

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE**

**BEFORE SHRI ABRAHAM P GEORGE, QCCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

**IT(TP)A No.1444(Bang) 2012
(Assessment years : 2008-2009)**

GXS India Technology Centre Pvt.Ltd
Prestige Emerald, 2nd, 3rd & 4th Floor,
Municipal NO.2, Madras Bank Road,
Lavelle Road Junction,
Bangalore-560 001

Appellant

Vs

The Income-tax Officer,
Ward-11(2),
Bangalore

Respondent

**Assessee by : Shri K.R.Vasudevan, Advocate
Revenue by : Shri Sunil Kumar Aggarwal, JCIT**

Date of hearing : 21-07-2015

Date of pronouncement : 31-07-2015

ORDER

PER SHRI VIJAYPAL RAO, JM:

This appeal by the assessee is directed against the assessment order passed u/s 143(3) r.w.s.144C(13) of the IT Act, 1961 in pursuant to the directions of DRP dated 26-06-2012 for the assessment year 2008-09.

2. The assessee is a company incorporated in India and was established as 100% EOU registered under Software Technological Parks of

India (SWTPI) at Bangalore. The assessee is a company primarily engaged in designing and development of software for its parent company. The assessee reported international transactions with its AE on account of provision of software development services of Rs.27,42,51,262/-. The assessee has reported profit before tax on cost at 10.28%. The assessee selected 18 comparables in its TP study report to bench mark its international transactions and arrived at 10.28% of mean margin in comparison to the assessee's operating margin at 10.28%. The comparables selected by the assessee are as under;

Sl.No.	Company Name	Unadjusted average margin 3 years
1	Aarman Software Pvt.Ltd	57.64%
2	Akshay Software Technologies Ltd	5.93%
3	ApplabsTechnologies Pvt. Ltd	18.25%
4	Computech International Ltd	5.20%
5	Core Projects & Technologies Ltd	38.85%
6	iGate Global Solutions Ltd	5.10%
7	Mindtree Ltd	15.61%
8	Nihar Info Global Ltd	-3.23%
9	Orient Information Technology Ltd	-21.85%
10	Prithvi Information Solutions Ltd	14.09%
11	R.S.Software (India) Ltd	14.58%
12	R.Systems International Ltd	18.08%
13	SIP Technologies & Exports Ltd	18.10%
14	Silverline Technologies Ltd	-26.25%
15	Sonata Software	7.38%

16	VJIL Consulting Ltd	8.46%
17	VMF Soft Tech	3.08%
18	Zylo Systems Ltd	18.53%
	Arithmetic Mean	10.98%

3. Out of the 18 comparables selected by the assessee 14 were rejected by the TPO. The TPO finally selected 20 companies as comparables including 4 companies from the list of assessee's comparables namely:

- a) *iGate Global Solutions Ltd (Seg.)*
- b) *Mindtree Consulting Ltd (Seg.)*
- c) *R.S.Software (India)Ltd. and*
- d) *R.S.Systems International (Seg.)*

3.1 Thus, the TPO calculated the mean margin of 20 comparables at 23.65%. There is no dispute regarding the most appropriate method being adopted by the assessee as well as the TPO as TNMM. The comparable companies selected by the TPO for determination of ALP are as under;

Sl.No	Company Name	Unadjusted margins FY: 2007-08
1	Avani Comcon	25.62%
2	Bodhtree Ltd	18.72%
3	Celestial Biolabs Ltd	87.94%
4	E-Zest Solutions Ltd	29.81%
5	Flextronics Software (WSeg.)	7.86%
6	Igate Global Solutions Ltd(Seg.)	13.99%
7	Infosys Technologies Ltd	40.37%

8	Kals Info Systems (Seg.)	41.94%
9	LGS Global Ltd(Lanco)	27.52%
10	Mindtree Consulting (Seg.)	16.41%
11	Persistent Systems Ltd	20.31%
12	Quintegra Solutions Ltd	21.74%
13	R.Systems International (Seg.)	15.30%
14	R.S.Software(India)Ltd	7.41%
15	Sasken Communications(Seg.)	7.58%
16	Tata Elxsi Ltd (Seg.)	18.97%
17	Thirdware Solutions	19.35%
18	Wipro Ltd.,	28.45%
19	Softsol India Ltd	17.89%
20	Lucid Software	16.50%
	Arithmetic Mean	23.65%

3.2. Thus, the TPO arrived at a arithmetic mean of 23.65% in comparison to assessee's operating margin of 10.28% and accordingly, proposed an upward adjustment of Rs.3,42,18,209. The assessee challenged the action of the TPO in rejecting the comparables selected by the assessee and adding 16 more comparables in the list of comparables for determination of ALP before the DRP. The DRP did not accept objections raised by the assessee and confirmed the proposed adjustment on account of ALP in respect of international transactions of the assessee. Accordingly, the DRP rejected the objections raised by the assessee.

4. Before us the assessee has raised the following grounds;

Grounds of Appeal

I. Transfer Pricing

1. The learned Assessing Officer ("AO") and the learned Additional Commissioner of Income Tax (Transfer Pricing - VI), Bangalore ("Transfer Pricing Officer" or "TPO") grossly erred in law and facts of the case in determining the Arm's Length Price ('ALP') of the international transaction of the Appellant and thereby making an adjustment of Rs. 34,218,209/- with respect to the software development services rendered by the tax payer u/s 92CA of the Income Tax Act.
1. The learned AO and TPO ought to have accepted the arm's length price as determined by the Appellant.
2. The learned TPO and the learned AO ought to have accepted the difference in risk profile of the appellant vis-a-vis the comparable companies. The learned TPO and the learned AO erred in not allowing the benefit of market risk adjustment to the Appellant.
3. The learned TPO and the learned AO erred in concluding that the Appellant is exposed to single customer risk without evaluating the business arrangement of the Appellant.
4. The learned TPO and the learned AO erred in not allowing the benefit of range of +/- 5% as provided in proviso to Section 92C(2) of the Act to the Appellant, while determining the arm's length price.
5. On the facts and circumstances of the case, the learned AO and the learned TPO erred in rejecting the Transfer Pricing ("TP") documentation without appreciating the contentions, arguments, and evidentiary data put forward by the Appellant during the course of the proceedings before them, and in doing so have grossly erred:
 - 6.1 In rejecting the comparability analysis carried in the TP documentation and conducting a fresh comparability analysis for determining the arm's length price by the learned TPO.

6.2 In adopting the arm's length mark up to be 23.65%, in respect of the international transaction pertaining to the rendering of software development

services by the Appellant;

6.3 In completely relying on the unaudited data requisitioned and consequently obtained by taking recourse to the provisions of Section 133(6) of the Income-tax Act, 1961 ('the Act'), which in many instances are inconsistent with the data disclosed in audited reports. In doing so the learned TPO has erred in complying with the principles of natural justice.

6.4 In considering 25 percent as the threshold limit for the Related Party Transactions filter as this number is an arbitrary number that has been adopted without any judicial precedence or reasonable basis.

6.5 In rejecting the upper limit for sales turnover filter proposed by the appellant without providing any empirical analysis. In doing so, the learned TPO erred in not appreciating that the software industry is clearly demarcated based on Size.

6.6 In accepting companies like Infosys Limited and Wipro Limited as comparable companies even though the sales of Infosys and Wipro are driven based on brand developed by them. In doing so the learned TPO and the learned AO have ignored the adjudication of the Delhi Income Tax Appellate Tribunal (IT AT) in Agnity India Technologies India Pvt. Ltd. (reference: ITA No. 3856(Del)12010).

6. In accepting companies engaged in the provision of software product development like Avani Cimcon Technologies Limited, KALS Information Systems Limited, Persistent Systems Limited, Quintegra Solution Limited, Sasken Communication Technologies Limited, R Systems International Limited and Thirdware Solution Limited which are functionally not comparable to the Appellant's business.

6.8 In accepting Tata Elxsi Limited as a comparable company even though the

company in its reply to the learned TPO under section 133(6) had mentioned that the company provides product design services, which is functionally not comparable to the Appellant's business.

6.9 In accepting companies such as Celestial Labs Limited, Flextronics Software Systems Limited and Softsol India Limited which are functionally not comparable to the Appellant's business;

6.10 In accepting companies like Celestial Labs Limited and Infosys Limited which have abnormal/fluctuating profit margins. In doing so the learned AO have disregarded the various jurisdictional ITA T rulings in case of SAP LABS India Pvt. Ltd. Vs. ACIT (reference ITA. No. 398/Bang/2008), E-Gain Communication Private Limited (reference: ITA No. 1685/PN/07 - Pune);

6.11 In accepting companies like Flextronics Software Systems Limited, Quintegra Solutions Limited, Sasken Communications Technologies Limited, Wipro Limited and R Systems International Limited without taking into consideration the peculiar economic circumstances surrounding their operations during the year under review;

6.12 In accepting companies having Related Party Transactions exceeding 10% such as Soft801 India Limited and Infosys limited. In doing so the learned AO has disregarded the Delhi IT A T ruling in case of Sony India Pvt. Ltd. (reference ITA No.1189/Del/2005)

6.13 In upholding the actions of the learned TPO in applying the export filter for selection of software comparables. In doing so, the learned TPO erred in rejecting Arman Software Private Limited and VMF Soft Tech Limited.

6.14 In applying the onsite filter for selection of software comparables with the use of the data obtained under section 133(6) of the Act, is not economically valid. In doing so, the learned TPO erred in rejecting companies such as Akshay Software Technologies Limited, Prithvi Information Solutions Limited, Silverline Technologies Limited, Zylog Systems Limited and V JIL Consulting Limited.

6.15 In not maintaining consistency in applying the filters of rejecting companies with abnormal fluctuating margin, diminishing revenue/ persistent losses for the period under consideration, companies with peculiar economic circumstances, companies with different financial year ending, companies for which in database/ public domain and companies with related party

6.16 In accepting companies like Wipro Limited, Thirdware Solution Limited, Persistent Systems Limited, Quintegra Solutions Limited Tata Elxsi Limited which owns intangible assets.

6.17 In accepting companies like I-Ggate global solutions Limited, Thirdware solution Limited, E-Zest Solutions Limited, Avani Cimcon Technologies Limited and Wipro limited where segmental data pertaining to software development services is not available.

7. The learned TPO and the learned AO erred in disregarding the use of multiple year data, and ought to have accepted the use of contemporaneous data due to non-availability of current year data in the public domain at the time of preparing the documentation.

11. Denial of benefit under section 10A of the Act

- a. The learned AO erred in not allowing tax benefit under section 10A amounting to Rs. 19,82-1,474/-
- b. The learned AO has failed to appreciate that the Appellant is eligible for deduction under section 10A of the Act since the undertaking of the Appellant resulted from a global transfer of the business of the undertaking as a going concern with all the elements of the business.
- c. The learned AO failed to appreciate that the deduction under section 10A of the Act is attached to the undertaking and cannot be denied merely on change in ownership thereof.
- d. The learned AO has failed to appreciate that the undertaking was not formed in the year of transfer i.e. Assessment Year CA Y) 2004-05 but in the initial year i.e. AY 2000-01.
- e. The learned AO has erred in concluding that the undertaking has been formed by the splitting up or the reconstruction of a business already in existence.
- f. The learned AO has erred in concluding that the undertaking of the Company has been formed out of plant and machinery previously used.

- g. The learned AO erred in not relying on the decision of the Honorable Income Tax Appellate Tribunal, Bangalore in the Appellant's own case for AY 2004-05 vide order dated 10 August 2010, wherein the Honourable Income Tax Appellate Tribunal has held that the appellant is eligible for tax benefit under section 10A.

III. Interest under section 234B of the Act: Rs. 2,839,310

The Learned AO is not justified in levying interest under section 234B of the Act. Levy of interest under section 234B is consequential in nature.

IV. Interest under section 234D of the Act: Rs. 897,122

The Learned AO is not justified in levying interest under section 234D of the Act. Levy of interest under section 234D is consequential in nature.

The appellant craves leave to add, alter and modify the above grounds during the course of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that the order of the Assessing officer be set aside”.

5. Ground No.(i to vii) pertain to TP adjustment. In the course of hearing, learned AR of the assessee submitted that the assessee raised the objection against 13 companies selected by the TPO, out of the set of comparables which are functionally dissimilar to that of the assessee. The objections raised by the assessee against the companies are listed as under;

Sl.No	Company Name	
1	Avani Comcon	
2	Bodhtree Ltd	
3	Celestial Biolabs Ltd	
4	E-Zest Solutions Ltd	
5	Infosys Technologies Ltd	
6	Kals Info Systems (Seg.)	
7	Persistent Systems Ltd	
8	Quintegra Solutions Ltd	
9	Tata Elxsi Ltd (Seg.)	
10	Thirdware Solutions	
11	Wipro Ltd.,	
12	Softsol India Ltd	
13	Lucid Software	

5.1 The objections of the assessee and functional similarity/dis-similarity of these companies are discussed one by one as under;

Avani Cimcon : The learned AR of the assessee submitted that this company is engaged in the development of software products as well as software services. However, there are no segmental details available in the financial account of this company. Therefore, this company cannot be considered as a good comparable of the assessee company which is purely

a software development company and not in software product. In support of his contention he has relied upon the decisions of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd., in IT(TP)A No.1303(B)/2012. Thus, the learned AR has submitted that the Tribunal while comparing the functional similarity of Avani Cimcon for the AY: 2008-09 has concluded that this company cannot be treated as a functionally similar to software development company.

6. On the other hand, learned DR has relied upon the orders of the authorities below and submitted that this company fulfills all filters and category of software solutions and software development company.

7. We have considered the rival submissions as well as the relevant material on record. At the outset we note that in the case of 3DPLM Software Solutions Ltd.,(Supra) the co-ordinate bench of this Tribunal had the occasion to examine the functional comparability of this company with that of a software development company. The Tribunal also relied upon the decisions of the co-ordinate bench of this Tribunal in the case of Trilogy e-business Software India Pvt.Ltd Vs DCIT(ITA No.1054/B/2011) and in case of Telecordia Technologies India Pvt.Ltd vs ACIT (ITA No.7821/M/2011). The assessee in case of 3DPLM Software Solutions Ltd (Supra) also explained certain facts before the Tribunal in para-7.3 is as under;

"7.3 The learned Authorised Representative further submitted that the facts pertaining to this company has not changed from the earlier year (i.e. Assessment Year 2007-08) to the period under consideration (i.e. Assessment Year 2008-09). In support of this contention, it was submitted that :-

(i) The extract from the Website of the company clearly indicates that it is primarily engaged in development of software products. The extract mentions that this company offers customised solutions and services in different areas;

(ii) The Website of this company evidences that this company develops and sells customizable software solutions like "DX Change, CARMA, etc."

7.1 Thus, it was brought to the notice of the Tribunal that the said company is primarily engaged in the development of software products and particularly in customized software solution like DXchange, Carma etc. products. The Tribunal after considering the functions and the information available on the website of the company has concluded at para-7.6.1 and 7.6.2 as under;

"7.6.1 We have heard both parties and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the final set of comparables only on the basis of information obtained under section 133(6) of the Act. In these circumstances, it was the duty of the TPO to have necessarily furnished the information so gathered to the

assessee and taken its submissions thereon into consideration before deciding to include this company in its final list of comparables. Non-furnishing the information obtained under section 133(6) of the Act to the assessee has vitiated the selection of this company as a comparable.

7.6.2 We also find substantial merit in the contention of the learned AR that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected on the basis on any search process carried out by the TPO but only on the basis of information collected under section 133(6) of the Act. Apart from placing reliance on the judicial decision cited above, including the assessee's own case for AY: 2007-08, the assessee has brought on record evidence that this company is functionally dis-similar and different from the assessee and hence it is not comparable. Therefore, the finding excluding it from the list of comparables rendered in the immediately preceding year is applicable in this year also. Since the functional profits and other parameters by this company have not undergone any change during the year under consideration which fact has been demonstrated by the assessee, following the decisions of the co-ordinate benches of this Tribunal in the assessee's own case for AY: 2007-08 in ITA No.845/Bang/2011 dated 22.2.2013 and in the case of Trilogy e-Business Software India Pvt. Ltd (ITA No.1054/Bang/201) we direct the AO/TPO to omit this company from the list of comparables".

Following the order of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) we direct the AO/TPO to exclude this company from the list of comparables.

8. **Bodhtree Ltd**: The learned AR of the assessee submitted that this company is in the business of software products and engaged in providing open and end to end as well as software consultancy and design, development and software. He has referred and relied upon the decisions of the co-ordinate bench of this Tribunal in case of M/s CISCO Systems India Pvt. Ltd., dated 14-08-2014 in ITA No.271(B)/2014 and submitted that this company was found to be not comparable to a software development company.

8.1 On the other hand, learned DR relied upon the orders of the authorities below.

8.2 Having considered the rival submission as well as the relevant material on record, we note that the functional comparability of this company has been examined by the co-ordinate bench of this Tribunal in case of M/s CISCO Systems India Pvt. Ltd(Supra) in para-26.1 as under;

“ 26.1 Bodhtree Consulting Ltd.:- As far as this company is concerned, it is not in dispute that in the list of comparables chosen by the assessee, this company .was also included by the assessee. The assessee, however, submits before us that later on it came to the assessee’s notice that this company is not being considered as a comparable company in the case of companies rendering software development services. In this regard, the learned counsel for the assessee has brought to our notice the decision of

the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. v. ITO, ITA No.7633/Mum/2012, order dated 6.11.2013. In this case, the Tribunal followed the decision rendered by the Mumbai Bench of the Tribunal in the case of Wills Processing Services (I) P. Ltd., ITA No.4547/Mum/2012. In the aforesaid decisions, the Tribunal has taken the view that Bodhtree Consulting Ltd. is in the business of software products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology. The decision rendered by the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. (supra) is in relation to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Following the aforesaid decision of the Mumbai Bench of the Tribunal, we hold that Bodhtree Consulting Ltd. cannot be regarded as a comparable. In this regards, the fact that the assessee had itself proposed this company as comparable, in our opinion, should not be the basis on which the said company should be retained as a comparable, when factually it is shown that the said company is a software product company and not a software development services company”.

Following the finding of this Tribunal in case of Cisco System (Ind.)Pvt. Ltd.(Supra)we direct the AO/TPO to exclude this company from the list of comparables.

9. **Celestial Labs Ltd.**, The learned AR of the assessee submitted that this company is engaged in the product development in the field of biotech and pharmaceuticals etc. This company has also incurred R&D expenditure which is more than 3% of the sales. Therefore, this company cannot be treated as functionally similar to the assessee for the purpose of determining the ALP. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd. (Supra).

9.1 On the other hand, learned DR relied upon the orders of the authorities below and submitted that the objections of the assessee were duly considered by the TPO/DRP and this company was found to be a good comparable of the assessee.

9.2 We have considered the rival submissions and the material on record. At the outset, we note that the functional comparability of this company has been examined by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra), in para-9.4.1 & 9.4.2 as under;

“9.4.1 We have heard both the parties and perused and carefully considered the material on record. While it is true that the decisions cited and relied on by the assessee were with respect to the immediately previous assessment year, and there cannot be an assumption that it would continue to be applicable for this year as well, the same parity of reasoning is applicable to the TPO as well who seems to have selected this

company as a comparable based on the reasoning given in the TPO's order for the earlier year. It is evidently clear from this that the TPO has not carried out any independent FAR analysis for this company for this year viz. Assessment Year 2008-09. To that extent, in our considered view, the selection process adopted by the TPO for inclusion of this company in the list of comparables is defective and suffers from serious infirmity.

9.4.2 Apart from relying on the afore cited judicial decisions in the matter (supra), the assessee has brought on record substantial factual evidence to establish that this company is functionally dis-similar and different from the assessee in the case on hand and is therefore not comparable and also that the findings rendered in the cited decisions for the earlier years i.e. Assessment Year 2007-08 is applicable for this year also. We agree with the submissions of the assessee that this company is functionally different from the assessee. It has also been so held by co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) as well as in the case of Triology E-Business Software India Private Limited. (supra). In view of the fact that the functional profile of and other parameters of this company have not changed in this year under consideration, which fact has also been demonstrated by the assessee, following the decision of the co-ordinate benches of the Tribunal in the

assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 and Trilogy E-Business Software India Pvt. Ltd. in ITA No.1054/Bang/2011, we hold that this company ought to be omitted form the list of comparables. The A.O./TPO are accordingly directed.

Following the decision of the co-ordinate bench of this Tribunal(Supra), we direct the TPO/AO to exclude this company from the list of comparables.

10. **E-Zest Solutions Ltd.** The learned AR of the assessee has pointed out that this company is engaged in the business of consultancy services and technical services which is categorized as KPO services hence, it is functionally not comparable to the assessee. Further, this company has not provided segmental data as part of its annual report and financial reports, therefore, this company cannot be considered as a good comparable of the assessee. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra).

10.1 On the other hand, learned AR relied upon the order of the authorities below and submitted that this company is mainly in the business of software development and therefore, it is functionally comparable.

10.2 Having 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 co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) in para-14.4 as under;

“14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133(6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q Information Systems (India) (P) Ltd. Supra) that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be

omitted from the set of comparables for the period under consideration in the case on hand. The A.O/TPO is accordingly directed”.

Following the order of the co-ordinate bench (Supra) we direct the AO/TPO to exclude this company from the set of comparables.

11. **Infosys Technologies Ltd.** The learned AR of the assessee has submitted that this company cannot be considered as good comparables of the assessee because this company own intangibles apart from the industry leader in the field. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in the case of M/s Cisco Systems (Ind.) Pvt.Ltd.

11.1 On the other hand, learned DR has relied upon the orders of the authorities below and submitted that this company is engaged in the same business that of the assessee and therefore, it is a good comparable of a software development company.

11.2 We have considered the rival submissions and the material on record. We note that the co-ordinate bench of this Tribunal in case of Cisco Systems (Ind.)Pvt. Ltd (Supra) has considered and examined the functional comparability of this company in para-26.2 as under;

“26.2 Infosys Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered

to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. TDPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-

“11.0 Infosys Technologies Ltd.

11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.

11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not

own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;

(iii) the company has generated several inventions and filed for many patents in India and USA ;

(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;

(v) the company has incurred huge expenditure for research and development;

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems.

In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded form the list of comparable companies.

11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has

brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.

The decision rendered as aforesaid pertains to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies”.

Following the findings of the co-ordinate bench of this Tribunal we direct the AO/TPO to exclude this company from the list of comparables.

12. **Kals Information Systems Ltd:** The learned AR of the assessee submitted that this company is engaged in the business of development of software and software products. This company is also engaged in the provision of training services and software services.

12.1 The learned AR thus, submitted that this company is functionally not comparable with the business of the assessee. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) as well as in the case of Cisco Systems India Pvt. Ltd., (Supra).

12.2 On the other hand, learned DR has relied upon the orders of the authorities below and submitted that the TPO has considered the segmental data of this company. Therefore, this company is a good comparable of the assessee.

12.3. We have considered the rival submissions as well as the relevant material on record. We find that the functional comparability of this company has been examined by this co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd.(Supra) and also in case of M/s Cisco Systems India Pvt. Ltd.,(Supra) the relevant finding of the Tribunal in case of Cisco Systems (Supra) in para-26.3 as under;

“26.3 KALS Information Systems Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered as not comparable to a pure software development services company by the Bangalore Bench of the Tribunal in the case of M/s. Trilogy e-business Software India Pvt. Ltd. (supra). The following were the relevant observations of the Tribunal:-

“(d) KALS Information Systems Ltd.

46. As far as this company is concerned, the contention of the assessee is that the aforesaid company has revenues from both software development and software products. Besides the above, it was also pointed out that this company is engaged in providing training. It was also submitted that as per the annual report, the salary cost debited under the software development expenditure was Rs. 45,93,351. The same was less than 25% of the software services revenue and therefore the salary cost filter test fails in this case. Reference was made to the Pune Bench Tribunal's decision of the ITAT in the case of Bindview India Private Limited Vs. DCI, ITA No. ITA No 1386/PN/10 wherein KALS as comparable was rejected for AY 2006-07 on account of it being functionally different from software companies. The relevant extract are as follows:

“16. Another issue relating to selection of comparables by the TPO is regarding inclusion of Kals Information System Ltd. The assessee has objected to its inclusion on the basis that functionally the company is not comparable. With reference to pages 185-186 of the Paper Book, it is explained that the said

company is engaged in development of software products and services and is not comparable to software development services provided by the assessee. The appellant has submitted an extract on pages 185-186 of the Paper Book from the website of the company to establish that it is engaged in providing of I T enabled services and that the said company is into development of software products, etc. All these aspects have not been factually rebutted and, in our view, the said concern is liable to be excluded from the final set of comparables, and thus on this aspect, assessee succeeds.”

Based on all the above, it was submitted on behalf of the assessee that KALS Information Systems Limited should be rejected as a comparable.

47. We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly software development service provider. We therefore accept the plea of the Assessee that this company is not comparable.

Following the aforesaid decision of the Tribunal, we hold that KALS Information Systems Ltd. should not be regarded as a comparable”.

Following the decision of the co-ordinate bench we direct the AO/TPO to exclude this company from the list of comparables.

13. **Persistent Systems Ltd:** The learned AR of the assessee submitted that this company is engaged in the software development and analytics services. Since the segmental information was not available, therefore, the results of the company cannot be compared with the assessee. In support of his contention, he has relied upon the decision of co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd.,(Supra)

13.1 On the other hand, learned DR has relied upon the orders of the authorities below.

13.2 We have considered the rival submissions as well as the relevant material on record. As pointed out by the learned AR of the assessee that the functional comparability of the company has been examined by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd.,(Supra) inpara-17.13 as under;

“17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the

assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.

13.3 It is clear from the finding of this Tribunal that this company is engaged in the product developing and product design services which is similar with the software development services provided by the assessee. Accordingly, following the decision of the co-ordinate bench of this Tribunal (Supra) we direct the TPO/AO to exclude this company from the list of comparables.

14. **Quintegra Solutions Limited:** The learned AR of the Assessee submitted that this company is engaged in product engineering services and this is not purely a software development service provider. He has further pointed out that this company is also engaged in research and development activity which resulted in creation of intellectual property rights (IPR). This company has also experienced an abnormal economic event. In support of his contention, he has relied upon the decision of this Tribunal in case of 3DPLM Software Solutions Ltd.(Supra).

14.1 On the other hand, learned DR relied upon the orders of the authorities below.

14.2 Having considered the rival submissions and relevant material on record, we note that the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra), has examined the functional profile of this company inpra-18.3.1 to18.3.3 as under;

“18.3.1 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details brought on record that this company i.e. Quintegra Solutions Ltd. is engaged in product engineering services and is not purely a software development service provider as is the assessee in the case on hand. It is also seen that this company is also engaged in proprietary software products and has substantial R&D activity which has resulted in creation of its IPRs. Having applied for trade mark registration of its products, it evidences the fact that this company owns intangible assets. The co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010 dt.9.11.2012) has held that if a company possesses or owns intangibles or IPRs, then it cannot be considered as a comparable company to one that does not own intangibles and requires to be omitted from the list of comparables, as in the case on hand.

18.3.2 We also find from the Annual Report of Quintegra Solutions Ltd. that there have been acquisitions

made by it in the period under consideration. It is settled principle that where extraordinary events have taken place, which has an effect on the performance of the company, then that company shall be removed from the list of comparables.

18.3.3 Respectfully following the decision of the co-ordinate bench of the Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra), we direct that this company i.e. Quintegra Solutions Ltd. be excluded from the list of comparables in the case on hand since it is engaged in proprietary software products and owns its own intangibles unlike the assessee in the case on hand who is a software service provider.

14.3 Thus, it is clear from the finding of this Tribunal that this company is engaged in the product engineering services and also owns intangible/intellectual property rights. Following the finding of the co-ordinate of this Tribunal (Supra) we direct the AO/TPO to exclude this company from the list of comparables.

15. **Tata Elxsi Ltd;** The learned AR of the assessee has submitted that software segment of this company comprises the activity of product designing services and therefore, this company is not purely software development service provider. He has further submitted that this company had significant intangible and R & D expenditure and also fails on site filter of more than 75%. In support of his contention, he

has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra).

15.1 On the other hand, learned DR relied upon the orders of the authorities below and submitted that TPO has considered the segmental data of this company pertaining to software development services therefore, this company is a good comparables.

15.2 We have considered the rival submissions as well also relevant material on record. We note that the functional comparability has been considered and decided by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) as well as in case of Cisco System (Ind.) Pvt. Ltd (Supra). In the case of Cisco Systems (Ind.) Pvt.Ltd (Supra) the Tribunal has analysed the functional comparability in para-26.4 & 26.5 as under;

“26.4 Tata Elxsi Ltd.:- As far as this company is concerned, it is not in dispute before us that in assessee's own case for the A.Y. 2007-08, this company was not regarded as a comparable in its software development services segment in ITA No.1076/Bang/2011, order dated 29.3.2013. Following were the relevant observations of the Tribunal:-

II. UNREASONABLE COMPARABILITY CRITERIA :

19. The learned Chartered Accountant pleaded that out of the six comparables shortlisted above as comparables based on the turnover filter, the following two companies, namely (i) Tata

Elxsi Ltd; and (ii) M/s. Flextronics Software Systems Ltd., deserve to be eliminated for the following reasons :

(i) Tata Elxsi Ltd., : The company operates in the segments of software development services which comprises of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There is no sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. The company has also in its response to the notice u/s.133(6) stated that it cannot be considered as comparable to any other software services company because of its complex nature. Hence, Tata Elxsi Ltd., is to be excluded from the list of comparables.

(ii) Flextronics Software Systems Ltd. : The learned TPO has considered this company as a comparable based on 133(6) reply wherein this company reflected its software development services revenues to be more than 75% of the "software products and services" segment revenues. Flextronics has a hybrid revenue model and hence should be rejected as functionally different. Based on the information provided under "Revenue recognition" in its annual report, it can be inferred that the software services revenues are earned on a hybrid revenue model, and the same is not similar to the regular models adopted by other software service providers. The learned representative pleaded that a regular software services provider could not be compared to a company having such a unique revenue model,

wherein the revenues of the company from software/product development services depends on the success of the products sold by its clients in the marketplace. Hence, it would be inappropriate to compare the business operations of the assessee with that of a company following hybrid business model comprising of royalty income as well as regular software services income, for which revenue break-up is not available. He finally submitted that this was a good reason to exclude this company also from the list of comparables.

20. *On the other hand, the learned DR supported the order of the lower authorities regarding the inclusion of Tata Elxsi and Flextronics Software Systems Ltd., in the list of comparables. He reiterated the contents of para 14.2.25 of the TPO's order. He also read out the following portion from the TPO's order :*

"Thus as stated above by the company, the following facts emerge :

1. The company's software development and services segment constitutes three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs.

2.The product design services sub-segment is into embedded software development. Thus this segment is into software development services.

3.The contribution of the embedded services segment is to the tune of Rs.230 crores in the total segment revenue of Rs.263 crores. Even if we consider the other two sub-segments pertain to IT enabled services, the 87.45% (>75%) of the segment's revenues is from software development services.

4.This segment qualifies all the filters applied by the TPO."

Regarding Flextronics Software Systems, the following extract from page 143 of TPO's order was read out by him as his submissions :

"It is very pertinent to mention here that the company was considered by the taxpayer as a comparable for the preceding assessment year i.e., AY 2006-07. When the same was accepted by the TPO as a comparable, the same was not objected to it by the taxpayer. As the facts mentioned by the taxpayer are the same and these were there in the earlier FY 2005-06, there is no reason why the taxpayer is objecting to it. How the company is functionally similar in the earlier FY 2005-06 but the same is not functionally similar for the subsequent FY 2006-07 even when no facts have been changed from the preceding year. Thus the taxpayer is arguing against this comparable as the company was not considered as a comparable by the taxpayer for the present FY 2006-07."

21. We have heard the rival submissions and considered the facts and materials on record. After considering the submissions, we find that Tata Elxsi and Flextronics are functionally different from that of the assessee and hence they deserve to be deleted from the list of six comparables and hence there remains only four companies as comparables, as listed below:"

26.5. Following the aforesaid decision of the Tribunal, we hold that M/s.Tata Elxsi Ltd. should not be regarded as a comparable.

Following the decision of the co-ordinate bench of this Tribunal we direct the AO/TPO to exclude this company from the list of comparables.

16. **Thirdware Solutions Ltd**: The learned AR of the assessee has submitted that this company is engaged in the software development products as well as software development. However, no segmental information is available on this company. Further this company acquired intangible assets and derived revenue based on sales of licences. In support of his contention, he has relied upon the orders of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) and submitted that this company was found to be functionally dissimilar to that of pure software development service provider.

16.1 On the other hand, learned DR relied upon the orders of the authorities below.

We have considered the rival submissions and carefully perused the material on record. We note that the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra), has considered the functional comparability of this company in para-15.3 as under;

“15.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the material on record that the company is engaged in product development and earns revenue from sale of licenses

and subscription. However, the segmental profit and loss accounts for software development services and product development are not given separately. Further, as pointed out by the learned Authorised Representative, the Pune Bench of the Tribunal in the case of E-Gain Communications Pvt. Ltd. (supra) has directed that since the income of this company includes income from sale of licenses, it ought to be rejected as a comparable for software development services. In the case on hand, the assessee is rendering software development services. In this factual view of the matter and following the afore cited decision of the Pune Tribunal (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

Following the decision of the co-ordinate bench, we direct the AO/TPO to exclude this from the list of comparables.

17. **Wipro Ltd:** The learned AR of the assessee submitted that this company is a industry leader and also owns tangibles. He has further submitted that this company is engaged in product development and services. However, the segmental information is not available. He has pointed out that there is a amalgamation during the year and the software service revenue to the sales is less than 75%. He has relied upon the decision of co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra).

17.1 On the other hand, learned DR relied upon the orders of the authorities below and submitted that this company was found to be functionally similar to the software development service provided by the assessee.

17.2 We have considered the rival submissions and relevant material on record. We note that in case of 3DPLM Software Solutions Ltd, (Supra), this Tribunal has considered the functional comparability of this company in para-12.4.1 and 12.4.2 as under;

“12.4.1 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial

statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison.

12.4.2 We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents. In this regard, the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010) has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any such intangible and hence does not have an additional advantage in the market. As the assessee in the case on hand does not own any intangibles, following the aforesaid decision of the co-ordinate bench of the Tribunal i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee. We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies in the case on hand for the year under consideration.

17.3 As it was found that this company owns Intellectual Property Rights in the form of registered patents and several pending applications for grant of patents. Therefore, the said company owning intangibles cannot be compared to low risk captive services provider.

Following the finding of the co-ordinate bench of this Tribunal, we direct the AO/TPO to exclude this company from the list of comparables.

18. **Softsol India Ltd:** The learned AR of the assessee submitted that this company is engaged in the software development services and also having related party transactions of more than 15%. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra).

18.1 On the other hand, learned DR relied upon the orders of the authorities below and submitted that this company is functionally comparable with the assessee and filter of 15% of RPT was not applied by the TPO or by the assessee in selection of comparables. Thus, the learned DR has submitted that if this filter of 15% is applied, the same should be applied to all the comparables or the filter of 25% of related party should be applied in all the comparable cases.

18.2 We have considered the rival submissions as well as relevant material on record. The learned AR of the assessee has heavily relied upon the order of this co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) wherein the Tribunal has excluded this company on the ground of related party transaction in excess of 15% as it was considered in the case of 24/7 Customer.com Pvt.Ltd. The relevant finding of the Tribunal are in para-19.3 as under;

"19.3 We have heard both parties and perused and carefully considered the material on record. We find that the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 has

excluded this company from the set of comparables for the reason that RPT is in excess of 15% following the decision of another bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2011. As the facts for this year are similar and material on record also indicates that RPT is 18.3%, following the afore cited decisions of the co-ordinate benches (supra), we hold that this company is to be omitted from the list of comparables to the assessee in the case on hand".

18.3 Since the functional comparability has not been examined by the Tribunal in the case of 3DPLM Software Solutions Ltd., (Supra) and this company was directed to be excluded only on the ground of related party transaction. It is pertinent to note that the Tribunal in series of decisions has determined the tolerance range of related party transactions from 5% to 25% depending upon case to case and facts and circumstances of the each case. It is not clear from the orders of the authorities below whether any related party filter was applied by the TPO. Further, the tolerance range of related party transactions has to be determined depending upon the availability of number of comparables. If the no of comparables are abundance then, this tolerance range of related party transactions can be fixed at a lower level to say 10% to 15% as against the case where number of comparables are very few, the tolerance range can be relaxed upto 25%. This view of varying the range of RPT percentage has been considered by

this Tribunal in number of cases depending upon the peculiar facts of each case. Thus, if the filter of RPT at 15% is applied in a particular comparable then, this filter should also applied to all other comparables companies. The assessee has also disputed functional comparability of this company and contended that this company is engaged in the software product development. However, the relevant record has not been produced before us to show the functional profile and the revenue generated activity of this company. In view of the facts and circumstances of the case, we are of the considered opinion that the functional comparability as well as the applicability of RPT filter is required to be properly examined at the level of TPO. Accordingly, we set aside the functional comparability and application of the RPT filter to the record of the TPO. Needless to say the assessee be given an appropriate opportunity of hearing.

18.4 We make it clear that the RPT filter if any is applied in this case, then, the same would be applicable in all the comparable companies to be considered for the purpose of determining the ALP.

19. **Lucid Software and Mindtree:** Though, these two companies were selected by the assessee itself and also accepted by the TPO , however, the assessee has raised the objections against the inclusion of M/s Lucid Software as well as M/s Mindtree by way of raising additional ground which was included as ground no.8 & 9.

19.1 The learned AR of the assessee has submitted that during the assessment proceedings, the assessee was not in a position to controvert

the stand of the TPO to include these companies in the list of comparables, because the specific details were not available in the public domain. Further there are subsequent findings of this Tribunal on the functional comparability of these companies. Thus, the learned AR has submitted that these two companies should be excluded from the list of comparables. In support of his contention, he has relied upon the decision of the co-ordinate benches of this Tribunal in case of 3DPLM Software Solutions Ltd.,(Supra) as well as in case of Cisco Systems (Ind.) Pvt. Ltd (Supra) and submitted that the functional comparability of these two companies have been examined by the co-ordinate bench of this Tribunal in these two case and found that these two companies are not comparable with the software development services providing company. Thus, the learned AR has submitted that though, the companies were originally selected by the assessee however, there are findings of the Tribunal that these companies are functionally dissimilar to the software development services provider companies then, the same may be excluded from the list of comparables.

19.2 On the other hand, learned DR submitted that the assessee did not raise any objection regarding the functional comparability of these two companies either before the TPO or before the DRP. Then, he assessee cannot be allowed to raise this objections at this stage. He has further contended that the facts relevant to the comparability of functions have not been examined by the TPO or by the DRP. Therefore, the facts which has

been contended now were not raised before the authorities below and therefore, the same were not examined by the TPO/DRP.

19.3 We have considered the rival submission and the relevant material on record. There is no dispute that these two companies were selected and included in the list of comparables by the assessee itself for the purpose of bench marking its international transactions in the TP study report.

19.4 We further note that as far as the Mindtree is concerned, the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd., (Supra) accepted the comparables of this company, whereas in case of NetHawk Networks India Pvt.Ltd., it was rejected as comparable.

19.5 It is pertinent to note that in the case of NetHawk Networks India Pvt. Ltd (Supra) the functional profile of the company per se was not examined by the Tribunal but, the Tribunal has followed the decision in case of Wills Processing Services (I)Pvt. Ltd. The relevant part of the finding was also reproduced which suggests that the TP analysis of the company was analysed in the said case on the ground that the TPO used the information obtained by the another TPO u/s133(6). Therefore, the functional comparability while considering the relevant facts and business profile of the said company was not examined by the Tribunal in the case of Wills Processing Services(I)Pvt. Ltd., which was followed in the case of NetHawk Networks India Pvt.Ltd.,(Supra). Further, the assessee has not produced any record before us to show the actual nature of activity and

business functions of Bodhtree Consultancy Ltd. In the absence of relevant facts and record, we are not in a position to give any finding regarding the comparability of this company. Therefore, a lapse on the part of TPO in some other case cannot be a ground of rejection of this company in the present case. Accordingly, in the facts and circumstances of the case, we remit this issue to the record of the TPO/AO to re-examine the functional comparability of this company by verifying the relevant facts.

20. As regards the **Lucid Software**, we find that the functional comparability of this company has been examined by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions (Supra) in para-16.3 as under;

“16.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the company i.e. Lucid Software Ltd., is engaged in the development of software products whereas the assessee, in the case on hand, is in the business of providing software development services. We also find that, co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 (IT(TP)A No.845/Bang/2011), LG Soft India Pvt. Ltd. (supra), CSR India Pvt. Ltd. (supra); the ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) and the Delhi ITAT in the case of Transwitch India Pvt. Ltd. (supra) have held, that since this company, is engaged in the

software product development and not software development services, it is functionally different and dis-similar and is therefore to be omitted from the list of comparables for software development service providers. The assessee has also brought on record details to demonstrate that the factual and other circumstances pertaining to this company have not changed materially from the earlier year i.e. Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09. In this factual matrix and following the afore cited decisions of the co-ordinate benches of this Tribunal and of the ITAT, Mumbai and Delhi Benches (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

20.1 Thus, it is clear from the examination of the fact that this company was found to be functionally not comparable with the software development service provider company. Accordingly, following the order of the co-ordinate bench of this Tribunal(Supra), we direct the AO/TPO to exclude this company from the list of comparables.

20.2 Since most of the comparables selected by the TPO has been rejected by us in the foregoing findings therefore, the assessee as well as the TPO are at liberty to consider as many as possible companies as comparable for the purpose of determining the ALP, subject to the

parameters on the basis of which the earlier companies selected by the TPO are rejected. Thus, the AO/TPO are directed to re-compute the ALP by doing a fresh exercise of selecting the suitable comparables apart from the comparables which are accepted by both the parties in the present of comparables.

21. Ground no.II is regarding the denial of deduction u/s 10A.

21.1 We have heard the learned AR as well as the learned DR and considered the relevant material on record. At the outset, we note that this issue has been considered and examined by this Tribunal in assessee's own case for the assessment year 2004-05 in ITA No.616/Bang/2009, by order dated 10-08-2010 in para-3 to 5 as under;

“ 3. Brief facts of the case are that the assessee-company is engaged in the business of design, development and testing of software. It filed its return of income on 30-10-2004 declaring a total income of Rs.1,43,781/- and claimed deduction of Rs.2,47,82,817/- u/s10A of the Income-tax Act, 1961. The return of income was processed u/s 143(1) and a refund of Rs.49,64,355/- was issued to the assessee-company. Subsequently, the assessee filed an application u/s 154 and pursuant to the same, further refund of Rs.74,465/- was granted. Thereafter, proceedings u/s 143(3) were initiated. During the course of 143(3) proceedings, the AO observed from the appendix filed along with the return of income for the assessment year 2004-05, that the assessee-company has acquired from GE India Technology Centre, the fixed assets,

employees customers, liabilities, obligations and others in all consulting an undertaking and has continued the business of software development. He also examined the approval letter of the Director, STPI dated 10-02-2003 and observed that the approval has been accorded for setting up a new undertaking and does not confer status of a STP consequent to the sale of the undertaking. Thereafter, he considered the question as to whether it is an expansion of a unit or shifting of a unit or splitting or reconstruction of a unit and examined the applicability of section 10A(2)(iii) and held that the assessee does not fulfill the conditions of sec.10A(2)(1)(b), 10A(2)(ii) and 10A(2)(iii) and therefore, the assessee is not eligible for deduction u/s 10A(2)(iii) and therefore, the assessee is not eligible for deduction u/s 10A of the Act. He, however, considered the assessee's alternative claim of deduction u/s 80HHEE of the Act. Aggrieved, the assessee preferred an appeal before the CIT(A) who allowed the same holding that the undertaking has existed in the same shape and form and has carried on the same business both before and after change in ownership and the mere fact of change of ownership cannot be taken to mean that the undertaking itself has been formed from the splitting up of re-construction of an existing business. Aggrieved, the revenue is in appeal before us.

4. The learned departmental representative strongly supported the order of the AO while the learned counsel for assessee supported the order of the CIT(A) and also placed reliance upon the decision of the 'B' Bench of this Tribunal in the case of Dy.CIT Vs M/s L.G Soft India Pvt.Ltd in ITA

Nos.623 & 847/Bang/2010 dated 19-05-2010 wherein it has been held that where an undertaking existed in the same place, form and substance and did carry on the same business before and after the change in the legal character of the form of organization, the assessee is eligible for deduction u/s 10A of the Act. He also placed reliance upon the decision of the Calcutta High Court in the case of CIT Vs P.K.Engg & Forging (P) Ltd, reported in 87 Taxmann. 101, wherein while considering the assessee's claim for deduction u/s 80-J, it was held that where the industrial undertaking run by a firm which had been allowed deduction u/s 80-J for a period of 5 years, it would be entitled to benefit of residuary period. He also placed reliance upon the decision of the Delhi Bench of the Tribunal in the case of Tech Books Electronics Services (P) Ltd Vs Addl.CIT (100 ITD 125) wherein it was held that merely because of change in ownership the exemption cannot be denied. Another decision relied upon by him is in the case of Kumaran Systems (P) Ltd., Vs ACIT (106 TTJ 494) wherein it was held that where a firm is converted into a company and there was change only in the composition of ownership and not the undertaking and business, the exemption allowed to the firm u/s 10A of the Act, could not be denied to the company merely because it had been separately granted recognition.

5. Having heard both sides and having considered the rival submissions, we find that the issue is squarely covered by the decisions relied upon by the learned counsel for assessee. The distinctions sought to be brought about by the learned Department Representative, in our opinion,

re not relevant to the facts of the case before us. In view of the same, the appeal of the revenue is dismissed”.

Following the order of the co-ordinate bench of this Tribunal in assessee's own case (Supra), we decide this issue in favour of the assessee and direct the AO to allow the claim of deduction u/s 10A of the IT Act, 1961.

22. Ground no.3 & 4 regarding chargeability of interest u/s 234B & 234D of the IT Act. The levy of interest u/s 234B & 234D is consequential in nature and no specific finding is required.

23. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open Court on the 31st July, 2015.

Sd/-
(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

Place: Bangalore

D a t e d : 31-07-2015

am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

By order

AR, ITAT, Bangalore