

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH MUMBAI

**BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.539/MUM/2025
Assessment Year: 2011-12
&
ITA No. 540/MUM/2025
Assessment Year 2012-13**

ACIT, Circle 3(3)(1) Room No. 522, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai 400020.	Vs.	Xoriant Solutions Private Limited 7 th Floor, 7A & 7B, C wing, Time Square Building, Mittal Estate, Marol Naka, Andheri Kurla Road, Andheri East, Mumbai 500059 PAN: AAACX0146P
(Appellant)		(Respondent)

Present for:

Assessee : Shri Pankaj Toprani, Advocate
 Revenue : Shri Asif Karmali, Sr. DR

Date of Hearing : 01.05.2025
 Date of Pronouncement : 26.06.2025

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

These two appeals filed by the Department are against the orders of Commissioner of Income Tax (Appeal)-58, Mumbai, vide order Nos. ITBA/APL/S/250/2024-25/1070691086(1) and ITBA/APL/S/250/2024-25/1070691614(1), both dated 27.11.2024 passed against the assessment orders by Income Tax Officer - 11(3)(4) Mumbai, dated 11.03.2015 for Assessment Year 2011-12 and by Deputy Commissioner of Income Tax - 11(3)(2), Mumbai, dated 26.05.2016 for Assessment Year 2012-13 respectively, u/s. 143(3)

r.w.s. 144C(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. Grounds of appeal raised by the revenue in both the appeals are in respect of exclusion by Id. CIT(A) of comparable from the list of comparable adopted by Id. Transfer Pricing Officer (TPO) on account of turnover filter and difference in functions, assets and risks. The comparable which are excluded and contested by the revenue are common in the two appeals and therefore both are taken up for adjudication by passing this consolidated order. We take up Assessment Year 2011-12 as the lead case. Our observations and findings in appeal for this year shall apply mutatis mutandis in appeal for Assessment Year 2012-13. Grounds raised by the revenue in appeal for Assessment Year 2011-12 are reproduced as under:

- i. *“Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude Infosys Ltd., Larsen & Toubro Infotech Ltd., Mindtree Ltd., Persistent Systems & Solutions Ltd., Persistent Systems Ltd., Sasken Communication Technologies Ltd., Tata Elxsi Ltd., Wipro Technologies Ltd. and Zylog Systems Ltd. from the list of comparables without analyzing the impact of turnover on the profitability and ignoring the fact that the assessee is a captive service provider to its AE, therefore, the quantum of turnover will not affect the profit margin being earned by the assessee from its AE?”*
- ii. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that higher turnover of comparables in service industry may not have significant impact on the profitability of captive entities?*
- iii. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude the above-mentioned companies from the list of comparables without appreciating the fact that the assessee has not demonstrated through documentary evidences the impact of higher turnover of the comparables to their profitability?*
- iv. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in removing Tata Elxsi Ltd. from the final list of comparables even though the assessee did not contest the inclusion of the*

company Tata Elxsi Ltd. from the final list of comparables on the ground of high turnover?

- v. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude the Acropetal Technologies Ltd. from the list of comparables without appreciating the fact that the majority of income of the assessee company is being derived from development of software products?*
- vi. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude the Acropetal Technologies Ltd. from the list of comparables without appreciating the fact that Ld. CIT(A) could have considered the segmental margins of the comparable, instead of rejecting it altogether?*
- vii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude the Acropetal Technologies Ltd. without appreciating the fact that, in the case of Symantec Software & Services India Pvt. Ltd. (supra) the TPO had applied the 75% export filter, which is not the case for the TPO order under consideration and since these filters were not applied by the TPO in the current order, these filters cannot be a basis for rejection of comparables at the appellate stage without providing an opportunity to the TPO to do an independent search again by applying these filters?*
- viii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude E-Zest Solutions Ltd. from the list of comparables without appreciating that E-Zest Solutions Ltd. is into development of software products as the assessee does and, therefore, it cannot be excluded from the list of comparables?*
- ix. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude E-Zest Solution Ltd. from the list of comparables without appreciating that it is an accepted principle that in TNMM analysis the strictness of functional comparability is least as compared to other methods and under this method net margin of entities engaged in similar function is compared and the minute differences in the functioning of comparables cannot become a reason for exclusion of comparables?*
- x. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude Sankhya Infotech Ltd. from the list of comparables without going into the merits of the case and also the assessee has not filed anything during transfer pricing proceedings to challenge the functional comparability of the aforesaid company?*

- xi. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude Sankhya Infotech Ltd. on the ground that it owns proprietary rights on the software developed whereas the assessee is a captive entity, when the TNMM analysis requires the TPO not to pick a captive entity as a comparable, which would imply that the intellectual ownership of the product would lie with the comparable only?*
- xii. Whether on the facts and circumstances of the case and in law, the Lit CIT(A) is correct in directing to exclude AurionPro Solution without appreciating the fact that the issue of merger of Silicon Tech Corp with Aurion Pro Solution was not raised before the TPO during the transfer pricing proceedings and nowhere from the accounts produced before the TPO, it was demonstrated how and where the profitability as shown in its books has been impacted, due to the merger?*
- xiii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude AurionPro Solution by treating the event of acquisition as extra ordinary event without analyzing the financial impact of the transaction on the working capital and cash flows of the comparable company and without going into the merits of the case?*
- xiv. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude E-Infochips Ltd. from the list of comparables by not treating the company as a software development company as out of the total revenue of Rs. 26.03 crores, revenue from software development amounts to Rs. 19.21 crores which is about 74% of the total revenue?*
- xv. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude Thirdware Solutions Ltd. for the reason that it is a product company?*
- xvi. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to exclude Thirdware Solutions Ltd. without appreciating the fact that both product companies and software development companies share several similarities due to their focus and technology and software development and both rely on modern tools and programming languages to create their product, therefore rejecting such comparables on the basis of strict comparison is not warranted for benchmarking under TNMM?"*

3. Brief facts of the case as culled out from records are that is a provider of software development and related services to its associated enterprises namely, Xoriant Corporation, USA and Y-Point UK Ltd. M/s.

Xoriant –US has 90.63% shareholding of M/s. Xoriant Solutions private limited. Another associated enterprise, M/s. Y-Point UK is a subsidiary of M/s. Xoriant-US. Assessee’s software development and engineering services line offers a full life-cycle software development, engineering services, producing implementation and integration services. Assessee reported the following international transactions in its Form 3CEB wherein it had claimed to have benchmarked the same under Cost Plus Method.: -

Sr. no.	Name of the A.E.	Nature of Transactions	Amount (RS.)	Method adopted
1	Xoriant Corporation, USA	Sale of computer software	36,99,51,010	Cost plus method
2	Y-Point UK ltd.	Sale of computer software	21,75,574	Cost plus method
	Total		37,21,26,584	

3.1. Reference was made to Id. TPO u/s 92CA(1) by the Id. Assessing Officer for computation of arms’ length price in relation to international transactions. According to Id. TPO, assessee has not properly applied the Cost Plus Method. However, according to the assessee, since inception, it had been following the Cost Plus Method in respect of transactions with its foreign associated enterprises as the most appropriated method while working out Arm’s Length Price. The said method has been accepted by the Department in Asst Year 2007-08 and Asst Year 2008-09 though a different view was taken in Asst Year 2009-10, Asst Year 2010-11. Further, according to the Id. TPO, cost claimed by the assessee to be attributable towards rendering software services to its Associated Enterprises are not certified by way of segmental accounts audited and duly certified by an auditor as a result of which

the claim of the assessee is not verifiable. Ld. TPO thus rejected the TP Study carried out by the assessee as unreliable and conducted his own study with TNMM as the most appropriate method and Operating Profit / Operating Cost (OP/OC) as the Profit Level Indicator (PLI). He benchmarked the arms' length price by bringing in new set of comparable which resulted in an upward adjustment of Rs.5,87,13,060/- to the total income of the assessee.

3.2. Assessee objected on the selection of following comparable by the ld. TPO:

Sr. No. (As per TPO's order)	Name of the Company	PLI (OP/OC) % AY 2011-12
01	Acropetal Technologies Limited	36.69
05	E-Infochips Limited	56.44
06	e-Zest Solutions Limited	34.83
08	M/s Infosys Technologies Ltd	43.53
10	Larsen & Turbo Infotech Limited	18.40
11	Mindtree Limited	10.74
12	M/s. Persistent Systems & Solutions Limited (Merged)	22.12
13	M/s. Persistent Systems Ltd	23.08
15	Sankhya Infotech Limited	26.20
16	M/s Sasken Communication Technologies Ltd	24.36
18	Thirdwave Solutions	16.19
19	M/s Wipro Ltd.	54.42
20	Zylo Systems Ltd	28.74
21	AurionPro Solutions Ltd	28.38

3.3. Assessee claims that comparable companies selected by the ld. TPO have turnover of more than 10 times of its own turnover of Rs.38.13

crores. These are uncomparable and therefore needs to be excluded. It is submitted that turnover less than 1/10th or more than 10 times of the turnover of assessee are to be excluded. To fortify its claim, assessee relied on several decisions of ITAT Coordinate Benches including decision of ITAT Bangalore Bench in the case of Misys Software Solutions (India) (P.) Ltd vs. DCIT; in the case of Tesco Hindustan Service Centre Pvt. Ltd. vs. DCIT; by ITAT Mumbai in Jacobs Engineering India P. Ltd. vs. DCIT.

3.4. According to the assessee, the criteria of comparable companies having turnover between 1/10th to 10 times turnover of the assessee has been considered by the ld. TPO in assessee's own case for Assessment Year 2017-18, 2018-19 and 2020-21 while making the transfer pricing assessment. Accordingly, following companies cannot be considered as comparable with the assessee as the turnover is not within the specified range:

Sr. No.	Name of the Company	OP/OC %	Turnover (in Rs. crores)
08	Infosys Ltd.	43.53	25,385.00
10	Larsen & Turbo Infotech Ltd	18.40	43,495.93
11	Mindtree Limited	10.74	1,509.00
12	Persistent Systems & Solutions Ltd	22.12	610.13
13	M/s. Persistent Systems Ltd	23.08	610.13
16	Sasken Communication Technologies Ltd	24.36	394.19
17	Tata Elxsi Ltd	13.00	4,110.12
19	Wipro Technologies Limited	54.42	26,005.00
20	Zylog Systems Ltd	28.74	899.11

4. In the first appeal, it is observed by the ld. CIT(A) that although prima facie, turnover should not have a significant impact on profitability in a service-oriented industry, it is an acknowledged fact

that the companies acquire significant intangibles in the form of brand and marketing etc. as their turnover increases. In many decisions, a reasonable cap on turnover has been upheld by ITAT of up to 10 times the turnover. Following such guidance, a higher turnover filter of Rs. 380 crore is considered by the Id. CIT(A) as fit for determining the arms' length price of the international transactions undertaken by the assessee.

5. The factual position stated above is uncontroverted. It is important to take note of the observations and finding of Hon'ble jurisdictional High Court of Bombay in the case of CIT vs. Pentair Water India (P) Ltd. [2016] 69 taxmann.com 180 (Bombay) wherein the aspect of turnover filter as claimed by the assessee was dealt with. Relevant para is extracted below for ready reference:

"5. On the perusal of the impugned order passed by the Tribunal dated 23.05.2014, we find that the Tribunal has recorded the reasons for not accepting the said three companies are comparable by stating as follows:

i. HCL Coment Systems & Services Ltd:- We find force in the submission of the Ld. AR that this company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the assessee, the turnover is around Rs. 11 crores only. While making the selection of comparable, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of Rs. 11 crores cannot be compared with a company which is having turnover of Rs. 260 crores which is more than 23 times the turnover of the Assessee. This company cannot be regarded to be in equal size to the assessee. We, accordingly direct the AO to exclude this company out of the comparable.

ii. Infosys BPO Ltd:- In this case also we noted the turnover in respect of this company is Rs. 649.56 crores while the turnover of the assessee company is around Rs. 11 crores which is much more than 65 times of the assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT(A) in excluding this company out of the comparable. Accordingly, we confirm the order of the CIT(A).

iii. Wipro Ltd.:- After hearing the rival submissions, we noted that the CIT(A) applying the turnover filter has excluded this company out of the comparable. The turnover reported in the case of Wipro Ltd. is Rs. 939.78 crores while in the case of the assessee the turnover is around Rs. 11

crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the assessee company and accordingly, we do not find any infirmity in the finding of CIT(A) while he excluded this company on the turnover criteria following the decision of this tribunal in:

*Sony India (P) Ltd. V. DY. CIT [2008] 114 ITD 448 (Delhi)
 E-gain communication (P). Ltd. V. ITO [2008] 23 SOT 385 (Pune).
 Deloitte Consulting India (P) Ltd. V. Dy. CIT [2013] 144 ITD 451/36
 taxman.com 68 (Hyd.)
 Genisys Integrating System (India) (P). Ltd. V. Dy. CIT [2012] 53
 SOT 159/20 taxman.com 715 (Bang.)”*

5.1. Considering the undisputed facts on record, factual finding given by the ld. CIT(A) and judicial precedents in favour of the assessee as noted above, we are in agreement with the claim of the assessee and find no reason to interfere with the findings arrived at by the ld. CIT(A) for excluding the above tabulated comparable companies on account of the turnover filter as discussed above.

6. For the remainder comparable companies, the basis of exclusion claimed by the assessee is on account of difference in their functions, assets and risks, that is their FAR analysis. For each of these comparable companies, ld. CIT(A) has elaborately analysed the differences in their FAR and arrived at fact-based finding. We have perused the observations and findings of ld. CIT(A) for each of the comparable companies which have been corroborated by the ld. Counsel of the assessee with the material placed on record in the paper book. The observations and findings of ld. CIT(A) for each of these comparable companies claimed to be excluded for ALP benchmarking are extracted below for ready reference:

6.1. Acropetal Technologies Ltd

“10.4 While going through the record in the light of the submissions made by the appellant it is found that Acropetal Technologies Ltd, according to the annual report of this company, its key services include Engineering

design services, Healthcare, Enterprise solutions and IT Infrastructure solutions. It offers technological expertise and commitment to deliver cost-effective software products. It indicates that this company is not a pure software development company, but is also engaged in product development. Even in the segment of Information technology service, no bifurcation figures are available between software development service and software product activity. As per segmental reporting, the income from Information Technology Services is Rs. 81.40 crores out of the total income of Rs. 141.65 crores, indicating that the income from software development services is only 57.46% of its total operating revenue. In the case of Symantec Software & Services India Pvt. Ltd. vs. DCIT (ITA No. 614/Mds/2016) there is a finding of the Tribunal that this company is into different business model being engaged in onsite development of software and it does not pass the filter applied by TPO of 75% export turnover and that ratio of onsite to total employee related expenses comes to 86.2%. In the case of Zynga Game Network India (P) Ltd. vs. ACIT (ITA No. 360/Bang/2016) there is a finding of the Tribunal that the income of this company from IT services is Rs. 81.40 crores out of total income of Rs. 141.65 crores, thus failing 75% of total revenue filter. Thus, on going through the facts mentioned herein above Acropetal Technologies Ltd is not comparable company to the assessee and thus same needs to be removed from the comparable.”

6.2. E-Zest Solution Limited

“10.6 I have gone through the record and case law in the light of the submissions made by the appellant and would like to say that E-Zest Solution Limited, the information available in the annual report shows that this company is a certified product engineering and software development company, having special expertise in emerging technologies such as Cloud SaaS, Business Intelligence and Mobility. Its business is diversified into product and service, the products being offered by it include product engineering ITA Nos. 189 & 317/Hyd/2016 services, outsourcing product development services, enterprise application development, IT services, industries solution, technology expertise and delivery approach. Findings of the Tribunal and the Hon'ble High Courts are to the effect that the company engaged in product development services and high-end technical services, are to be categorized as KPO services, in general. Apart from this the annual report at page No. 50 under the head 'segment reporting' shows that, considering the nature of business and operations only one segment is reported and no detailed segmental information is available with respect to different business of this company. Annual report further shows that this company has inventories amounting to Rs. 1.65 crores. It was found in Symantec Software & Services India Pvt. Ltd. vs. DCIT (supra), that this company is engaged in product engineering services which is in nature of high end knowledge process outsourcing having expertise in emerging

technologies such as Saas, mobility and business intelligence. Thus, on going through the facts mentioned herein above E-Zest Solutions Ltd is not comparable company to the assessee and thus the same needs to be removed from the comparable.”

6.3. SankhyaInfotech Limited

“10.8 While going through the record and case law in the light of the submissions made by the appellant and would like to say that SankhyaInfotech Limited, the company is functionally different from the assessee as it is engaged in development of niche software product and training. Thus, on going through the facts mentioned herein above SankhyaInfotech Limited is not comparable company to the assessee and thus same needs to be removed from the comparable.”

6.4. AurionPro Solution

“10.10 I have gone through the record and case law in the light of the submissions made by the appellant and would like to say that AurionPro Solution, I accept the contention of the appellant. Thus, on going through the facts mentioned herein above AurionPro Solution is not comparable company to the assessee and thus same needs to be removed from the comparable.”

6.5. E-infochip Ltd

“10.12 I have gone through the record and case law in the light of the submissions made by the appellant and would like to say that E-infochip Ltd, the company is functionally different from the assessee. Thus, on going through the facts mentioned herein above E-infochip Ltd is not comparable company to the assessee and thus same needs to be removed from the comparable.”

6.6. Thirdware Solutions Limited

“10.14 I have gone through the record and case law in the light of the submissions made by the appellant and would like to say that Thirdware Solutions Limited, the company was explicitly excluded on the grounds that it is a product company which were examined by co-ordinate bench of Mumbai Tribunal in Agnity India technologies Pvt Ltd wherein the company was held to be product Company. The same was excluded by ITAT in its order in case of the appellant for A.Y 2010-11. Thus, on going through the facts mentioned herein above and business carried on by the appellant is same as was in AY 2010-11 Thirdware Solutions Limited is not comparable company to the assessee and thus same needs to be removed from the comparable.”

6.7. We have considered the submissions made before us by both the parties and perused the material on record which does not in any way controverts the above extracted observations and finding of Id. CIT(A) while holding for the exclusion of the stated comparable companies taken by the Id. TPO for arriving at an upward adjustment to determine the ALP of the international transactions undertaken by the assessee. The factual position remains uncontroverted. Further, in the conclusion, Id. CIT(A) held that following remaining companies tabulated below should be adopted as comparable for computing the arm's length margin for the assessee by taking the arithmetic mean:

Sr. No.	Name of the Comparable Company	PLI (OP/OC) % AY 2011-12
1	Akshay Software Technologies Limited	0.16
2	Celstream Technologies Pvt Limited	12.26
3	Evoke Technologies Pvt Limited	8.11
4	R S Software (India) Limited	16.20
5	Igate Global solutions Limited	23.71
6	Kireeti Soft Technologies Limited	3.63
7	Ramco Systems Limited	9.16

6.8. Considering the factual matrix of the present case, fact-based findings of Id. CIT(A) fortified by judicial precedents, we do not find any reason to interfere with the stated observations and findings arrived at by the Id. CIT(A) who held in favour of the assessee for excluding these companies as comparable for the purpose of benchmarking. Grounds taken by the revenue are dismissed.

7. In the result, appeal by the revenue is dismissed.

7.1. In the appeal for Assessment Year 2012-13, the comparable companies whose exclusion is under contest have already been dealt in

the appeal for Assessment Year 2011-12 in the above paragraphs. There being no change in the factual position and applicable law, our observations and findings in appeal for Assessment Year 2011-12 apply mutatis mutandis to appeal for Assessment Year 2012-13. Accordingly, appeal for Assessment Year 2012-13 by the revenue is dismissed.

8. In the result, both the appeals by the revenue are dismissed.

Order pronounced in the open court on 26th June, 2025.

Sd/-
[Anikesh Banerjee]
Judicial Member

Sd/-
[Girish Agrawal]
Accountant Member

Dated: 26.06.2025.

Divya R. Nandgaonkar
Stenographer

Copy to:

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
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5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai