

2,18,690/-. The assessee had entered into following international transactions with its AE:

- Provision of software development services : Rs. 37961871
- Reimbursement of expenses Rs. 3,09,403

3. Ld. TPO did not dispute the ALP of reimbursement of expenses. Ld. TPO analysed the transactions pertaining to software development services. There is no dispute between assessee and TPO on the method employed for bench marking viz. TNM method. Ld. TPO noted that assessee had applied following filters to identify the comparables.

1. Companies for which sufficient financial data is not available to undertake analysis were excluded
2. Companies that have foreign shareholding more than 26% were excluded.
3. Companies which have trading sales, mfg. sales and scrap sales more than 5% of total sales were excluded.
4. Companies that have net worth and net PBT less than 10% were excluded.

4. Assessee identified 19 comparables. The average profit margin of comparables was 11.48% on cost and the assessee's operating margin was 15% of operating cost and, therefore, assessee had treated the transaction of software development services at arm's length. Ld. TPO applied the additional filters and also obtained information u/s 133(6) and on that basis selected following 26 comparables, which included only 4 comparables from the list of comparables selected by assessee:-

Sl. No.	Name of the company	Date of annual Report
1	Accel Transmatic Ltd.	29.05.2007
2	Avani Cimcon technologies Ltd.	03.09.2007
3	Celestial Labs Ltd	12.04.2007
4	Datamatics Ltd.	24.10.2007

5	E-Zest Solutions Ltd.	31.08.2007
6	Flextronics Software Systems Ltd.	04.07.2007
7	Geometric Ltd	30.04.2007
8	Helios & Matheson Information Technology Ltd.	August, 2007
9	Igate Global Solutions Ltd.	11.04.2007
12	KALS Information Systems Ltd.	17.08.2007
13	LGS Global Ltd. (Lanco Global Solutions Ltd)	01.12.2007
14	Lucid Software Ltd.	29.08.2007
15	Mediasoft Solutions Ltd	13.09.2007
16	Megasoft Ltd.	29.10.2007
17	Mindtree Ltd.	12.06.2007
18	Persistent Systems Ltd.	30.04.2007
19	Quintegra Solutions Ltd.	30.08.2007
20	R.S. Software (India) Ltd.	12.07.2007
21	R Systems International Ltd.	26.10.2007
22	Sasken Communication Technologies Ltd.	20.04.2007
23	SIP Technologies & Expors Ltd.	24.08.2007
24	Tata Elxsi Ltd	20.04.2007
25	Thirdware Solutions Ltd.	May, 2007
26	Wipro Ltd.	20.06.2007

5. Ld. CIT(A) rejected Megasoft Ltd. out of 26 comparables selected by ld. TPO.

6. Ld. counsel submitted that the assessee was incorporated in 1990 and is a part of international software development team of AVL group, participating in various development projects for premier clients of AVL world-wide. The assessee provides services to its AEs for developing softwares for various equipment / machine testing equipment (automobile industry) as per the specification prescribed by the contractor AEs. The software is used for the testing equipment, upon assembling of all required components, whether hardware or software, whether purchased or developed

in-house by AEs. For each of the projects, for which a task is sub-contracted to the assessee, specifications and details are provided by the AEs, which defines the scope of work, execution plan, quantum of deliverables, time etc. The assessee, thus, works closely with its AEs to develop customized software. The tasks are performed through the use of specific tools for layout, design calculations, coding languages, specification and datasheet generation, etc.

7. As the assessee provides software development support services to its AEs only, it is not responsible for entering into contract with final customers and negotiating the prices. It is the AE only, which is responsible for the same.

8. Ld. counsel submitted that the main dispute in the present appeal is regarding selection of comparables.

9. At the time of hearing, ld. counsel for the assessee did not press ground nos. 2, 3b, d and e. Ld. counsel submitted that primarily assessee is pleading for exclusion of following comparables:

- Accel Transmatic Ltd.
- Celestial Labs Ltd
- Helios & Matheson Information Technology Ltd.
- Infosys Technologies Ltd.
- KALS Information Systems Ltd.
- Persistent Systems Ltd.
- Tata Elxsi Ltd.
- Wipro Ltd.

10. Ld. counsel for the assessee has primarily relied on following decisions relating to A.Y. 2007-08 in support of its contention that since the aforementioned companies were in the same line of business viz.

software development services, therefore, the comparables accepted/rejected in the cases should get the same treatment in the present case also.

- Toluna India Pvt. Ltd. (ITA no. 5645/Del/2011 for AY 2007-08)
- Avaya India (P) Ltd. (ITA no. 5528/Del/2011 for AY 2007-08)
- Element K India Pvt. Ltd. (ITA no. 431/Del/2012 for AY 2007-08)
- Lear Automotive India P. Ltd. (ITA no. 5612/Del/2011 for AY 2007-08)

11. Ld. DR submitted that the ld. TPO has accepted 4 comparables out of 19 selected by assessee. He referred to pages 297 and 298 of PB and pointed out that the search process involved key words for classification of company and there was no manual selection done by TPO. Therefore, if the comparable passed all the filters adopted by TPO then the same cannot be rejected merely on the ground of higher or low margin.

12. We have considered the submissions of both the parties and have perused the record of the case. First we will examine the applicability of decisions relied by ld. authorized representative to the facts of the present case. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal in para 3 of its order has observed as under:

“3. Briefly stated, the facts of the case are that the assessee was incorporated in India in the year 2003 as a wholly owned@ subsidiary of Greenfield Online Inc., USA (Greenfield US), the ultimate parent entity of the Greenfield Group. The assessee is in the business of software development and providing related services to the Greenfield Group. Certain international transactions were reported in the requisite Form. The assessee is compensated on a time cost or fixed price basis for the projects assigned. Greenfield US is providing end to end

information technology services which include the provision of consulting and systems integration services to managing IT and business functions on behalf of its customers.

13. Thus it is evident that the functions carried out by assessee are similar to that of Toluna India Pvt. Ltd. (supra) and, therefore, both are functionally comparable.

14. In the case of Avaya India (P) Ltd. (supra), the Tribunal in para 2 of its order has observed as under:

“The assessee, Avaya India Private Limited is a subsidiary in India of Avaya International LLC. During the financial year (‘FY’) 2006-07, the assessee has provided software development and back office support services to the Associated Enterprises (AEs) under the cost plus model. The assessee has also provided marketing support services to Avaya International Sales Ltd. The assessee’s marketing activities include providing information about Avaya Products, customer Awareness etc.

15. Thus, it is evident that this company is also performing similar functions as assessee.

16. In the case of Lear Automotive India P. Ltd.(supra), The Tribunal in para 2.2 of its order has observed as under:

“Brief stated the facts of the case are that the assessee is a subsidiary of Lear Corporation USA, which holds the entire share capital of the assessee-company through its affiliate viz. Lear Corporation (Mauritius) Ltd. The assessee is primarily engaged in the manufacture/ assembly of automotive seating Systems (i.e. seats and seat trims) and interior parts. The

assessee provides design and engineering support services along with embedded software development support services to group companies, and design and engineering services to automotive industry customers, like general Motors Ltd. and Mahindra& Mahindra (M&M)”.

17. Further we find that in para 4.5 the Tribunal has observed as under:

“4.5. The assessee is involved in stages c) and d) alone. other words, the other stages in the provision of design and engineering services by the Lear Group to its customers are performed by the AEs independent of the assessee's help. To put it simply, whereas the group companies understand the total requirements/specifications of the customer and conceptualise the designs, the assessee, based on such specifications, prepares the designs, tests and simulates to ensure the proper functioning of the product when all its components would be assembled. The work done by the assessee goes back to the AE, who then gets such designs approved from the final customers and, thereafter, prototypes are made as per the designs which are tested for functionality and then approved by the customer. Once the prototypes are approved, the AEs get manufactured tools and moulds for the purposes of manufacturing components as per the designs finally approved by the customer. Such tools and moulds are then approved by the customers and, thereafter, the actual CV manufacturing starts. Thus, it can be seen that in the overall framework of designs and engineering of components, the assessee's role is limited to preparing software for designs as per the specifications given by its AE and then testing and simulating the work done by it before handing over such software to its AEs. To put it simply, the assessee is simply engaged in providing software development services to its AE, which work ends before the approval of designs by the final customers for manufacturing at a later stage”.

18. From the above it is evident that business profile of Lear Automotive India P. Ltd.(supra) is very similar to assessee. As a matter of fact assessee's functional profile is not that extensive as that of Lear Automotive India P. Ltd.(supra).

19. In the case of Element K. India Pvt. Ltd. the Tribunal in para 8 of its order, inter alia, has observed as under:

“8. After hearing both the sides and having gone through the material placed on record, we hold that assessee is a wholly owned subsidiary of Element K Corporation, USA. It provides content design and development support services for online courseware under a service agreement with its parent company. Assessee is remunerated on cost plus 15% markup for the services rendered. Thus, assessee is a low risk captive service provider. According to TPO also, the assessee was IT service provider in the field of software development services to its parent company.”

20. Thus, all the above four decisions, when considered from the perspective of functions performed by assessee, are applicable to the facts of present case.

21. Now, we proceed to consider various comparables, the inclusion of which has been impugned by assessee.

Accel Transmatic Ltd.:

22. Ld. TPO noted that this company did not figure in the Accept/ Reject matrix of the taxpayer's TP study. He pointed out that as software segment of this company qualified all the filters applied by him, therefore, the same is to be considered as comparable. After considering the assessee's

submissions he pointed out that the company's software segment did not have any product revenue as is evident from the Annual Report as well as the reply received from the company. He further pointed out that the filter of software development service revenues being more than 75% was applied at enterprise level as well as segment level. He, accordingly, rejected the assessee's contention that Accel Transmatic Ltd derived more than 45% of the total operating revenue from hardware products/ services.

23. Ld. CIT(A) had upheld the ld. TPO's contention.

24. Ld. counsel for the assessee referred to page 772 of the PB, wherein the annual report of Accel Transmatic Ltd is contained, wherein while giving the segmental report, the details, inter alia, are provided as under:

- Hardware Products/ Services	1585.37
- Software services	967.67

25. He further pointed out that Accel Transmatic Ltd is engaged in the services in the form of "ACCEL IT" and "ACCEL animation services" for 2D and 3D animation. In this regard he referred to following extracts from Annual report:

Change in Business:

The company has set up a subsidiary company, by name Accel Academy Limited and has hived off its training division, Accel IT Academy to this subsidiary. Henceforth all the training activities will be carried out from this subsidiary company.

Accel IT Academy

Accel IT Academy now part of Accel Academy Limited continues to focus on niche areas of IT training in hardware and networking, enterprise systems management, embedded

systems, VLSI designs and BPO. The division could not scale up its operations during the year due to increased competition and our inability to open new centres. Efforts are on to overcome the limitations and current year is expected to be a growth year for Accel IT Academy.

26. Ld. counsel further pointed out that this company has a RPT of 19.29%, which is significant enough for Accel to be rejected on RPT filter. Further, he pointed out that this company fails software service revenue filter. In this regard he submitted that revenue from the software service is 27.60% of the total revenue which is much less than the 75% threshold.

27. In the case of Toluna India Pvt. Ltd. (supra), the Tribunal has rejected the assessee's contention for exclusion of this comparable. Further in other decisions, ld. counsel very fairly conceded that this comparable has been accepted since the tested party was also in the business of software development and providing related services to its AE. Ld. counsel, however, submitted that in the decision of Toluna India Pvt. Ltd. (supra), the application of filter of revenue from software services was not considered and, therefore, matter may be restored back to ld. TPO for verification. After hearing both the parties, we restore this matter to the file of ld. TPO to examine assessee's plea and if the same is found to be correct then this comparable cannot be included in the list of comparables on the basis of filters applied by ld. TPO. We order accordingly.

Celestial Labs Ltd.:

28. In regard to this comparable also ld. counsel has relied on aforementioned 4 decisions of the Tribunal and pointed out that this comparable has been rejected in all the cases.

29. Having heard both the parties we find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“18.1. The TPO included this company in the list of comparables by observing that it was rendering mainly software development services.

18.2. After considering the rival submissions and perusing the relevant material on record, we find from the annual accounts of this company, a copy of which is available on page 41 of the paper book, that it is engaged mainly in the developing the software products in the shape of tools etc., which are protected using the patent. This company developed a tool, "CELSUITE" to drug discovery in finding the lead molecules for drug discovery. As this company is engaged in developing software tools after enough research and development activity and the tools so produced by it are its intellectual property, it cannot be considered as comparable to the assessee which is, also albeit in software development, but is doing it on contract basis without having any LP. rights in the software developed by it. It is further relevant to note that this company has been held to be not comparable by the Dispute Resolution Panel (DRP) in its Directions for a subsequent year, a copy of which is available on record. Thus this company can't be considered as functionally similar to that of the assessee. We, therefore, direct to exclude - is company from the list of comparables. The assessee succeeds.

30. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of co-ordinate Bench, this comparable is directed to be excluded from the list of comparables.

Helios & Matheson Information Technology Ltd.

31. Having heard both the parties we find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“23.1. The TPO noticed from the annual accounts of this company that it was engaged in the software development services and also qualified employee cost filter. The assessee objected to its inclusion by, inter alia, contending that the PLI of this company was incorrectly worked out by the TPO. Correcting this mistake in calculation part, the TPO held this company to be comparable and determined its revised PLI at 36.630/0. The DRP upheld the inclusion of this company in the list of comparables.

23.2. After considering the rival submissions and perusing the relevant material on record, we find from the annual accounts of this company that it is engaged in rendering ITES BPO-services, Application management services, Offshore delivery, Project management services, Public sector services, Maritime practice and Executive education information systems, etc. From the above narration of the nature of services rendered by this company, it can be seen that the same is not at all comparable to that of the assessee. It can further be noticed that the TPO has taken the figures of this company which represent Income from software sales and services'. Obviously, the assessee is not engaged in software sales. In view of our above discussion while dealing with the comparability of Flextronics Software Systems Limited, we are satisfied that this company cannot be considered as comparable and is, hence, directed to be excluded from the list of comparables. The assessee succeeds.”

32. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of

coordinate Bench, this comparable is directed to be excluded from the list of comparables.

Infosys Technologies Ltd.

33. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“25. From the nature of services rendered by the assessee to its AE on a cost plus basis without having any intangible assets or retaining any intellectual property in the work done by it, we find that Infosys Technologies Ltd., which is a giant company in terms of risk profile, scale, nature of services, revenue ownership of branded/proprietary products, onsite and offshore services, etc., cannot be compared with the assessee. Our view is fortified by the judgment of the Hon'ble jurisdictional High Court in the case of CIT vs. Agnity India Technologies Pvt. Ltd. [(2013) 219 Taxman 26 (Del)] in which Infosys Ltd. has been held to be not comparable to a company that was engaged in the business of development of software for parent company. We, therefore, direct the exclusion of this case from the list of comparables. The assessee succeeds.

34. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

CALS Information Systems Ltd.

35. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“27.1. The TPO observed that this company was engaged in Software development and training. As the software products constituted only 3% of its revenue and training revenue constituted 8.56%, the TPO held that this segment of KALS Information Systems Limited was rightly includible.

27.2. After considering the rival submissions and perusing the relevant material on record, it is an admitted position that the TPO adopted Software development segment of this company by noticing that this segment also included revenues from software products and training. In view of the fact that the assessee is not engaged in imparting any training on commercial basis or selling its software products, we hold that the financials of this company under this segment cannot be compared with the assessee. The contribution by the sale of software products or training to the overall revenue of this segment cannot be precisely ascertained to determine the question of its comparability. As such, this case is directed to be excluded. The assessee succeeds.

36. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

Persistent Systems Ltd.

37. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“33. After considering the rival submissions and perusing the relevant material on record, we hold that this company also cannot be considered as comparable because of merger of another company into it, which fact is evident from page 196, of

@ the paper book. It can be seen that a subsidiary company was merged into this company pursuant to judgment of Hon'ble Bombay High Court w.e.f. 1.4.06. Because of the merger of subsidiary into this company, we hold that the financial position of this company cannot be construed as normal capable of a good comparison. Following the Mumbai Bench decision in Petro Araldite (P) Ltd. (supra), we direct the exclusion of this company from the list of comparables. The assessee succeeds”.

38. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

Tata Elxsi Ltd.

39. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“39.1. The TPO included this company in the list of comparables by noticing that its 'Software development and services segment' matched with the assessee. On being called upon to explain as to why this company be not included in the list of comparables, the assessee stated that the nature of activity done by this company was different inasmuch as it was engaged in R&D activities also which resulted in creation of intellectual property. Not convinced with the assessee's submissions, the TPO included this segment of the company in the list of comparables.

39.2. After considering the rival submissions and perusing the material on record, we find from page No.206 of the paper book, which is Annexure to the Director's report of this

company, that the nature of its activity is quite distinct from that of the assessee. It can be seen that this company is into development of hardware and software for embedded products such as multi- media and some other electronics, etc. Apart from that, this company is also engaged In making some programmes developing technology intellectual property. As the nature of activity carried out by the assessee in question is nowhere close to that of Tata Elxsi Ltd., we hold that this company cannot be included in the list of comparables. Accordingly, this company is directed to be excluded. The assessee succeeds.

40. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

Wipro Limited:

41. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“41. After considering the rival submissions and perusing the relevant material on record, we have absolutely no doubt in our mind that this company cannot be considered as comparable to the assessee inasmuch as it is a giant company in terms of parameters discussed above while dealing with the case of Infosys Ltd. The Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) has upheld the exclusion of this company also from the list of comparables on the basis of certain parameters, which are fully applicable to the instant assessee as well. It is, therefore, directed to exclude this company from the list of comparables. The assessee succeeds.

42. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

Avani Cimcon Technologies Limited:

43. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under

“17.1. The TPO found this company to be engaged in software development. Notice u/s 133(6) was issued to the company to get complete information. According to the TPO, this company qualified all the filters. The assessee argued before the TPO that this company was into software products and the segmental results were not available. The TPO rejected such contention by relying on the specific information collected from the company u/s 133(6) which divulged that this company was a purely software development company engaged in providing software development and consulting IT services to its clients. This company was concentrating on internet enabled business formation systems in a wide range of industries. Resultantly, this company was included in the list of comparables.

17.2. After considering the rival submissions and perusing the relevant material on record, we find from the description of business activity of this company as reproduced on internal page 90 of the TPO's order, that it is a pure software development service provider. In the absence of any other specific objection against this company, we are of the considered opinion that this company has been rightly included by the TPO in the list of comparables. The assessee fails.

44. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

E-Zest Solutions Ltd.:

45. At the time of hearing Id. counsel for the assessee did not press for exclusion of this comparable.

Ishir Infotech Limited:

46. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has rejected the assessee's claim for exclusion of this comparable from the list of comparables by observing as under

“26.1. The AO included this company in the list of comparables by observing that it qualified 25% employee cost filter and all other filters on the basis of information received u/s 133(6). The assessee objected to the inclusion of this company by contending that its related party transactions were more than 15% and employees cost was only 4%. The TPO rejected both the contentions by noticing that the employees cost was, in fact, more than 25% as was apparent from the information received u/s 133(6) and, further, the RPTs also did not exceed 25%.

26.2. Having heard both the sides and perused the relevant material on record, we find this company to be comparable to that of the assessee. The assessee's objection that employee cost of this company was 4% only, is not correct because of the exercise carried out by the TPO indicating that the employees cost was more than 25%). The Id. DR has taken us through the Annual accounts of this company which show that some part of the employees cost was also included In 'Administrative expenses' apart from direct Establishment expenses. It can be

seen that the company has included Professional fees of Rs. 3.41 crore along with Director's salary, etc., under the head 'Administrative expenses'. When this objection was taken by the assessee before the TPO that the employee cost was only 4% viewing only the 'Establishment expenses' in isolation without considering the employee cost included under the head 'Administrative expenses', the TPO corrected the position by observing that the employee cost was more than 25% by impliedly including the personnel cost included under the head 'Administrative expenses'. The assessee did not challenge the TPO's calculation before the DRP on this issue. As such, it becomes apparent that there is no merit in this objection again taken up before us which has already been successfully dealt with by the TPO. Insofar as the assessee's objection about the related party transactions is concerned, we have discussed this issue thoroughly while dealing with the comparable case of Accel Transmatics Ltd. (supra) in which it has been held that filter of 25 of RPT is good enough to make a controlled transaction and thus expunging it from the list of comparables, which can only be uncontrolled transactions. The Id. AR failed to point out any functional difference of this company vis-a-vis the assessee. As such, we approve the view taken by the TPO in including this case in the list of comparables. The assessee fails”.

47. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed not to be excluded from the list of comparables.

48. As regards inclusion/ exclusion out of 25 comparable companies taken by AO subsequent to DRP's direction, Id. counsel has not advanced any other submission as regards other comparables.

49. In view of above discussion, we set aside the impugned order and remit the matter back to the file of Id. TPO/ AO for fresh determination of ALP of the assessee's international transaction in terms of our observations.

50. Ground no. 4 raised by assessee is in regard to rate of depreciation applicable to computer and computer software. Brief facts apropos this issue are that assessee company had claimed certain additions to the applicable computer and depreciation @ 60% was claimed as deduction. The AO observed that the addition was of mini power backup which was UPS. He pointed out that this does not come within the ambit of computer and computer software. He, accordingly, allowed depreciation @ 15% treating the same as plant and machinery. In appeal the Id. CIT(A) confirmed the action of AO. Aggrieved, the assessee is in appeal before us.

51. Having heard the submissions of both the sides, we find that the issue in question is squarely covered by the decision of Hon'ble Jurisdictional Delhi High Court in the case of CIT Vs. Orient Ceramics & Industries Ltd. (2011) 56 DTR 397, holding that UPS would form part of computer peripherals and accessories and, accordingly, depreciation is to be allowed at 60% rate. Respectfully following the decision of Hon'ble Jurisdictional Delhi High Court, order of authorities below on the issue in question is set aside and the assessee's claim for depreciation @ 60% is directed to be allowed.

ITA no. 279/Del/2013 (AY 2008-09):

52. In AY 2008-09, under consideration, the assessee continued to carry on the same activity as bin AY 2007-08 and the functional profile remained the same.

53. Ld. counsel for the assessee referred to page 46 of the PB, wherein the TP study is contained in which assessee had selected 25 comparables. The average OP/TC was 9.79% as against the assessee's OP/TC of 7.20% and, therefore, the international transaction relating to software development services was at arm's length.

54. Ld. counsel further referred to pages 308 and 309 of the PB wherein the TPO's order is contained and pointed out that the final set of comparables considered by the TPO was as under:

1. Avani Cimcon technologies Ltd.
2. Bodhtree Consulting Ltd.
3. Celestial Labs Ltd
4. e-Zest Solutions Ltd.
5. Flextronics Software Systems Ltd.
6. iGate Global Solutions Ltd.
7. Infosys
8. Kals Information Systems Ltd.
9. LGS Global Ltd.
10. Mindtree Ltd.
11. Persistent Systems Ltd.
12. Quintegra Solutions Ltd.
13. R Systems International Ltd.
14. Sasken Communication Technologies Ltd.
15. Tata Elxsi (Seg.)
16. Thirdware Solutions Ltd.
17. Wipro Ltd (Seg)
18. Softsol India Ltd.

55. Ld. counsel referred to page 341 of PB and pointed out that arm's length margin was taken at 21.51% of the operating cost by ld. TPO and adjustment of Rs. 1,03,81,787/- was directed to be made. Ld. counsel further pointed out that ld. CIT(A) excluded Celestial Biolabs from the list of comparables as is evident from CIT(A)'s order.

56. In the present assessment year ld. counsel has relied on following decisions relating to A.Y. 2008-09:-

- Sun Life India Service Centre Pvt. Ltd. (ITA no. 5799/Del/2012 – AY 2008-09)
- Ciena India Pvt. Ltd. (ITA no. 3324/Del/2013 – AY 2008-09).
- Pyramid IT Consulting Pvt. Ltd. (ITA no. 5401/Del/2012 – AY 2008-09)
- 3DPLM Software Solutions Ltd.(IT (TP)A no. 1303/Bang/2012 AY 2008-09).

57. Now we will consider each comparable separately about its inclusion/exclusion.

Avni Cincom Technologies Ltd.

58. Ld. counsel pointed out that in AY 2008-09 this comparable has been rejected in all the above cases except Ciena India Pvt. Ltd. (supra), where it did not form part of the ITAT order. He submitted that M/s 3DPL Software Solutions Ltd. performing same functions as assessee, as is evident from Tribunal's order dated 28.11.2013, wherein para 2.1 it has been, inter alia, observed as under:

“The assessee, M/s 3DPL Software Solutions Ltd. (formerly known as Delmia Solutions Pvt. Ltd.) is a private limited company registered in India. The assessee is established as a 100% Export Oriented Unit (“EOU”) under the StPI scheme and is engaged in the provision of software development and other related service to its group companies.”

59. We have considered the submissions of both the parties. As regards Sun Life India Service Centre Pvt. Ltd. (supra), we find that Tribunal in para 3 has, inter alia, observed as under:

“Briefly stated, the facts of the case are that the assessee is an Indian company, a part of Sun Life Group, which has diversified financial services organization providing savings, retirement and pension products and life and health insurance in Canada, UK and Asia. This group also operates mutual funds and investment management business. The assessee provided software development and maintenance support services and also back office support services to its associated enterprises (AEs) for assistance in their projects.”

60. The functional profile of this company, in our opinion, is though broadly in line with assessee, but the functional profile of Toluna India Pvt. Ltd. (supra) is more in conformity with the assessee’s functional profile. Therefore, we are not inclined to deviate from the view which we have taken in AY 2007-08 and, therefore, we are not inclined to exclude this comparable from the list of comparables. Assessee fails.

E-Zest Solutions Ltd.:

61. At the time of hearing ld. counsel for the assessee did not press for exclusion of this comparable from the list of comparables. Accordingly, we reject the assessee’s ground on this issue being not pressed.

KALS Information systems Ltd.

62. For the very same reasons as in AY 2007-08, we exclude this comparable from the list of comparables. Assessee succeeds.

Persistent Systems Ltd.

63. For the very same reasons as in AY 2007-08, we exclude this comparable from the list of comparables. Assessee succeeds.

Softsol India:

64. Ld. counsel referred to annual report of this comparable and pointed out that not much details are available. He referred to following observations from the Chairman's address:

"I am proud to share with you that not only our team delivered excellent quality work for our clients, but also developed improved and perfected certain process, specialized tools, methodologies and best practices that are relevant for the area of our specialization, namely, Enterprise Technology Modernization. We are also creating Intellectual property as we perform our normal work. Once again this will improve profitability and intrinsic value of our company."

65. With reference to above, ld. counsel pointed out that assessee is not developing any intangible, therefore, it is not the right comparable. Ld. counsel further referred to page 318 of PB, wherein TP report is contained and pointed out that capacity utilization adjustment has not been allowed to assessee. He pointed out that ld. TPO proceeded on the premise that assessee was compensated on cost basis though assessee was compensated on hourly basis. Ld. counsel referred to page 32 of the PB, wherein TP study is contained, wherein assessee had specifically referred to the capacity utilization risk. Ld. counsel referred to page 487 of PB and pointed out that while dealing with ground no. 4.7 of assessee regarding denying the impact of adjustment for the difference in profile of assessee vis-a-vis the comparable, ld. CIT(A) did not deal with this issue and has not recorded any finding on this issue. He, therefore, submitted that the matter may be restored back to the file of ld. CIT(A) to provide opportunity to assessee.

66. Ld. DR submitted that Director's statement is general in nature. He submitted that before ld. CIT(A), no ground of appeal was taken regarding capacity utilization as is evident from ground no. 4.7.

67. Having heard both the parties, we find that assessee had taken specific objection on this count before Id. CIT(A) and, therefore, we restore this matter to the file of Id. CIT(A) to provide opportunity to assessee in regard to this comparable and specifically consider the adjustment claimed by assessee regarding capacity utilization so that the comparable is brought on the level playing field with the assessee. We order accordingly.

Tata Elxsi Ltd. :

68. For the very same reasons as in AY 2007-08 we exclude this comparable from the list of comparables. Assessee succeeds.

69. No other argument was advanced on behalf of the assessee in regard to other comparables.

70. In view of above discussion, we set aside the impugned order and remit the matter back to the file of Id. TPO/ AO for fresh determination of ALP of the assessee's international transaction in terms of our observations.

71. In the result both the appeals are partly allowed.

Order pronouncement in open court on 10/06/2016.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Dated:10/06/2016.

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.