proceedings was pending before the Ld. AO. Consequently, as the reference was not made "**during the course of proceedings for the assessment**", jurisdictional preconditions under section 153(4) of the Act necessary to extend the limitation period to 30 months were not satisfied. As a result, the entire assessment is time barred and nullity in law.*

1.3. *If the interpretation of the law made by the Learned Commissioner of Income Tax (Appeals) ["Ld. CIT(A)"] / Ld. AO, that reference can be made at any time during the 30 months is accepted as a principle of law, the same would give a license to the Ld. AO to make a reference to the Ld. TPO merely as an excuse to get the benefit of extended limitation whenever the Ld. AO fails to complete the assessment within the original period of limitation, which would run contrary to the aim, object and mandate of the statute, and the provisions of section 153 of the Act in particular.*

2. **General grounds:**

2.1 *The order passed by the Ld. CIT(A), pursuant to the order of the Ld. TPO/ Ld. AO to the extent prejudicial to the Appellant, is erroneous, bad in law and contrary to the facts and circumstances of the case.*

2.2 *The Ld. CIT(A) has erred in law and in facts by making an upward adjustment to the arm's length price ("ALP") of the Appellant's international transactions with associated enterprises ("AEs").*

3. **Transfer pricing grounds:**

3.1. *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and in facts, by not accepting the economic analysis and transfer pricing documentation undertaken by the Appellant in accordance with the provisions of the Act read with the rules, and conducting a fresh search for the determination of ALP in connection with the impugned international transactions in the nature of provision of IT services and holding that the Appellant's international transactions are not at arm's length.*

3.2. *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and facts, by modifying/ applying the following quantitative/ qualitative filters applied by the Appellant; which are arbitrary in nature and not in accordance with the law:*

- a) *Companies having accounting year different from financial year of Appellant*
- b) *Companies having less than 75% of export turnover*
- c) *Companies having employee cost to sales less than 50% of sales*

3.3. *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and facts, by additionally considering certain erroneous quantitative/ qualitative filters; which are arbitrary in nature and not in accordance with the law including a filter which should be rejected based on a judicial precedent in the Appellant's own case.*

3.4 *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and in facts, by rejecting the following companies selected by the Appellant in its transfer pricing documentation based on unreasonable comparability criteria:*

- a) *Jindal Intellicom Private Ltd.*
- b) *R Systems International*

- c) *Kcube Consultancy Services Private Ltd.*
- d) *SQS India BFSI Limited*

3.5 *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and in facts, by additionally selecting/ accepting the following companies as comparables to the Appellant based on unreasonable comparability criteria.*

- a) *Infobeans Technologies Ltd.*
- b) *Nihilent Ltd.*
- c) *Gwynniebee India Pvt. Ltd.*
- d) *Exilant Technologies Private Limited*
- e) *Xavient Software Solutions (India) Pvt. Ltd.*
- f) *Black Pepper Technologies Pvt.*
- g) *Backoffice IT Services India Pvt.Ltd.*
- h) *Cybage Software Pvt.Ltd.*

3.6 *The Ld. CIT(A) | Ld. TPO / Ld. AO have erred in law and facts by considering amortization of goodwill (arising out of merger) as operating expenditure while computing the operating margin of the Appellant.*

3.7 *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred in law and in facts, by treating certain items of income and expense as non-operating in nature while determining the operating margin of the tested party and/ or comparable companies.*

3.8 *The Ld. CT(A) | Ld. TPO | Ld. AO have performed several computational errors in arriving at the margins of the following comparable companies for determination of arm's length margin:*

- a) *Inteq Software Pvt. Ltd*
- b) *Harbinger Systems Pvt Ltd*
- c) *CG Vak Software and Exports Ltd*
- d) *Sagarsoft (India) Ltd*
- e) *Gwynniebee India Pvt. Ltd*
- f) *Backoffice IT Services India Pvt. Ltd*
- g) *Nihilent Ltd*
- h) *Cybage Software Pvt Ltd.*

Consequently, the Ld. CIT(A) / Ld. TPO / Ld. AO have erred in computing the amount of adjustment to be made in respect of the impugned transactions of the Appellant.

3.9 *The Ld. CIT(A) / Ld. TPO / Ld. AO have erred, in law and in facts, by not making suitable adjustments to, account for differences in the working capital*

position of the Appellant vis-a-vis the comparable companies, thus acting against the principles laid down in the Rules.

- 3.10. The Ld. CIT(A) I Ld. TPO I Ld. AO have erred, in law and on facts and circumstances of the case, by not making suitable adjustments to account for differences in levels of depreciation, amortization and other non-cash expenses of the Appellant vis-a-vis the comparable companies.
- 3.11. The Ld. CIT(A) I Ld. TPO I Ld. AO have erred, in law and on facts and circumstances of the case, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.

4. Corporate tax grounds

- 4.1 Without prejudice to the arguments against the adjustment made, the Ld. AO has erroneously arrived at a tax demand of INR 2,08,84,437 as against a tax demand of INR 1,94,87,302 by not considering advance taxes already paid, taxes deducted at source, credit for minimum alternate tax paid earlier and by undertaking certain other errors.

5. Other Grounds:

The Ld. AO erred in initiating penalty proceedings under section 270A of the Act. Further, the Ld. CIT(A) has erred in law and facts by dismissing the ground undertaken by the Appellant with regards to abeyance of penalty proceedings initiated by the Ld. Assessing Officer.

Further, The Appellant craves leave to add, supplement, amend, delete or otherwise modify any of the grounds stated hereinabove before commencement of or at the time of hearing.

The revenue has raised the following grounds of appeal in **ITA No.: 1715/CHNY/2024:**

1. The order of the learned CIT(A) is contrary to law, facts and circumstances of the case.
2. The learned CIT(A) erred in accepting the documents not corroborated by evidence and which had not stood the test of enquiries in assessment proceedings.
3. The learned CIT(A) erred by not obtaining the Remand Report from the Assessing Officer/ TPO while accepting the fresh submissions by the assessee u/s 46A of the Act while accepting the segmentation approach of the assessee, as per the provisions u/s 46A(3) of the IT Rules, 1962.
4. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored.

4. The facts in brief are that M/s.Hitachi Solutions India Private Limited, (herein called as "Assessee") company incorporated in India. It is a subsidiary of Hitachi Solutions America Limited. It provides IT services to its AEs. For the Assessment Year ('AY') 2018-19, the assessee filed its return of income on 30.11.2018, declaring Rs.2,73,79,990/- taxable income under the normal provisions of the Income-tax Act, 1961(the 'Act') and book profits of Rs.6,66,95,090/- as per the provisions of Section 115JB of the Act. Accordingly, Rs.1,35,98,362/- tax liability was determined under the provisions of section 115JB of the Act.

5. A reference was made u/s.92CA(1) of the Act to the Deputy Commissioner of Income-tax, Transfer Pricing Officer, Corporate Circle - 2(1), Chennai ("Ld. Transfer Pricing Officer" or "TPO") for determination of the arm's length price ("ALP") of the international transactions entered into by the assessee with its Associated Enterprise ("AE") dated 01.03.2021. The TPO disregard the submissions filed by the assessee and passed the impugned Transfer Pricing ('TP') order on 31.07.2021 proposing a total adjustment of Rs.9,63,59,905/-.

6. Subsequent to the order of the TPO, the AO passed a draft assessment order on 21.09.2021 u/s.144C r.w.s 92CA (3) of the Act. Aggrieved by the draft assessment order, the assessee had filed a response on 13.10.2021, intimating that the assessee would prefer to file an appeal before the Id.CIT(A) against the order of the AO.

7. Subsequent to the order passed by the TPO, the assessee had filed a rectification petition u/s.154 r.w.s 92CA(5) on 22.09.2021, stating that the order

passed u/s.92CA(3) contains certain mistakes apparent from record. The TPO rejected the assessee's petitions and passed a rectification order on 18.03.2022.

8. The AO then passed the final assessment order dated 23.11.2021 (digitally signed on 25.11.2021) u/s.143(3) r.w.s. 144C(3) r.w.s. 144B of the Act along with the computation of income and notice of demand, incorporating the TP adjustments proposed by the AO as additions to the returned income of the assessee without making any further adjustments. Subsequent to the final assessment order, the assessee had filed a rectification petition u/s.154 on 03.03.2022, given short credit for TDS and excess interest u/s.234B of the Act, which is pending disposal.

9. Being aggrieved by the order of the AO, the assessee had filed an appeal with the Ld. Commissioner of Income- Tax (Appeals) ['CIT(A)].

10. Pursuant to the submissions undertaken by the assessee, the Ld.CIT(A) partially accepted the contentions of the assessee and passed an order on 12.03.2024. Additionally, a corrigendum to order was also passed by the Ld. CIT(A) dated 15.05.2024. Subsequent to the order passed by the Ld.CIT(A), the assessee had filed a rectification petition u/s.154 on 15.05.2024 on the erroneous initiation of penalty. The Ld.CIT(A) accepted the assessee's petition and passed a rectification order on 12.07.2024.

11. The assessee had also filed an application for giving effect to the order passed by the Ld. CIT(A) on 17.05.2024 before the TPO for the following:

- Calculating the operating margin of the assessee considering the segmental accounts and allocating the amortization of goodwill on the same basis as other indirect costs, i.e. FTE/Head count ratio

- Considering comparable set basis, the inclusion of certain companies upheld by the Ld.CIT(A)
- Rectifying computational errors for calculation of operating margins of certain comparable companies

12. Based on the above, the order giving effect to the findings of the Ld.CIT(A) was issued by the TPO on 31.05.2024. This order accepted the assessee's segmental accounts but classified the amortization of goodwill as non-operating, resulting in the assessee's margin being calculated at 8.59% and the median of comparable margins at 11.70% (after considering the inclusion of comparable upheld by the CIT(A)). Consequently, a total adjustment of Rs.2,87,70,447/- was proposed in the order dated 31.05.2024, compared to the adjustment of Rs.9,63,59,905/- proposed in the TP dated 31.07.2021. However, the order did not account for computational errors in the calculation of operating margins for certain comparable companies. As a result, the assessee submitted a request letter for backup data on the margins of comparable companies on 27.06.2024

13. Without prejudice to the grounds granted in favour of the assessee by the Ld.CIT(A), the assessee has filed an appeal before us for the grounds ruled not in favour of the assessee.

Amortization of goodwill (arising out of merger) to be considered as a non-operating expense while computing operating margins of the assessee (Ground no 3.6 and 3.10):

The TPO held that depreciation and amortization fall under the category of operating expenses. Depreciation is an expense that takes into account the

estimated useful life of plant and equipment. Amortization works in the same way but pertains to intangible assets such as goodwill, patents and copy rights. (*Page 397 of factual PB*)

14. The assessee has claimed amortization of goodwill as a deduction for the purpose of computation of total income for tax purposes which reduces the tax incidence on the assessee to that extent. Since it is amortized over 5 years, it has a bearing on the cash flow and is operating in nature. Basis the same, the Ld. CIT(A) has upheld the TPO's views and treated amortization of goodwill as an operating expense. (*page 67 of the factual PB - CIT(A) order*)

15. The Id.AR submitted that the amount recorded as goodwill in the books of accounts of the assessee is the excess consideration paid in relation to the assets purchased by way of the amalgamation. The difference in purchase value treated as goodwill cannot be identified to any specific characteristic or value generating intangible that can support the operations of the assessee in the future and is a result of the accounting treatment. Further, undertaking reorganization of business is not a regular activity of the assessee. Hence, the resultant goodwill is non-recurring and an extra-ordinary item of expenditure which is not incurred for the purpose of rendering the services to AEs, i.e., its operations.

16. Accordingly, the expenses under consideration are not common business expenditures (goodwill arising out of a merger) that any third-party comparable companies would have incurred in the course of its business.

17. Further, the Id.AR stated that the services rendered by the assessee before and after the amalgamation have not undergone any change. In an independent

scenario, no third-party service provider would increase the price of its services for acquiring another company without any change in its service offerings.

18. Amortization of goodwill is exceptional cost and none of the comparable companies have such expenses. Accordingly, it is to be eliminated from the operating margin earned by the assessee so as to bring it at parity with the operating margin earned by the comparable companies.

19. Depreciation as a % of operating revenue has an abnormal effect from FY 2016-17 (year in which amortization commenced), increasing to 12.77% from 2.80% in FY 2015-16.

20. Further, without prejudice, adjusting the operating margin of the assessee to account for the difference in depreciation rates of comparable companies is warranted, given the differences between depreciation to sales ratio of assessee and comparable companies.

Judicial precedence:

- Jurisdiction caselaw of ACIT vs. CH Robinson Worldwide Freight India Pvt. Ltd [ITA No.3444/Chny/2016 & No.28/Chny/2017], wherein the facts are squarely similar to that of the Assessee, and wherein the Chennai ITAT has held amortization of goodwill to be a non-operating expense, despite being claimed as a deduction for tax purposes. Further, treatment of expenses as operating/non-operating in nature differ for calculation of operating margins from a TP perspective, vis-à-vis return position. Relevant extracts are provided below (Page 39 and 42 of legal paper book):

“4.1...The facts with regard to impugned dispute are that the assessee has derived goodwill on account of acquisition of certain undertakings and same has been treated as intangible assets, as defined u/s.32(1) of the Act, and claimed depreciation. However, for the purpose of computing operating margin of the assessee, to test its international transactions, the assessee has excluded amortization of goodwill as non-operating expenditure on the ground that goodwill does not have any bearing on the operations of the assessee”

“5. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The goodwill is an intangible asset which arises to an assessee either by way of acquisition of any company or self-generated by the assessee by considering its intangible like technical know-how, trade mark, patent etc. Further, all assessees do not have goodwill in their books of account. because it arises only in very few instances as stated by us in earlier part of this order and thus, definitely it is in the nature of extraordinary item which cannot be considered as part of operating cost of the assessee. Further, it cannot be said that amortization of goodwill does having bearing on operations of the assessee. Therefore, we are of the considered view that the Assessing Officer has erred in considering amortization of goodwill as operating in nature for the purpose of computing margin of the assessee to determine arms' length price of international transactions.”

- Hospira Healthcare India Pvt. Ltd [ITA No.469/Chny/2017] (page 31 & 32 of the legal PB)

“10.3 We have considered the rival arguments and perused the TP documents. We agree with assessee submission that amortization of goodwill is an abnormal item arising out of business acquisition and therefore not part of operating expenditure. The Ld AO/TPO in A.Y 2011-12 has allowed the assessee's claim of adjustment on account of amortization. The Ld AO/TPO are accordingly, directed to grant adjustment of amortization of goodwill by excluding from operating expenditure.”

- DIAB Core Materials Pvt. Ltd [ITA No.2176/Chny/2017] (page 60 & 62 of legal

PB)

- Ametek Instruments India Pvt. Ltd [IT(TP)A No.398/Bang/2016] (page 76 of legal PB)

21. Per contra the Id.DR relied on the orders of the AO and that of Id.CIT(A).

22. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. The present dispute is covered by the various courts and tribunals by holding it as amortization of goodwill is an abnormal item arising out of business acquisition and therefore not part of operating expenditure. Considering the present facts and judicial precedents as discussed supra, we direct the AO/TPO to grant adjustment of amortization of goodwill by excluding from operating expenditure by allowing the related grounds of appeal of the assessee.

Rejection of comparables additionally selected by the TPO/ Ld.CIT(A) (Refer grounds 3.4 and 3.5)

A. Infobeans Technologies Ltd

23. The TPO rejected the assessee's contentions and concluded that the business of Company is in the nature of provision of software engineering services primarily in 'Custom Application Development (CAD), Content Management Systems (CMS), Enterprise Mobility (EM), and Big Data Analytics (BDA), which is comparable to the services provided by the Assessee. (page 384 of the factual PB –Page 14 of TPO's order)

24. The Ld. CIT(A) rejected the assessee's contentions and stated that given TNMM method allows for flexibility in selection of comparable with broader comparability criterion and basis the detailed rebuttals provided by the TPO in the TP order, the comparable selected by the TPO are accepted.

(page 61 of factual PB, para 4.7.3 - Page 14 of Ld. TPO's order)

The Id.AR for the assessee submitted that the comparable company is:

- **Functionally different** - involved in diversified unrelated activities such as high-end software engineering and consultancy services such as Product Engineering, Digital Transformation, Automation and DevOps. *(page 455 of the factual PB for excerpts from annual report and website)*
- **Insufficient segmental information** - The company is engaged in high-end software engineering services and consultancy related activities. However, there is no segmental information in the financials that carves out profitability from software development services vis-à-vis high end software engineering services. *(page 458 of the factual PB)*
- **Judicial precedence:**
- AMD India Private Ltd [IT[TP]A No.775/Bang/2022] *(page 148 & 149 of legal PB)*
- *Rejected basis functional comparability*

"18.2 We have considered the rival submissions and perused the material on record. We note from the financial statements placed at page 1830-1837 of PB that the company's overview is as under:-

"Our company is leading playing in offering, Product engineering, Digital Transformation and Automation and DevOps for clients across the globe. With two state-of-the-art facilities in India, the CMMI level 3 certified company caters to Fortune 500 clients in USA, Germany and Middle East markets. The Company caters to a wide range of segments in the industry, including Healthcare, Compliance,

Storage and Virtualization, Media and Publishing and eCommerce. The company's efficient operations professional team of over 700+ employees and high customer-focus has enabled it to grow blue-chip client base with high amount of repeat business."

18.3 On going through the above activity, the company is functionally different from the assessee. Further, we note from the financial statements that the revenue is generated from sale of services but not from sale of products. We therefore direct the AO/TO to exclude this company from the comparables."

- M/s. Radisys India Limited (formerly known as Radisys India Private Limited) [IT(TP)A No.190/Bang/2022 – (page 219 & 222 of the legal PB) - Rejected basis functional comparability

"8.3. On verification of the financials of this company for AY 2017-18, we note that in the Annual Report at page 2343 placed in paper book Volumes 4 of 6, this has been stated to be catering into wide range of segments as under:

"INFOBEANS TECHNOLOGIES LIMITED

Founded in 2000, InfoBeans Technologies is a leading player offering Customized Software, Digital, Transformation and Enterprise Mobility solutions for clients across the globe. With two state-of-the-art facilities in India, the CMMI level 3 certified Company caters to Fortune 100 clients in USA, Germany and Middle East markets. The Company caters to a wide range of segments in the industry, including distributed storage systems, multi-format multimodal content and e-commerce web and mobile platforms for diverse sectors. The Company's transparent operations, professional team of over 700 employees and high customer-focus has enabled it to grow a blue-chip client base with over 90% repeat business."

8.4. Further, at page 2320 of the paper book, this company is said to be providing computer programming, consultancy and related activities as per NIC code. A combined reading of this makes it clear that this company is engaged in not only SWD service but other allied services to various industrial segments. Whereas on perusal of financial statement at page 12367 of the paper book and Note 20 at page

2378 of the paper book, we note the revenue recognition is only under one head being "Expert" amounting to Rs.66,12,31,773/-. We also notice that at page 2408, in Related Party Transaction details this company has earned revenue of Rs.8,00,53,350/- from its AE. From this it is clear that this company is rendering services to non-AE customers also, whereas the assessee before us is a captive service provider only catering to the requirements of its AE. Under such circumstances we do not deem it fit to be considered in the final set of comparables. Accordingly, this comparable is directed to be excluded.

- M/s. Xchanging Solutions Ltd [IT(TP)A No.292/Bang/2022] (page 264 to 267 of legal PB)
- HP PPS Services India Pvt Ltd [IT(TP)A No.78/Bang/2021] (page 332 & 341 of legal PB)

25. Per contra the Id.DR relied on the orders of the AO and that of Id.CIT(A).

26. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. On perusal of the financials the company we note that it is engaged in the business activity involved in diversified unrelated activities such as high-end software engineering and consultancy services such as Product Engineering, Digital Transformation, Automation and DevOps. Apart from that the company is also engaged in high-end software engineering services and consultancy related activities. Further, we also note from the financial statements that there is no segmental information that carves out profitability from software development services vis-à-vis high end software engineering services. Considering the present facts and judicial precedents as discussed supra, we direct the AO/TPO to exclude this company from the comparable by allowing the related grounds of appeal of the assessee.

B. Nihilent Ltd.

27. The TPO rejected the assessee's contentions and concluded that the company is engaged in rendering software services, business consulting in the area of enterprise transformation, change and performance management and providing related IT services which is comparable to the services provided by the assessee.
(page 384 of the factual PB)

28. The Ld.CIT(A) rejected the assessee's contentions and stated that given TNMM method allows for flexibility in selection of comparable with broader comparability criterion and basis the detailed rebuttals provided by the TPO in the TP order, the comparable selected by the TPO are accepted.
(page 61 of factual PB, para 4.7.3 - Page 14 of Ld. TPO's order)

The Id.AR for the assessee submitted that the comparable company is:

- **Functionally different** - engaged in business transformation, digital transformation, brand and marketing transformation, platform and technology transformation, and data science and analytics services. *(page 458 of the factual PB)*
- **Upper turnover filter** - The Company's turnover for the subject year is INR 125 crores approx. Given that the TPO had applied a lower turnover filter, an upper turnover filter is also to be applied. Accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. For the subject year, Nihilent has a turnover greater than Rs.280 crores approx. and is to be rejected from the comparable set. *(page 1253 of the annual report PB)*
- **Judicial precedence:**
 - AMD India Private Ltd [IT[TP]A No.775/Bang/2022] – *(page 146 to 148 of legal PB) - Rejected basis functional comparability*

“17.2 Considering the rival submissions, we note from the financial statements placed at page 1882-1889 of PB that the core activity of Nihilent Ltd. as per NIC Code No.99831319 allotted, “other professional, technical and business services” and the turnover is Rs. 2800.62 crores during the year from the core activity of “other IT consultancy services”. The comparable company is engaged in global business consulting and IT services solutions, the major revenue is received from South Africa...

17.3 Considering the above activity undertaken by Nihilent Ltd., it cannot be considered as a comparable with assessee company. Therefore, the AO/TPO is directed to exclude this company on the basis of functional dissimilarity.”

- *Genesys Telecom Labs India Pvt. Ltd [IT(TP)A No.: 38/CHNY/2024 (page 97 to 101 of legal PB) - Rejected basis turnover filter – facts similar to Assessee’s case*

“4.. (A) In Ground No. 4 and its sub-grounds, assessee is seeking application of upper turnover filter and thereby praying for exclusion of following five companies from the list of comparables :-

- i) Larsen and Turbo Infotech Ltd., ii) Nihilent Ltd. iii) Mindtree Ltd. iv) Tata Elaxi Ltd. v) Cybage Software Pvt. Ltd.*

6.2 We have heard rival submissions and perused the material record. It is an admitted fact that the assessee’s turnover in SWD segment is Rs.106 crores. It is also a fact that the TPO had applied lower turnover filter by excluding companies having less than crore turnover. When the TPO has applied lower turnover filter ought to have applied upper turnover filter also. As per the Dun Bradstreet classification of software industry, the companies could be classified under three major heads depending on the turnover the company viz.,

- a. Less than Rs.200 crores categorized as small size companies*
- b. Rs.200 crores to Rs.2,000 crores categorized as medium size companies.*
- c. More than Rs.2,000 crores categorized as large size.*

6.4 In light of the aforesaid reasoning and the judicial pronouncements cited supra, since the turnover of the aforesaid five companies exceeds Rs.200 crores, we direct

the TPO to exclude the same from the comparable list. Therefore grounds Nos.4, 4.1, 4.4, 4.5, 4.6 & 4.7 are partly allowed. It is ordered accordingly.”

- Etisalat Software Solutions Pvt Ltd [IT(TP)A No.240/Bang/2022] (page 304 & 305 of legal PB)
- Wipro GE Healthcare Pvt. Ltd. [IT(TP)A No.803 Bang 2022] (page 475 & 478 of legal PB)

29. Per contra the Id.DR relied on the orders of the AO and that of Id.CIT(A).

30. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. On perusal of the financials the company we note that it is engaged in the business activity of transformation, digital transformation, brand and marketing transformation, platform and technology transformation, and data science and analytics services, which is not similar to the activities carried out by the assessee. Further, the Company's turnover for the subject year was around Rs.280 crores and accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. Therefore, considering the present facts and judicial precedents as discussed supra, we direct the AO/TPO to exclude this company from the comparable by allowing the related grounds of appeal of the assessee.

C. Cybage Software Pvt. Ltd

31. The TPO rejected the assessee's contentions and concluded that the company is engaged in the exporting software mainly on man hourly basis. Further the TPO held that revenues are directly proportional to the number of employees. So, there is no reason why bigger companies cannot be compared with the taxpayer

as size does not matter in the above type of business model. (page 386 of the factual PB)

32. The Ld. CIT(A) rejected the assessee's contentions and stated that given TNMM method allows for flexibility in selection of comparable with broader comparability criterion and basis the detailed rebuttals provided by the TPO in the TP order, the comparable selected by the TPO are accepted.

(page 61 of factual PB, para 4.7.3 - Page 14 of TPO's order)

The Id.AR for the assessee submitted that the comparable company is:

- **Functionally different** - engaged in provision of product engineering services, transformational services, support services and provides diversified digital solutions. (page 474 of the factual PB)
- **Earning super normal profits** – Cybage is earning supernormal profits which is an aberration from the industry. The Company earns a weighted average upwards of 55% on cost and is unrepresentative of industry trends.
- **Upper turnover filter** - The Assessee's turnover for the subject year is Rs.125 crores approx. Given that the TPO had applied a lower turnover filter, an upper turnover filter is also to be applied. Accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. For the subject year, Cybage has a turnover greater than Rs.734 crores approx. and is to be rejected from the comparable set. (page 1973 of the annual report PB)

Judicial precedence:

- [Optiva India Technologies Pvt. Ltd. [ITA No.194/PUN/2021] – (page 607 of legal PB) - Rejected basis functional comparability

“7.1 The assessee contends that this company is mainly Onsite service provider whereas the assessee is offsite service provider and therefore, functionally different.

Further, there is incorrect reporting figures which are unreliable. This company is product development as well as R & D Intensive Company. The arguments of the assessee were not accepted by the A.O/T.P.O and the company was held to be comparable. The Id. A.R demonstrated through Annual Report at page 1804, as per the description of the business of this company that it is onsite service provider.

Furthermore at page 1796 of the Annual Report this company is doing other computer related activities but nowhere software services are mentioned. On the other hand, the assessee is offsite provider and thus functionally different. We direct the A.O/T.P.O to exclude this company from the list of comparables.

- Genesys Telecom Labs India Pvt. Ltd [IT(TP)A No.: 38/CHNY/2024 (page 97 to 101 of legal PB) - Rejected basis turnover filter – facts similar to Assessee’s case

“4.. (A) In Ground No. 4 and its sub-grounds, assessee is seeking application of upper turnover filter and thereby praying for exclusion of following five companies from the list of comparables :-

i) Larsen and Turbo Infotech Ltd., ii) Nihilent Ltd. iii) Mindtree Ltd. iv) Tata Elxi Ltd. v) Cybage Software Pvt. Ltd.

6.2 We have heard rival submissions and perused the material record. It is an admitted fact that the assessee’s turnover in SWD segment is Rs.106 crores. It is also a fact that the TPO had applied lower turnover filter by excluding companies having less than crore turnover. When the TPO has applied lower turnover filter ought to have applied upper turnover filter also. As per the Dun Bradstreet classification of software industry, the companies could be classified under three major heads depending on the turnover the company viz.,

a. Less than Rs.200 crores categorized as small size companies

b. Rs.200 crores to Rs.2,000 crores categorized as medium size companies.

c. More than Rs.2,000 crores categorized as large size.

6.4 In light of the aforesaid reasoning and the judicial pronouncements cited supra, since the turnover of the aforesaid five companies exceeds Rs.200 crores, we direct the TPO to exclude the same from the comparable list. Therefore grounds Nos.4, 4.1, 4.4, 4.5, 4.6 & 4.7 are partly allowed. It is ordered accordingly.”

- Euronet Services India Pvt Ltd [IT(TP)A No.962/Bang/2022] (page 638 and 639 of legal PB)

33. Per contra the Id.DR relied on the orders of the AO and that of Id.CIT(A).

34. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. On perusal of the financials the company we note that it is engaged in provision of product engineering services, transformational services, support services and provides diversified digital solutions and earning supernormal profits which is an aberration from the industry. The Company earns a weighted average upwards of 55% on cost and is unrepresentative of industry trends. Further, we also note that the subject year, Cybage has a turnover greater than Rs.734 crores approx. and accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. Therefore, considering the present facts and judicial precedents as discussed supra, we direct the AO/TPO to exclude this company from the comparable by allowing the related grounds of appeal of the assessee.

D. Exilant Technologies Private Limited

35. The TPO rejected the assessee's contentions and concluded that the company is an Information Technology consulting and implementation company. Along with its subsidiaries, the company provides/delivers business solutions through global software development, Business IT services, application development and maintenance, business process management, business technology consulting,

cloud, and product engineering and is therefore comparable to the Assessee. (*page 385 of the factual PB –Page 15 of TPO’s order*)

36. The Ld. CIT(A) rejected the assessee’s contentions and stated that given TNMM method allows for flexibility in selection of comparable with broader comparability criterion and basis the detailed rebuttals provided by the TPO in the TP order, the comparable selected by the TPO are accepted.

(page 61 of factual PB, para 4.7.3 - Page 14 of TPO’s order)

The Id.AR for the assessee submitted that the comparable company is:

- **Functionally different** - involved in provision of broad spectrum of services, which include Software Development, Business IT services, application development and maintenance, business process management, business technology consulting, cloud and product engineering. (*page 464 of the factual PB for excerpts from annual report and website*)
- **Insufficient segmental information** - 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 464 of the factual PB*)
- **Owns significant intangibles:** The Company holds significant intangible assets in the form of patents and trademarks across various jurisdictions. As per the annual report of the company, it is currently maintaining over 20 different patent applications in various international jurisdictions. (*page 465 and 466 of the factual PB*)
- **Upper turnover filter** - The Company’s turnover for the subject year is Rs.125 crores approx. Given that the TPO had applied a lower turnover filter, an upper turnover filter is also to be applied. Accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. For the subject

year, Exilant has a turnover more than Rs.330 crores approx. and is to be rejected from the comparable set. (page 1253 of the annual report PB)

- **Judicial precedence:**

- Optiva India Technologies Pvt. Ltd. [ITA No.194/PUN/2021] – (page 604 of legal PB) - Rejected basis functional comparability

“13.1 The assessee submitted that this company is not comparable since it is into development of new intellectual property and it is substantially a product company. The T.P.O, however, held that this company is into technology software and other related services and the company derives revenue from software development services, thus held to be valid comparable.

13.2 The D.R.P has given their findings at page 99 at para (l) upholding the findings of the T.P.O. The learned A.R demonstrated from the Annual Report at page 470 of the paper book that this company is into development of new intellectual property. Further at page 565 regarding functionality of Exilant Technologies, it is demonstrated that this company is a product company doing varied services. The Id. D.R could not bring on record any evidences/documents to prove any facts contrary to what is already there in the annual report of this company.

13.3 Having heard the parties and on examination of the relevant documents, we find that this company is into intellectual property development and is a product company having varied services. We direct the A.O/T.P.O to exclude this company from the list of comparables.”

- Genesys Telecom Labs India Pvt. Ltd [IT(TP)A No.: 38/CHNY/2024 (page 97 to 101 of legal PB) - Rejected basis turnover filter – facts similar to Assessee’s case

“4.. (A) In Ground No. 4 and its sub-grounds, assessee is seeking application of upper turnover filter and thereby praying for exclusion of following five companies from the list of comparables:-

i) Larsen and Turbo Infotech Ltd., ii) Nihilent Ltd. iii) Mindtree Ltd. iv) Tata Elxi Ltd. v) Cybage Software Pvt. Ltd.

6.2 We have heard rival submissions and perused the material record. It is an admitted fact that the assessee's turnover in SWD segment is Rs.106 crores. It is also a fact that the TPO had applied lower turnover filter by excluding companies having less than crore turnover. When the TPO has applied lower turnover filter ought to have applied upper turnover filter also. As per the Dun Bradstreet classification of software industry, the companies could be classified under three major heads depending on the turnover the company viz.,

- a. Less than Rs.200 crores categorized as small size companies
- b. Rs.200 crores to Rs.2,000 crores categorized as medium size companies.
- c. More than Rs.2,000 crores categorized as large size.

6.4 In light of the aforesaid reasoning and the judicial pronouncements cited supra, since the turnover of the aforesaid five companies exceeds Rs.200 crores, we direct the TPO to exclude the same from the comparable list. Therefore grounds Nos.4, 4.1, 4.4, 4.5, 4.6 & 4.7 are partly allowed. It is ordered accordingly.”

- Euronet Services India Pvt Ltd [IT(TP)A No.962/Bang/2022] (page 638 and 639 of legal PB)

37. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. On perusal of the financials the company we note that it is engaged in broad spectrum of services, which include Software Development, Business IT services, application development and maintenance, business process management, business technology consulting, cloud and product engineering and holds significant intangible assets in the form of patents and trademarks across various jurisdictions. As per the annual report of the company, it is currently maintaining over 20 different patent applications in various international jurisdictions. Moreover 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. Further, we also note that the subject year, Exilant Technologies has a turnover greater than Rs.330 crores approx. and accordingly, companies with turnover greater than Rs.200 Crores are to be excluded from the comparable set. Therefore, considering the present facts and judicial precedents as discussed supra, we direct the AO/TPO to exclude this company from the comparable by allowing the related grounds of appeal of the assessee.

Department's appeal – ITA No.1715/CHNY/2024

The Ld. CIT(A) not obtaining remand report for segmentation approach:

38. The TPO while computing the assessee's margins, rejected the segmental accounts without demonstrating the rationale for the same and undertook an entity level adjustment without appreciating that such an approach is contrary to the provisions of the Act and various judicial pronouncements (Page 388 of factual PB and internal page 18 of TPO's order)

The Ld.CIT(A)'s observations (Page 64 & 65 of factual PB and internal page 16 & 17 of Ld. TPO's order)

"4.8.3..The Assessee had placed reliance on the Assessee's own case for AY 2021-22, wherein the TPO had accepted the segmentation maintained by the Assessee. Basis the detailed submissions undertaken by the Assessee, I understand that the facts and circumstances of the issue at hand, as well as the back-up documentation provided by the Assessee is identical to the Assessee's own case in AY 2021-22, wherein the TPO had accepted the Assessee's segmentation. The Assessee had submitted the audited segmented financials, basis of allocation of segmentation and demonstrated how employees are allocated to various projects and how the time sheets are maintained. Further, the Assessee also

submitted the proportion of bench allocated to the AE and non-AE segments, and from the submissions it is ascertained that the distribution of bench FTE to the AE segment is higher than that of the non-AE segments. Accordingly, the segmentation approach of the Assessee is accepted in the facts and circumstances of the case for AY 2018-19 as well. Accordingly, Ground no. 3.6 of the Assessee stands allowed.”

39. The Id.DR submitted that the order of the Ld. CIT(A) was to be set aside and restored to the AO since a remand report was not obtained by the Ld. CIT(A) u/s.46A(3) of IT Rules while accepting fresh submissions regarding the segmental approach adopted by the assessee.

40. Per contra the Id.AR submitted that the assessee referenced the submissions made before the TPO and Ld. CIT(A), which included the same segmental information and segmentation certificate:

- a) TP report wherein segmental data is captured (*Page 876 of factual PB*)
- b) Submission undertaken as a response to the SCN issued by the TPO (*Page 550 of factual PB*)
- c) Rectification application undertaken before the TPO (*Page 365 of factual PB*)
- d) Submission undertaken before the Ld. CIT(A) (*page 97 of factual PB*)

41. In the submission undertaken by the Assessee before the Ld. CIT(A) (*Page 75 & 76 of factual PB*), the Assessee only explained that the TPO had allowed the segmentation approach undertaken by the Assessee in a subsequent year, i.e., AY 2021-22, and that the same segmentation approach had been followed during the subject year, i.e., AY 2018-19.

42. Therefore, the Id.AR submitted that consequently, no additional evidence regarding the segmental accounts maintained by the assessee was presented before Ld.CIT(A). The Id.AR stated that the assessee had submitted the same segmental information in various submissions, as previously indicated, and only provided further clarification about the acceptance of the segmentation approach by the TPO in AY 2021-22, noting that there had been no changes to this approach for the subject year.

43. Accordingly, the Id.AR submitted that the Grounds undertaken by the Department are contrary to law and facts. Further, it is pertinent to note that during the course of the hearing before the ITAT, the Ld. DR did not provide any further contentions in response to the Assessee's arguments.

44. We have heard the rival contentions perused the material available on record and gone through the orders of the authorities along with submissions and case laws relied upon by both the parties. On perusal of the orders of the TPO and Id.CIT(A), we find that the assessee had furnished the TP report and other explanations before the Id.CIT(A), which were already produced before the TPO during the assessment proceedings. Further, we note that the assessee has brought to the notice of the Id.CIT(A) that the TPO had allowed the segmentation approach undertaken by the Assessee in a subsequent year, i.e., AY 2021-22, and that the same segmentation approach had been followed during the subject year, i.e., AY 2018-19.

45. Therefore, considering the facts of the present case, in our considered view, the assessee has not furnished any additional evidence before the Id.CIT(A) and

hence there is no violation of Rule 46A of the IT Rules. Hence, the grounds taken by the revenue are dismissed.

46. In the result, the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 06th June, 2025 at Chennai.

Sd/-
(जॉर्ज जॉर्ज के)
(GEORGE GEORGE K)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(एस. आर.रघुनाथा)
(S. R. RAGHUNATHA)
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 06th June, 2025

SP

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT – Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF