

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " A "**

**BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

I.T.(T.P) A. No.1099/Bang/2011 (Assessment Year : 2005-06)		
Income Tax Officer, Ward 12(1), Bangalore.	Vs.	M/s. Net Devices India Pvt. Ltd., A Wing, Silver Oak, Manya Embassy Business Park, Nagarwara, ORR, Bangalore. PAN AACCN 2025R
Appellant		Respondent.

C.O. No.19/Bang/201
(In I.T.(T.P) A. No.1099/Bang/2011)
(Assessment Year : 2005-06)
(By Assessee)

Appellant By : Dr.P.K. Srihari, Addl. CIT (D.R.)

Respondent/C.O. By : Shri Pravin Kishore Prasad, Advocate.

Date of Hearing : 21.04.2016.

Date of Pronouncement : 25.05.2016.

ORDER

Per Shri Vijay Pal Rao, J.M. :

This appeal by the Revenue and the Cross Objection of the assessee are directed against the order dt.12.9.2011 of Commissioner of Income Tax (Appeals) for the Assessment Year 2005-06.

2. The Revenue has raised the following grounds :

1. The order of the Learned CIT(A) in so far as it relates to the following grounds is opposed to law and facts of the case.

2. The CIT(A) erred in holding that expenditure of RS.7,35,710/- towards telecommunication expenses and Rs.11,23,240/- towards foreign travel expenses are to be excluded from total turnover as well for the purpose of computation of deduction u/s 10A while such exclusion is permitted to arrive at the export turnover only as per the definitions given in Sec.10A of the I.T. Act, 1961 and total turnover has not been defined in the section.

3. In the facts and circumstances of the case, the learned CIT(A) erred in holding that the TPO erred in not excluding comparables having any related party transactions, even if the related party transactions are less than 25% of the revenues.

4. The learned CIT(A) erred in holding that profit on cost of more than 50% of the comparable company(ies) is abnormal without giving reasons how functions discharged, assets deployed and risks assumed of such companies were different from the appellant company .

5. The learned CIT(A) erred in holding that the assessee is eligible for a standard deduction of 5% from the Arm's Length Price (ALP) under the proviso to Section 92C(2) of the Income Tax Act.

6. The learned CIT(A) erred in holding that the size, turnover and brand of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Infosys Technologies Ltd. as a comparable.

7. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.+

8. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.+

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. Ground No.2 is regarding exclusion of the expenditure towards telecommunication expenses and expenses towards foreign travel expenses from the export turnover as well as total turnover for the purpose of computation of deduction under Section 10A of the Income Tax Act, 1961 (in short 'the Act').

5.1 We have heard the rival submission and perused the material on record. The Hon'ble Karnataka High Court in the case of CIT v M/s Tata Elxsi Ltd. & Others 349 ITR 98 (Kar) had held that while computing the exemption u/s 10A, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded from the total turnover in the denominator. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:-

".....Section 10A is enacted as an incentive to exporters to enable their products to be competitive in the global market and consequently earn precious foreign exchange for the country. This aspect has to be borne in mind. While computing the consideration received from such export turnover, the expenses incurred towards freight, telecommunication charges, or insurance attributable to the delivery of the articles or things or computer software outside India, or expenses if any incurred in foreign exchange, in providing the technical services outside India should not be included. However, the word total turnover is not defined for the purpose of this section. It is because of this omission to define 'total turnover', the word 'total turnover' falls for interpretation by this Court;

.....In section 10A, not only the word 'total turnover' is not defined, there is no clue regarding what is to be excluded while arriving at the total turnover. However, while interpreting the provisions of section 80HHC, the courts have laid down various principles, which are independent of the statutory provisions. There should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10A is a beneficial section which intends to provide incentives to promote exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of section 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in section 10-A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. To the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. If the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in section 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. When the statute prescribed a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total

turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. Thus, there is no error committed by the Tribunal in following the judgements rendered in the context of section 80HHC in interpreting section 10A when the principle underlying both these provisions is one and the same".

5.2 The Hon'ble Mumbai High Court in the case of CIT Vs. Gem Plus Jewellery India Ltd. 330 ITR 175, in identical circumstances, held that since the export turnover forms part of the total turnover, if an item is excluded from the export turnover, the same should also be reduced from the total turnover to maintain parity between numerator and denominator while calculating deduction u/s 10A of the Act. The relevant finding of the Hon'ble Mumbai High Court reads as follows:-

"The total turnover of the business carried on by the undertaking would consist of the turnover from export and the turnover from local sales. The export turnover constitutes the numerator in the formula prescribed by sub-section (4). Export turnover also forms a constituent element of the denominator in as much as the export turnover is a part of the total turnover. The export turnover, in the numerator must have the same meaning as the export turnover which is constituent element of the total turnover in the denominator. The legislature has provided a definition of the expression "export turnover" in Explan.2 to s.10A which the expression is defined to mean the consideration in respect of export by the undertaking of articles, things or computer software received in or brought into India by the assessee in convertible foreign exchange but so as not to include inter alia freight, telecommunication

charges or insurance attributable to the delivery of the articles, things or software outside India. Therefore in computing the export turnover the legislature has made a specific exclusion of freight and insurance charges. The submission which has been urged on behalf of the revenue is that while freight and insurance charges are liable to be excluded in computing export turnover, a similar exclusion has not been provided in regard to total turnover. The submission of the revenue, however, misses the point that the expression "total turnover" has not been defined at all by Parliament for the purposes of s.10A. However, the expression "export turnover" has been defined. The definition of "export turnover" excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression "export turnover" cannot have a different meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. Undoubtedly, it was open to Parliament to make a provision which has been enunciated earlier must prevail as a matter of correct statutory interpretation. Any other interpretation would lead to an absurdity. If the contention of the Revenue were to be accepted, the same expression viz. 'export turnover' would have a different connotation in the application of the same formula. The submission of the Revenue would lead to a situation where freight and insurance, though these have been specifically excluded from 'export turnover' for the purposes of the numerator would be brought in as part of the 'export turnover' when it forms an element of the total turnover as a denominator in the formula. A construction of a statutory provision which would lead to an absurdity must be avoided. Moreover, a receipt such as freight and insurance which does not have any element of profit cannot be included in the total turnover. Freight and insurance charges do not have any element of turnover. For this reason in addition, these two items would have to be excluded from the total turnover particularly in the absence of a legislative prescription to the contrary - CIT v Sudarshan Chemicals Industries Ltd. (2000)

163 CTR (Bom) 596: (2000) 245 ITR 769 (Bom) applied; CIT v Lakshmi Machine Works (2007) 210 CTR (SC) 1: (2007) 290 ITR 667 (SC) and CIT v Catapharma (India) (P) Ltd. (2007) 211 CTR (SC) 83: (2007) 292 ITR 641 (SC) relied on"

5.3 In the light of the above binding precedent, we are of the view that the order of the CIT(A) is correct and in accordance with law and he is justified in directing the AO to exclude the above mentioned expenses both from the export turnover as well as from the total turnover while calculating deduction u/s 10A of the Act. Ground No.2 raised by the revenue is dismissed.

6. Ground No.3 is regarding 0% Related Party Transactions (in short 'RPT') filter applied by the CIT (Appeals). The assessee is a subsidiary of Net Devices Inc., USA and registered as 100% Export Oriented Unit (EOU) with Software Technology Park of India (STPI). The assessee carried out contract software design and development services for its parent company Net Devices Inc., USA on an exclusive basis. For this purpose, the assessee entered into a service agreement with Net Devices Inc., USA. Thus the assessee has been categorized as a software design and development service provider for its parent company. The financial results of the assessee for the year under consideration are reported as under :

“2.3 Financial Results of NDPL, F.Y. 2004-05

Operating Revenue	Rs.10,55,11,862.
Operating Expenses	Rs.9,59,12,822 *
PBIT	Rs.95,99,040.
PBIT on cost	10%
* Excluding foreign exchange loss of Rs.7,053.”	

The assessee entered into international transactions with its Associated Enterprises ('AEs') viz. Net Devices Inc., USA which are reported as per 3CEB Report and as per Section 92CA of the Act as under :

Rendering of software development services : Rs.10,55,11,862.

Purchase of Lab Equipments : Rs.34,35,078.

The assessee selected 7 comparable companies and computed Arithmetic Mean ('AM') at 9.70% by adopting Transactional Net Margin Method ('TNMM') as Most Appropriate Method ('MAM') and OP/TC as Profit Level Indicator ('PLI'). The Transfer Pricing Officer ('TPO') rejected the comparables selected by the assessee are as under :

Sl.No.	Name of the Company	Op. margin as taken by the tax payer.
1.	Birlasoft Limited	13.81
2.	Dynacons Systems & Solutions Ltd.	4.49

3.	Integra Telecommunciations & Software Ltd.	0.93
4.	Softcell Technology Ltd.	1.92
5.	VJIL Consulting Ltd.	10.09
6.	Visualsoft Tech Ltd.	31.75
7.	R S Software Ltd.	4.88

The TPO carried out a fresh search and selected 17 comparable companies as under :

Sl.No.	Company Name	OP to Total Cost %
1.	Bodhtree Consulting Ltd.	24.85
2.	Lanco Global Systems Ltd.	13.65
3.	Exensys Software Solutions Ltd.	70.68
4.	Sankya Infotech Ltd.	27.39
5.	Sasken Network Systems Ltd.	16.64
6.	Four Soft Ltd.	22.98
7.	Thirdware Solution Ltd.	66.09
8.	R S Software (India) Ltd.	8.07
9.	Geometric Software Solutions Co. Ltd.	20.34
10.	Tata Elxsi Ltd. (Seg.)	24.35
11.	Visual Soft Technologies Ltd. (Seg.)	23.52
12.	Sasken Communication Technologies Ltd. (Seg.)	14.42
13.	Igate (Seg.)	4.32
14.	Flextronics (Seg.)	32.19
15.	L&T Infotech	10.33
16.	Satyam	29.44
17.	Infosys	42.83
	Average	26.59

The TPO has arrived at the mean margin at 26.59% and after granting working capital adjustment of 3.15%, the adjusted mean PLI was determined by TPO at 23.44%. Accordingly, the TPO proposed an adjustment of Rs.1,28,82,925 under Section 92CA. The assessee challenged the action of the TPO/A.O. before the CIT (Appeals). The CIT (Appeals) applied 0% Related Party filter as against 25% Related Party filter applied by the TPO and consequently the CIT (Appeals) excluded 12 comparable companies from the set of comparables selected by the TPO on the ground of RPTs. Thus out of the 17 comparable companies, the CIT (Appeals) has excluded 12 companies on the ground of RPTs by applying 0% filter and one company i.e. **Infosys Technologies Ltd.** on functional dissimilarity. The company excluded by the CIT (Appeals) from the list of comparables are listed in para 2.10 as under :

“ 2.10 In view of the findings given above, out of 17 comparables selected by the TPO, the following companies are excluded as comparables :

Sl.No.	Name of the Company
1.	Exensys Software Solutions Ltd.
2.	Sasken Network Systems Ltd.
3.	Four Soft Ltd.
4.	Thirdware Solution Ltd.
5.	R S Softwre (India) Ltd.
6.	Geometric Software Solutions Co. Ltd.
7.	Tata Elxsi Ltd. (Seg.)
8.	Sasken Communication Technologies Ltd. (Seg.)

9.	Igate Solutions Ltd. (Seg.)
10.	Flextronics Software Ltd. (Seg.)
11.	L&T Infotech Ltd.
12.	Satyam Computer Services Ltd.
13.	Infosys Technologies Ltd.

On exclusion of the above companies from the list of the comparables, the remaining 4 companies are having a turnover between Rs.1 Crore to Rs.200 Crores and after giving effect to the finding given above, the arithmetic mean of the margins of the remaining comparables works out as under :

Sl.No.	Name of the company	OP/OV %	OP/OC after working capital adjustment.
1	Bodhtree Consulting Ltd.	24.01	21.19
2	Lanco Global Systems Ltd.	13.22	8.57
3	Sankya Infotech Ltd.	26.63	20.05
4	Visual Soft Technologies Ltd.	23.52	19.75
	MEAN (69.56 / 4)		17.39

Considering the above, the ALP of the international transactions works out as under :

A. Operating Cost (including foreign exchange loss)	Rs.9,59,12,822.
B. ARMS LENGTH MARGIN	17.39%
C. PRICE @ 117.39%	Rs.11,25,92,061.
D. ALP (95% of C)	Rs.10,69,62,458
E. Price Received	Rs.10,55,11,862
F. Difference (AD) u/s.92CA	14,50,596

In the result, the adjustment under Section 92CA(3) of the Income Tax Act to the extent of Rs.14,50,596, is upheld.”

7.1 Before us, the learned Departmental Representative has submitted that the CIT (Appeals) has committed an error by applying the RPT filter at 0%. He has further submitted that the TPO has applied the filter of RPT at 25% which is a proper filter as accepted by this Tribunal in various cases.

7.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the Tribunal in a series of decisions has applied Related Party filter at 15% and therefore the companies which are having more than 15% of RPT should be excluded from the list of comparables selected by the TPO. He has relied upon the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Citrix R&D India Pvt. Ltd. in IT(TP)A Nos.841/Bang/2013 & 172/Bang/2013.
- iii) M/s. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.
- iv) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

The learned Authorised Representative has further submitted that in the assessee's own case for the Assessment Year 2006-07, the Tribunal has considered this issue and taken a view that the RPT threshold limit should not be more than 15%.

7.3 We have considered the rival submissions as well as the relevant material on record. At the outset we note that in strict sense, the ALP has to be

determined by considering uncontrolled comparable prices which means unrelated comparable prices has to be taken into account to bench mark the international transactions which are the control and RPTs. However, 0% RPTs of the comparable price is an impossible situation and therefore a reasonable tolerance range of the revenue from RPT can be considered for selecting the uncontrolled comparables. There cannot be a single criteria / parameter which can be applied as a general rule in all cases. Therefore, this tolerance range varies from case to case and depending upon the availability of the comparables. If the comparables of international transactions are easily available, then, this tolerance of RPT should be restricted to minimum. There is no specified tolerance range in the Act or Rules under the Transfer Pricing provisions, however, in due course of discussion and adjudication of this issue in a series of decisions of this Tribunal, commonly accepted tolerance range of 5% to 25% of the total revenue from RPT has been considered as reasonable depending upon the facts and circumstances of each case. In the case on hand, the availability of the comparables is abundant in number as the TPO selected 17 comparables by applying the filter of 25% of revenue from related parties. Therefore, in this case, good number of comparables are available and there is no difficulty in searching the comparables. Accordingly, in order to determine the ALP by considering the comparable uncontrolled transactions, it should be kept in mind that the uncontrolled transactions should be least influenced by the RPT in the case of **DCIT Vs. Textron Global Technology Centre Pvt. Ltd.** in IT(TP)A No.29/Bang/2012 & C.O. No.40/Bang/2012 Dt.20.3.2015 for the Assessment Year 2005-06 the Tribunal has held in para 17 as under :-

“ 17. In view of the conclusion above that exclusion of comparable companies with RPT of less than zero percent is not valid, and that companies where RPT is less than 15% alone can be considered, then the comparable rejected by the CIT (Appeals) on the basis of the said filter will have to be included along with the four comparable retained by the CIT (Appeals). Although 12 comparable which were rejected on the basis of RPT being more than zero percent, one comparable viz., Four Soft Ltd, will have to be excluded since the RPT is at 19.89% and thus in excess of 15%. Sathyam Computers Ltd. and Infosys Technologies Ltd. will get excluded for the reason that the financial results are not reliable in the case of Sathyam Computers Ltd. and for the reason that the high turnover, brand value, high risks etc. The remaining 9 comparable companies which were excluded by the CIT (Appeals) by applying the RPT filter of 0% related party transaction will not have to be included. Their comparability with the assessee in terms of other filters will be discussed in the following paragraphs.”

We further note that in the assessee's own case for the Assessment Year 2006-07, the Tribunal has taken a similar view has been taken in assessee's own case for the Assessment Year 2006-07 in para 14 as under :

“ 14. Further, as regards Mega Soft Ltd., Aztec Software Ltd., and Geometric Software Ltd.(segment) are concerned, it is stated by the learned counsel for the assessee that RPT of these companies is 17.08%, 17.78% and 19.34% respectively. He stated that this Tribunal, in a number of cases has been holding that if the RPT are more than 15%, then such comparable companies have to be excluded from the final list of comparables. In support of this contention also, the learned counsel for the assessee has placed reliance upon the decision of the co-ordinate bench of the Tribunal in the case of M/s.Ariba Technologies India Pvt. Ltd.”

In view of the facts and circumstances of the case when there is good number of comparables available then, we concur with the view of the co-ordinate bench that the RPT filter of 15% is proper in the case of the assessee. Accordingly we direct the Assessing Officer/TPO to exclude the comparable companies having the revenue of more than 15% from related parties. The learned Authorised Representative of the assessee has referred Annexure A to TPO order which mentions the percentage of

RPTs. Thus as per the Annexure A of the TPO's order, the following companies having more than 15% of RPT are directed to be excluded.

<u>Sl. No.</u>	<u>Comparable Company Name</u>	<u>% of RPT Over sales</u>
1.	Aztec Software Limited	17.78
2.	Geometric Software Limited	19.34
3.	Megasoft Limited	17.08

The order of the CIT (Appeals) stands modified on this issue.

8.1 Ground No.4 is regarding exclusion of the companies having more than 50% of profit margin. The learned Departmental Representative has submitted that the CIT (Appeals) has excluded two companies viz. **Accentia Software Solutions Ltd. and Thirdware Solutions Ltd.** on the ground that these companies are having abnormal profits of more than 50%. Thus the learned Departmental Representative contended that high profits or high loss cannot be a reason for exclusion of a company in the list of comparables. He has relied upon the order of the TPO and submitted that the TPO found that these two companies are in the similar business and therefore functionally comparable with the assessee.

8.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the CIT (Appeals) has excluded these two companies by considering various facts on functional comparability as well as extra-ordinary events during the year under consideration and not merely on the basis of high profit margins. He has further submitted that the company like **Accentia Software Solutions Ltd.** is functionally different and there is an extra ordinary event of amalgamation during the year under consideration with **M/s. Honloom India Ltd.** He has referred the Annual Report of this company in support of his contention. The learned Authorised Representative has further submitted that even otherwise this company is engaged in diversified operation including software products as well as intangible assets, brands which comprise a substantial part of growth of assets. Therefore, this company cannot be considered as comparable to the assessee which is a captive service provider. In support of his contention, the learned Authorised Representative has relied upon a number of decisions of this Tribunal including the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Citrix R&D India Pvt. Ltd. in IT(TP)A Nos.841/Bang/2013 & 172/Bang/2013.
- iii) M/s. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.

iv) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

8.3 We have considered the rival submissions as well as relevant material on record. We note that though the CIT (Appeals) has finally concluded that this company has abnormal profit and accordingly directed the TPO/A.O to exclude the same from the set of comparables, however, as it is manifest from the Annual Report of the company that during the year under consideration this company entered into a scheme of amalgamation with **M/s. Holool India Ltd.** The scheme of amalgamation has been sanctioned by the Hon'ble High Court of Andhra Pradesh w.e.f. 1.4.2004 vide order dt.5.9.2005. Therefore, undisputedly there was an extra-ordinary event during the year under consideration in respect of this company. Further we find that the co-ordinate bench of this Tribunal in case of **M/s. Textron Global Technology Centre Pvt. Ltd.** in IT(TP)A No.29/Bang/2012 has considered the comparability of this company in paras 19 & 20 as under :

“ Sankhya Infotech Limited ('Sankhya')

19. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:

(1) SILICON™ Training Suite of Products: The products are a comprehensive enterprise wide training platform that covers the entire spectrum of training in a paperless environment. It comprises of four products:-

- SILICON™ LMS (Training Management Information)
- SILICON™ QT (Online Assessment System)
- SILICON™ LCMS (Learning Content Management System)
- IRMAQ™ : This is an integrated resource planning, management tracking system exclusively developed for Airline operations. It is an end-to- end solution for all Flight Operations.
- Sakai CLE : This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract from the Annual report substantiating that the company also engages in different activities is reproduced below:

~~%~~ Activities

The company as engaged in the business of development of Software Products & Services and training. The production of software is not capable of being expressed in any generic unit and hence 11 is riot possible to give the information as required by certain clauses of paragraphs 3.4C and 4 D of Part II of Schedule VI of the Companies Act, 1956.+

The Delhi Tribunal in *ITO v. Colt Technology Services India Pvt. Ltd. (judgment dated 23.10.2012 in ITA No. 6091/Del/2011 for the assessment year 2005-06)* has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

20. The submissions made by the learned counsel for the Assessee are considered. The activities set out above and the decision of the Delhi ITAT rendered in the context of a software development company such as the Assessee makes it amply clear that this company Sankhya cannot be regarded as a comparable. The same is directed to be excluded from the list of comparable companies.+

A similar view has been taken by the Tribunal in the cases as relied upon by the assessee. Accordingly, we find that this company is functionally different from the assessee which is a captive service provider. Hence we concur with the

view of the CIT (Appeals) though on a different reason and direct the A.O./TPO to exclude Accentia Software Solutions Ltd. from the list of comparables.

Thirdware Solutions Pvt. Ltd.

9.1 There is no dispute that the high profit margin or loss cannot be a ground for exclusion or inclusion of a particular company in the list of comparables. The learned Authorised Representative of the assessee has submitted that this company is in the diversified activities and derive its income from sale of software license, software products apart from software development services. This company is engaged in the diversified activities of rendering application development, customer relationship management and ERP, software products. He has referred to the Annual Report of this company and submitted that this company is also engaged in the distribution of software products and providing trunky project which include a bundle of activities such as providing software product combined with implementation and customer services. In support of his contention, he has relied upon the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Sunquest Information Systems (India) Pvt. Ltd. in IT(TP)A No.1302/Bang/2012.

iii) M/s. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.

iv) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

9.2 The learned Departmental Representative has submitted that the TPO has analysed the functions of this company and it was found that this company is engaged in the similar activity of providing software development services. He has relied upon the orders of the authorities below.

9.3 We have heard the rival submissions as well as considered the relevant material on record. The learned Authorised Representative of the assessee has contended that this company is having diversified activities including software product as well as trunky project. We find that as per Schedules 12 as well as 14 of the balance sheet of this company, this company has sale of license, purchase of license and purchase of AMC charges. The details of the sales in Schedule 12 and details of purchase in Schedule 14 are as under :

SCHEDULE 12 : SALES	
Sale of Licence	27,202,087
Software Services	80,602,781
Export	147,425,780
Revenue from Subscription	35,939,678
SCHEDULE 14 : DETAILS OF PURCHASE	
Purchase of Licence	21,168.657
Clearing and Forwarding charges	835,754
Purchase – AMC Charges	16,893,037
Software Service Charges	17,329,999

Training Expenses	554,296
Purchase others	0

Thus it is clear from the Schedules 12 & 14 of the balance sheet of this company that this company is in trading of licenses and no separate segmental data are available. Therefore, this company cannot be considered as a good comparable to the software development services provider, companies like assessee which is a captive service provider. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

10. Ground No.5 is regarding the benefit of proviso to Section 92C(2) of the Act.

10.1 The learned Departmental Representative has submitted that the CIT (Appeals) has erred in directing the Assessing Officer to allow the standard deduction of 5% whereas this is only a benefit in the nature of tolerance range up to + or – 5%.

10.2 On the other hand, the learned Authorised Representative has not disputed that the benefit of proviso to Section 92C(2) is only in the nature of a tolerance range up to + or – 5% and not a standard deduction.

10.3 It is pertinent to note that it is settled proposition of law that the benefit of proviso to section 92C(2) is only in the nature of tolerance range if the price of international transactions is within the range of + or – 5% of the average comparable price. Accordingly, we direct the A.O./TPO to consider the benefit under the proviso to Section 92C(2) of the Act if the difference between the Arm's Length Price ('ALP') and the price of international transactions of the assessee are within the tolerance range of + or – 5%.

11.1 Ground No.6 is regarding exclusion of **M/s. Infosys Technologies Ltd.** on the ground of turnover and brand value of the company.

11.2 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the functional comparability of this company was decided by the Delhi Bench of this Tribunal in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856/Del/2010 which has been upheld by the Hon'ble Delhi High Court reported in 219 Taxman 26 in paras 5 to 8 which are as under :

" 5. The tribunal has observed that the assessee was not comparable with Infosys Technologies Ltd., as Infosys Technologies Ltd. was a large and bigger company in the area of development of software and, therefore, the profits earned cannot be a bench marked or equated with the respondent, to determine the results declared by the respondent- assessee. In paragraph 3.3 the tribunal has referred to the difference between the respondent- assessee and Infosys Technologies Ltd. For the sake of convenience, we are reproducing the same:-

Basic Particular	Infosys Technologies Ltd.	Agnity India
Risk Profile	Operate as full-fledged risk taking entrepreneurs	Operate at minimal risks as the 100 percent services are provided to AEs
Nature of Services	Diversified-consulting, application design, development, re-engineering and maintenance system integration, package evaluation and implementation and business process management, etc. (refer page 117 of the paper book)	Contract Software Development Services.
Revenue	Rs.9, 028 Crores	Rs.16.09 Crores
Ownership of branded/proprietary products	Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProwe, Infosys mConnect, Also, the company derives substantial portion of its proprietary products (including its flagship banking product suite -Finacle)	
Onsite Vs. Offshore	-As much as half of the software development services rendered by Infosys are onsite (i.e., services performed at the customer's location overseas). And offshore (50.20 percent) (Refer page 117 of the paper book) than half of its service, income from onsite services.	The appellant provides only offshore services (i.e., remotely from India)
Expenditure on Advertising/Sales promotion and brand building	Rs.61 Crores	Rs. Nil (as the 100 percent services are provide to AEs)
Expenditure on Research & Development	Rs. 102 crores	Rs. Nil
Other		100 percent offshore (from India)

"6. Learned counsel for the Revenue has submitted that the tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent- assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.

7. Learned counsel for the appellant Revenue during the course of hearing, drew our attention to the order passed by the TPO and it is pointed out that based upon the figures and data made available, the TPO had treated a third company as comparable when the wage and sale ratio was between 30 percent to 60 percent. By applying this filter, several

companies were excluded. This is correct as it is recorded in para 3.1.2 of the order passed by the TPO. TPO, as noted above, however had taken three companies, namely, Satyam Computer Service Ltd., L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean.

8. It is a common case that Satyam Computer Services Ltd. should not be taken into consideration. The tribunal for valid and good reasons has pointed out that Infosys Technologies Ltd. cannot be taken as a comparable in the present case. This leaves L&T Infotech Ltd. which gives us the figure of 11.11 percent, which is less than the figure of 17 percent margin as declared by the respondent-assessee. This is the finding recorded by the tribunal. The tribunal in the impugned order has also observed that the assessee had furnished details of workables in respect of 23 companies and the mean of the comparables worked out to 10 percent, as against the margin of 17 percent shown by the assessee. Details of these companies are mentioned in para 5 of the impugned order.”

Following the decision of the Hon'ble Delhi High Court (supra), we do not find any reason to interfere with the impugned order of the CIT (Appeals) on this issue.

C.O. No.19/Bang/2012

12. The assessee has raised the following grounds in the cross objections :

“1. That the order of the learned CIT (Appeals) resulting in income of the Respondent being subject to tax, is bad in law, without application of mind and liable to be quashed.

2. That the learned CIT (Appeals) erred in not entirely deleting the adjustment to the arm's length price made by the Id. Assessing Officer / TPO amounting to INR 12,882,925 in respect of the software development services.

3. That in making an adjustment to the Respondent's transfer price, on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in :

a) Upholding the comparability analysis performed by the Id. TPO in the TP order.

b) Arbitrarily rejecting the filters applied by the Respondent while undertaking the TP Study.

c) Modifying some of the filters applied by the Id. TPO in the TP order, without providing an opportunity of being heard to the appellant.

- d) *Arbitrary arriving at a set of companies as comparable to the Respondent.*
- e) *Disregarding application of multiple year / prior year data and holding that current year (i.e. opportunity of being heard to the appellant.*
- f) *Upholding the Id. TPO's approach of using data as at the time of assessment proceedings.*
- g) *Upholding the approach adopted by the Id. TPO of collecting selective information of the companies by exercising power granted to him under section 133(6) of the Income Tax Act, 1961 that was not available to the Respondent in the public domain.*
- h) *Not providing appropriate adjustment towards the risk differential between the Respondent and the entrepreneurial companies selected as comparables, while determining the arms length price.*
- That the Respondent craves leave to add to and/or alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time hearing of this Appeal.'*

13. The assessee has also raised additional grounds as under :

" The grounds mentioned herein are without prejudice to the grounds mentioned in Appeal No. CO 19/Bang/12 filed on July 12,2012.

Transfer Pricing Related

1. *That the Id. ITO, Ward 12(1), Bangalore and the learned CIT (Appeals) erred in confirming the action of the Id. JDIT (TPO)-II of accepting Bodhtree Consulting Limited as a comparable that fail the test of comparability on application of related party transaction filter of 15% and thus not comparable to the Appellant in respect of its software development services.*
2. *The Id. A.O/TPO erred in considering Flextronics Software Systems Ltd. (Seg.) that fails the test of comparability due to functional dissimilarity and thus not comparable to the Appellant in respect of its software development services.*

The appellant craves leave to add, alter, amend or withdraw all or any of the grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

14. First we take up the additional grounds raised by the assessee in respect of the exclusion of **Bodhtree Consultancy Ltd. & Flextronics Software Systems (Seg.)**.

15.1 The learned Authorised Representative of the assessee has submitted that though the assessee did not raise any objection before the authorities below in respect of the comparability of these two companies however in view of the various decisions of the Tribunal, these two companies are found to be not cocmparable with the software development services provider. Thus the learned Authorised Representative has submitted that the assessee has raised objection by filing the additional grounds which may be admitted for deciding the comparability of these two companies on merits.

15.2 On the other hand, the learned Departmental Representative has objected to the admission of the additional grounds raised by the assessee when the assessee has not raised any objection before the authorities below and the objections proposed to raise by the assessee now was not available with the authorities below for their consideration.

15.3 We have heard the rival submissions as well as considered the relevant material on record on the admissibility of the additional grounds raised by the

assessee. We find that there are some decisions of this Tribunal wherein the comparability of these two companies have been considered and decided by this Tribunal. Therefore, once the assessee has brought on record some decisions of the Tribunal wherein these two companies were held to be not good comparables then the facts and circumstances and in the interest of justice, we admit the additional grounds raised by the assessee. Accordingly, we will deal with the comparability of these two companies on merits.

16. **Bodhtree Consultancy Ltd.**

16.1 The learned Authorised Representative of the assessee has submitted that this company is required to be rejected the RPT of 34.68% of the total sale which is in excess of 15% taken as proper threshold limit. In support of his contention, he has relied upon the decision of the Hyderabad Bench of ITAT in the case of NTT Data Enterprises Pvt. Ltd. Vs. ACIT Dt.23.10.2013 in ITA No.1612/Hyd/2010 and submitted that in the said case the Tribunal has noted that the RPT of this company are 34.68%. The learned Authorised Representative has submitted that by following the said decision, the coordinate bench of this Tribunal in the case of ACIT Vs. McAfee Software India Pvt. Ltd. Dt.18.3.2016 in ITA Nos.4/Bang/2012 and 1388/Bang/2011 has also

taken a similar view. Thus the learned Authorised Representative has submitted that in view of the decisions of the co-ordinate benches of this Tribunal, this company cannot be considered as good comparable and the same shall be excluded from the set of comparables.

16.2 On the other hand, the learned Departmental Representative has submitted that this company was found to be comparable by the authorities below and even otherwise from the Annual Report of this company the RPT are less than 15% and therefore when the company itself has reported the RPT as less than 15% then the same cannot be excluded from the set of comparables merely on assumption of wrong facts.

16.3 We have heard the rival submissions as well as considered the relevant material on record. There is no dispute that as per the Annual Report of this company, the RPT has been reported only to the extent of Rs.10,73,871 in the nature of manager remuneration to the Managing Director and therefore the said transaction is almost NIL and in any case is less than 15% of the total sales. The learned Authorised Representative of the assessee has placed reliance on the decision of the Hyderabad Bench of ITAT in the case of **NTT Data India**

Enterprise Application Services Pvt. Ltd. (supra), we find that the Tribunal has

recorded the submissions of the counsel of the assessee in para 7 as under :

“ 7. Bodhtree Consulting Ltd.

The learned counsel submitted that this company should be rejected under the following TPO’s filters :

- *Related party transactions filter : As per Schedule 4 of the balance sheet, the company has investments in Perigon, LIC, USA and as per the response under Section 133(6); the company has export sales to Perigon LIC, USA of Rs.133.90 lakhs being 34.68% of the total turnover.*
- *Functionally different filter : The company in its response to notice under Section 133(6) has stated that it provides e-paper solutions, data cleansing software, website development and other customized software and also state that the e-paper solutions and data cleansing services would come under the category of IT enabled services.”*

However, the Tribunal did not propose to give any finding on this issue as the assessee did not press the exclusion of the said company as evident from the finding of the Tribunal in para 9 as under :

“ 9. Even though detailed submissions were made with reference to the above 7 companies, the learned counsel fairly admitted that even one company i.e. Exensys Software Solutions Ltd. is excluded, inclusion of other companies will become academic in nature as the arm’s length margin is within Assessee’s margin of 16.74%. With reference to this company, the learned counsel referring to replies given to AP/TPO in response to the notices under Section 133(6) and their annual reports, which are available in its paper book, submitted that this company is functionally different and the operations are exceptional as there was a merger in the year with another company which had a material/significant impact on the profit margins and further the computations are also wrong as the differed revenue expenditure, which was claimed regularly on the basis of accounting policy of the company, was excluded by the TPO in arriving at a different higher profit margin, which is not correct.”

Thus it is manifest from the order of the Tribunal that only the submissions of the learned Authorised Representative of the assessee were recorded by the Tribunal but there was no occasion for the Tribunal to even examine the facts

as pleaded by the learned Authorised Representative and therefore the facts pleaded by the learned Authorised Representative were not examined by the Tribunal then the question of giving any finding on the said issue did not arise. In the case of **M/s. Mc Afee Software (India) Pvt. Ltd.** (supra), the Tribunal has not gone into the fact of the RPT and even no record relating to the said fact has been examined but the Tribunal has just reproduced the submissions of the assessee as pleaded in case of **NTT Data India Enterprise Application Services Pvt. Ltd.** (supra) and therefore it is a clear case of assumption of unexamined facts. Accordingly, we are of the view that when the relevant record showing the RPT at 34.68% as claimed by the learned Authorised Representative of the assessee is not available or produced either before the authorities below or before us, then this objection of the assessee cannot be accepted for want of the supporting evidence. However, in the interest of justice, we set aside this issue to the record of the A.O./TPO to verify the fact as alleged by the assessee and if need arises the information under Section 133(6) of the Act may also be called for and decide the RPT issue.

17. Flextronics Software India Pvt. Ltd.

17.1 The learned Authorised Representative of the assessee has submitted that this company is having hybrid model of supplying both products and services. It offers new product design and development to enhancing and testing their current products. These services are provided for fixed networks, mobile networks, voice over packet and data network. Thus the learned Authorised Representative of the assessee has submitted that this company is functionally different from the assessee. He has contended that this company is engaged in the R&D activity as it is evident from the Annual Report of this company. In support of his contention, he has relied upon the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Sunquest Information Systems (India) Pvt. Ltd. in IT(TP)A No.1302/Bang/2011 & 92/Bang/2012.
- iii) M/s. Intoto Software India Pvt. Ltd. (ITA No.1196/Hyd/2010)
- iv) M/s. CNO IT Services (India) Pvt. Ltd. (ITA No.1280/Hyd/2010)

17.2 On the other hand, the learned Departmental Representative has submitted that the TPO has examined the functional comparability of this company and it had qualified all the parameters and filters applied by the TPO.

The objections raised by the assessee at this stage were not available before the TPO and therefore the same cannot be accepted in the absence of the examination of the fact by the TPO.

17.3 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the comparability of this company has been examined by this Tribunal in various cases as relied upon by the learned Authorised Representative of the assessee. In the case of **McAfee Software (India) Pvt. Ltd.** (supra), the co-ordinate bench of this Tribunal has again considered this issue in para 10.10 as under :

“10.10 This company was objected to on functional dissimilarity. This was considered in ITO Vs. M/s. Sunquest Information Systems (India) Pvt. Ltd. in IT(TP)A No.1302/Bang/2011 dt.11.6.2015 (supra) as under :

“ 26. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional dissimilarity between the assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the assessee company to bring them on par with the assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables.”.

Respectfully following, we exclude the same.”

In view of the facts as recorded and considered by the co-ordinate benches of this Tribunal that this company is in the activity of software development

services as well as software products and further also incurred R&D expenditure. Therefore, the same was found to be dis-similar to this pure software development services provider in the capacity of captive service provider. By following the earlier order of the Tribunal, we direct the Assessing Officer/TPO to exclude this company from the list of comparables.

18. The assessee has raised objections against the inclusion of the following companies by the TPO :

- (i) Sankya Infotech Ltd.
- (ii) Foursoft Ltd.
- (iii) Geometric Software Solutions Ltd.
- (iv) Tata Elxsi Ltd. (Seg.) and
- (v) Satyam Computer Services Ltd.

(i) Sankya Infotech Ltd.

18.1.1 The learned Authorised Representative of the assessee has submitted that this company is functionally dis-similar as this company is product based company and also engaged in R&D activity and development of niche product for the transportation and aviation fields. This company also owns intangibles. Thus this company cannot be considered as a good comparable when it is

engaged in software products for transportation and aviation industry and incurred selling and marketing expenses. In support of his contention, he has relied upon the following decisions :-

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Sunquest Information Systems (India) Pvt. Ltd. (IT(TP)A No.1302/Bang/2011 & 92/Bang/2012)
- iii) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

18.1.2 On the other hand, the learned Departmental Representative has relied upon the orders of the TPO.

18.1.3 We have considered the rival submissions as well as relevant material on record. At the outset, we note that the functional comparability of this company has been examined by the Tribunal in a series of the cases as relied upon by the learned Authorised Representative of the assessee. In the case of ITO Vs. M/s. Sunquest Information Systems (India) Pvt. Ltd. (IT(TP)A No.1302/Bang/2011 & 92/Bang/2012), the Tribunal has considered and decided an identical issue in paras 19 & 20 as under :

“ Sankhya Infotech Limited ('Sankhya')

19. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be

considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:

(1) SILICONTM Training Suite of Products: The products are a comprehensive enterprise wide training platform that covers the entire spectrum of training in a paperless environment. It comprises of four products:-

SILICONTM LMS (Training Management Information

- SILICON TM QT (Online Assessment System)
- SILICONTM LCMS (Learning Content Management System)
- IRMAQTM : This is an integrated resource planning, management tracking system exclusively developed for Airline operations. It is an end-to end solution for all Flight Operations.
- Sakai CLE : This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract from the Annual report substantiating that the company also engages in different activities is reproduced below:

“2. Activities

The company as engaged in the business of development of Software Products & Services and training. The production of software is not capable of being expressed in any generic unit and hence 11 is not possible to give the information as required by certain clauses of paragraphs 3.4C and 4 D of Part II of Schedule VI of the Companies Act, 1956.”

The Delhi Tribunal in ITO v. Colt Technology Services India Pvt. Ltd. (judgment dated 23.10.2012 in ITA No. 6091/Del/2011 for the assessment year 2005-06) has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

20. The submissions made by the learned counsel for the Assessee are considered. The activities set out above and the decision of the Delhi ITAT rendered in the context of a software development company such as the Assessee makes it amply clear that this company Sankhya cannot be regarded as a comparable. The same is directed to be excluded from the list of comparable companies.”

A similar view has been taken by the Tribunal in the other decisions as relied upon by the Id. A.R. Following the earlier order of the Tribunal where it was found that this company is engaged in the business of development of software products and services as well as training, it cannot be considered as a good comparable of software development services provider. Accordingly, we direct the A.O/TPO to exclude this company from the list of comparables.

Foursoft Ltd.

18.2. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset, we note that the RPT of this company is 19.89%. Therefore in view of our finding on the threshold limit of RPT at 15%, this company cannot be considered as a good comparable having more than 15% RPT. We find that this fact of RPT at 19.89% has not been disputed by the Revenue. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

Geometric Software Solutions Ltd.

18.3.1 The learned Authorised Representative of the assessee has submitted that the RPT of this company is 22% whereas the TPO has wrongly considered the RPT at 10.97%. The learned Authorised Representative has referred the computation of RPT at page 561 of the paper book containing Annual Report and submitted that if all the RPTs are taken into consideration as reported in the Annual Report of this company then it comes to 22.52% of the total sales.

18.3.2 On the other hand, the learned Departmental Representative has submitted that the TPO has considered the RPT as taken from the Annual

Report of this company and therefore this objection was not raised by the assessee before the TPO.

18.3.3 Having considered the rival submissions as well as the relevant material on record, We note that the assessee has submitted computation of RPT of this company at page No.561 of the paper book wherein the assessee has calculated this percentage by considering the various transactions with the Related Parties which consists of software development services charges and marketing expenses. Therefore, this issue requires a proper examination and verification of the fact as produced by the assessee. Accordingly, in the facts and circumstances of the case, we set aside this issue of comparability of this company to the record of the A.O./TPO for proper verification of the facts as contended and produced by the assessee before us and then decide the issue after giving an opportunity of hearing to the assessee.

Tata Elxsi Ltd. (Seg.)

18.4.1 The learned Authorised Representative of the assessee has submitted that this company is functionally different from the assessee as this company is engaged in the diversified activity of software development segment as well as in product design, this company also incurred deferred and promotional

expenses and engaged in the activity such as hardware design, industrial design and engineering and visual computing. In support of his contention, he has relied upon the following decisions :

- i) M/s. McAfee Software (I) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Citrix R&D India Pvt. Ltd. in IT(TP)A Nos.841/Bang/2013 & 172/Bang/2013.
- iii) M/s. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.
- iv) M/s. Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

He has further submitted that for the Assessment Year 2006-07, the Tribunal in the assessee's own case has decided an identical issue by holding that this company cannot be compared with the assessee.

18.4.2 On the other hand, the learned Departmental Representative has relied upon the order of the TPO and submitted that the predominant activity of this company is software development and therefore it is considered as functionally comparable.

18.4.3 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the functional comparability has been considered by this Tribunal in assessee's own case for the Assessment Year 2006-07 vide order dt.30.6.2015 in ITA No.1485/Bang/2010 in para 13 to 18 as under :

“ 13. Having regard to the rival contentions and the material on record, we find that being the very same assessment year viz., 2006-07 in the case of M/s.Ariba Technologies India Pvt. Ltd. this Tribunal had occasion to go into the comparability of these companies with the said company and the Tribunal

has held it to be functionally dissimilar from the similar activity of software development service. We find that the Tribunal, at para.12 & 13 of its order, has held as under:

“12. The following were the relevant observations of the Tribunal on the aforesaid comparable companies in the case of Trilogy E-Business Software India Pvt.Ltd.(supra):

Xxxxxx

Xxxxxx

17. As far as comparable company chosen by the TPO viz., Tata Elxsi Ltd., is concerned, the comparability of the aforesaid company with that of the software service provider such as the Assessee was considered by the Mumbai Bench of this Tribunal in the case of Logica Pvt.Ltd. IT (TP) 1129/Bang/2011 AY 07-08) wherein on the comparability of the aforesaid company, the Tribunal held as follows:-

“14. As far as comparable at Sl.No.6 & 24 are concerned, the comparability of the aforesaid two companies with that of the software service provider was considered by the Mumbai Bench of the Tribunal in the case of Telcordia Technologies India Private Ltd. (supra) wherein on the aforesaid two companies, the Tribunal held as follows:-

“7.7.Tata Elxsi Limited.: From the facts and material on record and submissions made by the learned AR, it is seen that the Tata Elxsi is engaged in development of niche product and development services, which is entirely different from the assessee company. We agree with the contention of the learned AR that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company fit for comparability analysis for determining the arms length price for the assessee, hence, should be excluded from the list of comparable parties.”

15. In view of the above, the Id. counsel for the assessee fairly admitted that comparable company at Sl.No.6 viz., Flextronics Software Systems Pvt. Ltd. should be taken as a comparable, while comparable at Sl.No.24 viz., Tata Elxsi Ltd. should be rejected as a comparable.”

18. In view of the aforesaid decision, we hold that Tata Elxsi has to be excluded from the list of comparable chosen by the TPO.

Respectfully following the same, we direct the AO to exclude these companies from the final list of comparables.”

We find that there is no change in the business activity of this company in the year under consideration in comparison to the Assessment Year 2006-07. We

further note that a similar view has been taken by this Tribunal in the other cases as relied upon by the assessee pertaining to the Assessment Year 2005-06. Accordingly, by following the earlier decisions of this Tribunal, we are of the view that this company cannot be considered as a good comparable to the assessee. Hence, the Assessing Officer / TPO is directed to exclude this company from the list of comparables.

Satyam Computer Services Ltd.

18.5.1 The learned Authorised Representative of the assessee has submitted that the financial results and information of this company is not reliable due to the financial irregularity and fraudulent activities by the Directors of this company. In support of his contention, he has relied upon the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) M/s. Agnity India Technologies Pvt. Ltd. (ITA No.3856/Del/2010).
- iii) M/s. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.
- iv) M/s. Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

18.5.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

18.5.3 We have considered the submissions of rival parties and the relevant material on record. At the outset, we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in case of Textron Global Technology Pvt. Ltd. (supra) in para 14 as under :

“ 14. Ground No.3 raised by the Revenue is misconceived and the issue does not arise out of the order of the CIT(A). As we have already seen the CIT(A) rejected some of the comparable companies chosen by the TPO by applying related party transaction filter. The filter of companies dealing in software products and abnormal profits owing to amalgamation of the companies during the relevant period thereby showing abnormal profits was applied to exclude Exensys Software solutions Ltd. Infosys Technologies Ltd., was excluded for reasons of high turnover and high risk profile. Satyam Computer Services Ltd., has to be excluded from the comparable companies for non-reliability of financial data as it was involved in financial scam. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO (ITA 3856/Del/2010) and SAP India Pvt. Ltd v. ITO [ITA No. 398/8/2008]. Therefore the grievance as projected by the Revenue in ground No.3 is misconceived. On the facts of the present case, we are of the view that the CIT(A) rightly excluded Exensys Software Solutions Ltd., Infosys Technologies Ltd., and Satyam Computers Ltd., from the list of comparable companies.”

It is clear from the record that this issue was also involved in the case of Agnity India Technologies Pvt Ltd Vs. ITO (supra) wherein Delhi Bench of ITAT has excluded this company on the ground of unreliable data and information. The order of the Delhi Bench of Tribunal has been confirmed by the Hon'ble Delhi High Court. In view of the finding of the co-ordinate bench of this Tribunal, we direct the A.O./TPO to exclude this company from the list of comparables.

19. Since we have directed the exclusion of various companies form the set of comparables and also remanded some of the comparable companies for verification of facts, therefore the TPO/A.O is directed to recompute the ALP

after exclusion of the certain companies as directed by us as well as after considering the comparability of the companies remanded for verification. Needless to say that the benefit of the proviso to section 92C(2) of the Act regarding the tolerance range of + or – 5% also shall be considered.

20. In the result, the appeal of the Revenue as well as C.O. of the assessee are partly allowed.

Order pronounced in the open court on 25th day of May, 2016.

Sd/-
(A.K. GARODIA)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore