

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE****BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.210/Bang/2021
Assessment Year: 2016-17

EIT Services India Pvt. Ltd. Digital Park, 39/40, Electronic City Phase II Hosur Road Bangalore 560 100 PAN NO : AAACD4078L	Vs.	Deputy Commissioner of Income-tax Circle 2(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Padam Chand Khincha, A.R.
Respondent by	:	Shri Praveen Karanth, D.R.

Date of Hearing	:	27.07.2022
Date of Pronouncement	:	22.08.2022

O R D E R**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against order of DCIT 2(1)(1), Bengaluru dated 27.3.2021 passed u/s 143(3) r.w.s. 144C(13) r.w.s. 143(3A) & 143(3B) of the Act. The grounds raised by the assessee are as under:-

The Appellant submits that:

1. That the order of the Assessing Officer (AO' for short) pursuant to the directions of the Dispute Resolution Panel ('the DRP' for short), to the extent prejudicial to the Appellant, is bad in law and liable to be set aside.

2. Determination of arm's length price by the TPO-

- a. *The Transfer Pricing Officer ('the TPO') erred in rejecting the value of international transactions relating to software development services ('SWD services') and information technology enabled services ('ITE Services') as recorded in the books of accounts, as the arm's length price. The DRP erred in upholding the actions of the AO/TPO.*
- b. *The AO/TPO erred in law and facts in making an aggregate Transfer Pricing adjustment ('TP adjustment') of Rs. 339,44,00,000/- (adjustment of Rs. 286.96.00.000/- to the SWD services segment and an adjustment of Rs. 52,48,00,000/- to the ITE services segment) to the income returned by the Appellant and in holding that the international transactions of provision of SWD services and ITE services by the Appellant to its Associated Enterprises ('AEs') was not at arm's length.*
- c. *The AO/TPO has erred in rejecting the Transfer Pricing Study ('TP' study) maintained by the Appellant in the manner Prescribed under Section 92D of the Income Tax Act, 1961 ('the Act').*
- d. *The AO/TPO erred on facts and in law in conducting a fresh benchmarking analysis based on his own conjectures and surmises. The DRP erred in upholding the actions of the AO/TPO*

3. Comparability analysis adopted by TPO for determination of arm's length prices of the transactions of provision of SWD and ITE services-

- a. *That the TPO erred in applying arbitrary filters to arrive at fresh sets of companies as comparables to the Appellant, without establishing their functional comparability. The DRP erred in confirming the action of the TPO.*
- b. *That the TPO erred in selecting companies only if the data pertaining to financial year 2015-16 is available in the public database. The DRP erred in upholding the action of the TPO.*
- c. *That the TPO erred in arbitrarily rejecting companies merely on the ground that they have a different financial year ending (i.e. other than 31st March 2016) or the data which does not fall within 12-month period (i.e. 1st April 2015 to 31st March 2016) The DRP erred in confirming the same.*
- d. *That the TPO erred in rejecting companies having export service income less than 75% of sales and the DRP erred in confirming the same.*
- e. *That the TPO erred in rejecting companies having losses for 2 years out of 3 years and the DRP erred in confirming the same*

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- f. *That the TPO erred in not rejecting companies that earned abnormal profits and the DRP further erred in confirming the action of the TPO.*
 - g. *That the TPO grossly erred in excluding provision for bad and doubtful debts as non-operating in nature, while computing the operating margins of alleged comparable companies. The DRP further erred in upholding the same.*
 - h. *That the TPO grossly erred in applying the RPT filter by taking the RPT income/total income or RPT expenditure/total expenditure instead of taking the total value of RPT transactions/total sales and the DRP further erred in upholding the same.*
 - i. *That the TPO erred in using information gathered under Section 133(6) of the Act, which information was not available while preparing the transfer pricing documentation for the relevant financial year.*

4. Determination of arm's length price of the SWD Services

- a. *That Inteq Software Private Limited, Larsen & Toubro Infotech Limited, Nihilent Limited, Persistent Systems Limited, Infobeans Technologies Limited, Aspire Systems (India) Private Limited, Infosys Limited, Thirdware Solution Limited, Cybage Software Private Limited ought to be excluded from the list of comparables as the functions performed, assets employed and risks assumed by the said companies are entirely different and incomparable to that of the Appellant.*
- b. *That, Minvesta Infotech Limited, Eluminous Technologies Private Limited, and Ace Software Exports Limited ought to be included in the list of comparables as the functions performed, assets employed and risks assumed by the said companies are comparable to that of the Appellant.*
- c. *That the DRP erred in holding that inclusion of certain comparables need not be adjudicated for the reason that the companies did not feature in the TPO's search matrix/Appellants TP study and their inclusion would therefore amount to cherry picking. although the companies are otherwise comparable*
- d. *That the TPO and the DRP grossly erred in not including Sasken Communication Technologies Limited. Evoke Technologies Private Limited. Agilisys IT Services India Private Limited. Batchmaster Software Private Limited. DCIS Dot Corn Solutions India Private Limited. Sagarsoft (India) Ltd., [summation Technologies Private Limited. despite the functions performed. assets employed and risks assumed by the said companies are comparable to that of the Appellant.*
- e. *That without prejudice. the DRP erred in upholding the rejection of Sasken Communication Technologies Limited. and Agilisys IT*

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Services India Private Limited on the above basis. despite the Appellant having selected the said companies in its TP study.

- f. That the TPO erred in computing the margin of Orion India Systems Private Limited.*

5. Determination of arm's length price relating to IT Enabled Services

- a. That Infosys BPO Limited. SPI Technologies India Private Limited. and Eclerx Services Limited ought to be excluded from the list of comparables as the functions performed. assets employed and risks assumed by the said companies are entirely different and incomparable to that of the Appellant*
- b. That Jindal Intellicom Limited, R Systems International Limited. Micro genetic Systems Limited, Ace BPO Services Private Limited, Informed Technologies India Private Limited and Crystal Voxx Limited ought to be included in the list of comparables as the functions performed, assets employed and risks assumed by the said companies are comparable to that of the Appellant.*
- c. That without prejudice, the DRP grossly erred in not including Informed Technologies India Private Limited and Crystal Voxx Limited on the basis of the said companies did not feature in the search matrix of the TPO, although the said companies are otherwise comparable to the Appellant.*

6. Non-allowance of appropriate adjustments to the margins of the comparable companies.

- a. That the TPO erred in law and on facts in not allowing appropriate adjustments under Rule 10B of the Income-tax Rules, 1963 to account for the differences in: (a) working capital positions; and (b) risk profiles of the Appellant and of the companies selected as comparables. The DRP further erred in confirming the same.*
- 7. That the DRP erred in observing that decisions of this Hon'ble Tribunal cannot be relied upon while adjudicating the comparability of the companies and that companies cannot be rejected for non-availability of segment details.**
- 8. That the TPO grossly erred in the computing the TP adjustment at entity level without restricting the same to the value of international transactions, and the DRP erred in upholding the same.**
- 9. That the disallowance made under Section 37 of the Act by the Assessing Officer ought to have been taken into consideration while computing the TP adjustment, by reducing the disallowed expenditure from the operating cost base of the appellant, which the DRP failed to appreciate**

10. Erroneous disallowance of ESOP expenses under Section 37 of the Act.

- a. *The AO erred in law and on facts. in disallowing the expenditure on Employee Stock Option ('ESOP') of INR 28.72.00.000 under section 37 of the Act without appreciating the submission furnished by the Appellant.*
- b. *The AO erred in law. in disregarding the decision of Hon'ble High Court of Karnataka in the case of Biocon Limited ([2020] 121 taxmann.com 351 (Kar.)) and the decision of this Hon'ble Tribunal in the case of Novo Nordisk ([2014] 42 taxmann.com 168) wherein it was held that discount on issuance of ESOP is an allowable business expenditure under section 37 of the Act.*
- c. *The AO and DRP erred in law and on facts by not appreciating that the difference between the market value and the purchase price of shares is being taxed as perquisite in the hands of the employees under Section 192 of the Act which is evidenced by sample Form 16 furnished by the Appellant*
- d. *The AO and DRP erred in law and on facts. in disregarding the sample debit note/invoices. Employee listing Sample Form 16, cost reimbursement agreement, sample RSU agreement and scheme document submitted during the DRP proceedings by the Appellant.*
- e. *That the AO erred in disallowing the ESOP expenses reimbursed by the Appellant to its parent entity on the erroneous basis that the (i) loss in the hands of the parent entity is notional in nature. (ii) the payment is fictitious in nature; and (iii) the payment is a colourable device adopted by the Appellant for avoidance of tax. The DRP erred in upholding the same.*
- f. *The AO and DRP has erred in law and on facts by placing reliance on the case laws decided on different context and not applicable to the facts of the Appellant.*
- g. *That the DRP erred in upholding the disallowance on the basis that the expenditure cannot be claimed by the Appellant as a deduction prior to the date of exercise of option by employee.*
- h. *That the DRP erred in upholding the disallowance on the basis that the expenditure if at all is a capital expenditure and therefore cannot be allowed as a deduction.*
- i. *That the AO erred in holding that there is no outflow of money resulting in an expenditure when in fact there is a clear outflow of economic resources/cash in the hands of the Appellant which is wholly and exclusively used for the purpose of business in India. The DRP erred in law and on facts by stating that the ESOP is uncertain and not*

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appreciating the fact that the ESOP expenses are actual expenses claimed by the Appellant and is based on actual invoices issued and payments made.

- j. That the AO grossly erred in holding that the payment made by the Appellant to its parent entity is liable for deduction of tax at source under Section 195 of the Act, without appreciating that the payment is merely in the nature of reimbursement without any income element embedded therein and thereby not attracting the provisions of Section 195 of the Act.*
- k. That the AO grossly erred in holding that a disallowance under Section 40(a)(i) of the Act is warranted for non-deduction of tax at source under Section 195 of the Act, without appreciating that provisions of Section 195 of the Act are not applicable to the reimbursement made by the Appellant.*
- l. That the AO erred in holding that income is embedded in the reimbursement without any basis*
- m. The AO erred in law and on facts. in disregarding that the remittance towards recovery of ESOP charges is not taxable under the provision of India-USA Double Taxation Avoidance Agreement*
- n. That the AO while on the one hand held that there is an element of income embedded in the reimbursement made by the Appellant to the parent entity, contradicted himself by holding on the other hand that the expenditure is notional/fictitious in nature.*
- 11. That the AO. while assessing the total income of the Appellant for the year under consideration. ought to have allowed a deduction for education cess and secondary & higher education cess (collectively known as "education cess") paid during the year under consideration. although not claimed as a deduction by the Appellant while filing its return of income.*
- 12. That in the computation sheet annexed to the final assessment order, the AO erroneously considered the total income at Rs 1271,74,65,420/- as against Rs. 1269,72,60,217/- computed in the final assessment order.*
- 13. That in the final assessment order the AO erroneously adopted the TP adjustment at Rs. 339.44,00.000/- against Rs 310,47,31.000/- as computed in the order passed by the TPO giving effect to the DRP's directions.*

14. Initiation of penalty proceedings

- a. *That the AO erred in initiating penalty proceedings under Section 271(1)(c).*

The Appellant craves leave to add to or alter, by deletion, substitution or otherwise. the above grounds of appeal, at any time before or during the hearing of the appeal.

15. Relief

- a. *The Appellant prays that the appeal may be allowed and the impugned final assessment order be set aside”.*

2. Ground Nos.1 to 3 are general in nature which do not require any adjudication.

3. In Ground No.4(a) the assessee pressed exclusion of following comparables:-

- i. L&T Infotech Ltd.
- ii. Persistent Systems Ltd.
- iii. Infobeans Technologies Ltd.
- iv. Infosys Ltd.

i. L&T Infotech Ltd.

3.1 Ld. A.R. submitted that L&T Infotech Ltd. is engaged in diversified business activities and thereby functionally dissimilar. According to the Ld. A.R., L&T Infotech Ltd. has two business segments namely:

- “Services cluster, which includes Banking, Financial services, Insurance, Media & Entertainment, Travel & Logistics and health care; and
- Industrials Cluster, which includes Hi Tech and Consumer Electronics. Consumer, Retail & Pharma, Energy & Process, Automobile & Aerospace, Plant Equipment & Industrial Machinery, Utilities and E&C.

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3.2 Further, the segmental information is not available in the annual report Services Cluster of L&T Infotech including Banking, Financial services, Insurance, Media & Entertainment, Travel & Logistics and Health Care. It was submitted that the segmental break-up of revenue attributable to IT segment is not available as such, it cannot be included. Further, it is also subjected that in assessee's own case in ITA No.2498/Bang/2019 dated 3.9.2021 for the assessment year 2015-16, it has been excluded.

3.3 He also relied on the order of the Tribunal in the case of ADP Private Limited reported in 135 Taxmann.com 44 (Hyd. – Trib.) for the assessment year 2016-17 wherein it was excluded as not comparable.

3.4 The Ld. D.R. relied on the order of Ld. DRP.

3.5 We have heard the rival submissions and perused the materials available on record. As rightly pointed out by the Ld. A.R. in the assessment year 2015-16 in assessee's own case in ITA No.2498/Bang/2019, the Tribunal vide order dated 3.9.2021 has held as under:-

“7. We notice that the coordinate bench in the case of Yahoo Software Development India Pvt. Ltd. (supra) has excluded following 3 companies holding them as not good comparable companies.

(A) Persistent Systems Ltd.:-

33. We have considered the rival submissions. We find that on the question of application of RPT filter, the assessee had made the following submission before the DRP:-

4. Fails the Related Party Transaction to Sales filter applied by the learned TPO

In the show-cause notice issued, the learned TPO has excluded companies for which the ratio of RPT to sales exceeds 25% during the current year i.e., during FY 2014-15. The relevant extract from the show-cause notice is reproduced below for ease of reference:

e) Companies who have more than 25% related party transactions of the sales were excluded.

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Companies having related party transactions of more than 25% are proposed to be excluded. A threshold of 25% is being applied following the provisions of Section 92A(2)(a) which provides a limit of 26% of the equity capital carrying voting rights for treating an enterprise as Associated Enterprise. If the limit is reduced further it would only result in eliminating more and more companies, on the other hand if the limit is relaxed then companies with predominantly related party transactions would get included which would not represent uncontrolled transactions. Therefore, on a balancing note, 25% is a proper threshold limit for related party transactions. The companies having more than 25% related party transactions should therefore be rejected as comparables.

The Hon'ble ITAT has upheld the application of this filter by the TPO in its order in the case of M/s. Supporisoft India Pvt. Ltd for AY 2005-G6 in IT (TP)A 1372/B/11 & 20/2012 dated 28.03.2013 following its own decision in the case of M/s. Actis Advertisers Pvt. Ltd vide ITA No.5277/De1/2011 dated 12.10.2012.

On perusal of the Annual Report of Persistent, we observe that the company has RPT in excess of 25% of the sales. The calculation of the same has been provided below for your ease of reference:

RPT to Sales ratio for FY 2014-15	Amount
Particulars	(INR Million)
Sale of services	2,410.02
Commission received	10.26
Purchase of software	1.49
Cost of technical professional	1,339.1
Commission paid on sales	111.79
Traveling and conveyance	19.27
Total related party transactions (A)	3,891.93
Total Sales (B)	12,424.98
RPT % of Sales (A/B)	31.32%

*From the above computation, it is clear that the **controlled transactions of Persistent constitutes 31.32% of sales**. Based on the above, it can be seen that Persistent fails the 'RPT to sales ratio' filter applied by the learned TPO and should therefore not be considered as a comparable."*

34. This argument has been addressed by the DRP in its order as follows:-

"4.4.9 We note that the approach of the TPO in treatment of related party transaction into two sets, are for revenue transactions and other for expense transaction is logical and correct. We also note

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that the RPT filter was adopted by the TPO was with the above conditions and has adopted consistently. Hence, we do not find any infirmity the approach. Hence, we reject the assessee's plea. We hold that onsite expenses do not adversely affect comparability and hence, such plea is rejected.”

35. Further, the assessee had also raised plea with regard to onsite revenue filter by pointing out that onsite revenue is substantial and therefore this company should not be regarded as a comparable company with a company which does not have any onsite revenue. In this regard, the ld. counsel for the assessee placed reliance on the decision of the ITAT Bangalore Bench in the case of Trilogy e-business Software India P. Ltd. v. DCIT, ITA No.1054/Bang/2011 for AY 2007-08 dated 23.11.2012 wherein this Tribunal took the following view:-

“64. The next objection of the Assessee is that when the most appropriate method selected for determining ALP is the TNMM there is no reason as to why one should look at price difference in offshore software development and onsite software development. It is no doubt true that in TNMM it is only the margins in an uncontrolled transaction that is tested with reference to the controlled transaction but it is not possible to ignore the fact that pricing will have an effect on the margins obtained in a transaction. The argument that if pricing structure were to be considered as criteria, then it will have to be seen as to what is the pricing structure of all the comparable for various projects cannot be accepted because the TPO has not chosen any other onsite software service provider with a revenue composition of more than 75% from onsite software services as comparable. As rightly observed by the TPO, the pricing is different in onsite when compared to offshore operations. The further observations of the TPO that the reasons for the same lie in the fact that while in the case of OFFSHORE projects most of the costs are incurred in India; an ONSITE project has to be carried out abroad significantly increasing the employee cost and other costs.

65. The next objection of the Assessee is with regard to Assets employed. The companies, which predominantly generate revenues from onsite activity, do not have significant assets as most of the work is carried on the site of customer outside India. The argument that the TPO has himself observed that software service providers do not require much assets cannot be basis to accept the Assessee's plea. Those observations are made by the TPO in the context of application of turnover filter and have been quoted out of context by the Assessee.

66. The next argument of the Assessee is that TPO has held that margins are lower in onsite software services and that margin is not a criteria to select or reject a comparable under Rule 10B(2) of the I.T. Rules. We are of the view that this argument again ignores the fact that the approach of the TPO has been to highlight the fact that there can be no functional comparability, if the assets employed and risks assumed are

taken into consideration. It is in that context the TPO has referred to the margins.

67. The companies who generate more than 75% of the export revenues from onsite operations outside India are effectively companies working outside India having their own geographical markets, cost of labour etc., and also return commensurate with the economic conditions in those countries. Thus assets and risk profile, pricing as well as prevailing market conditions are different in predominantly onsite companies from predominantly offshore companies like the taxpayer. Since, the entire operations of the tax payer are taking place offshore i.e. in India; it is but natural that it should be compared with companies with major operations offshore, due to the reason that the economics and profitability of onsite operations are different from that of offshore business model. As already stated the Assessee has limited its analysis only to functions but not to the assets, risks as well as prevailing market conditions in which both the buyer and seller of services located. Hence, the companies in which more than 75% of their export revenues come from onsite operations are to be excluded from the comparability study as they are not functioning in similar economic circumstances to that of the tax payer. Hence, it is held that this filter is appropriately applied by the TPO.

68. Admittedly the onsite revenue in the case of the following comparable companies identified by the Assessee was more than 75% of its export revenues viz., a) Visu International Ltd. b) Maars Software International Ltd. c) Akshay Software Technologies Ltd. d) VJIL Consulting Ltd. e) Synfosys Business Solutions Ltd. The above companies were therefore rightly not considered as comparable by the TPO. We hold accordingly."

36. It is seen that the TPO in coming to the conclusion that the onsite revenue filter is not applicable has placed reliance on the decision of the ITAT Mumbai Bench in the case of Capegemini as quoted in para 16 in para 14 of the TPO's order, but that decision does not deal with a case of onsite revenue filter and the decision was rendered on the facts of its own case.

*37. On the issue of RPT filter, we notice that the TPO in para 16 has accepted that the RPT filter should be @ 25%. In the case of Persistent Systems Ltd., the RPT is at 31.32% as extracted in the earlier part of this order and therefore this company should be excluded by application of RPT filter. In view of the above, we do not wish to go into other grounds on which this company is sought to be excluded viz., that it is a product company and there is no segmental data between product and services segment, presence of onsite activity and the impact of extra-ordinary event of acquisition during the relevant previous year. **Therefore, this company is directed to be excluded from the list of comparable company.***

(B) LARSEN & TOUBRO INFOTECH LTD:-

38. As far as L&T Infotech Ltd. is concerned, the ld. counsel for the assessee brought to our notice the decision of ITAT Delhi Bench in the case of Saxo India Pvt. Ltd. v. ACIT, ITA No.6148/Del/2015 for AY 2011-12, order dated 5.2.2016, wherein the Tribunal took note of the fact that this company was also trading in software and owned insignificant intangible assets. **The company was excluded from the list of comparable companies with reference to SWD services provider such as the assessee.** The ld. Counsel pointed out that though this decision was rendered with reference to AY 2011-12, the same reasoning would apply to AY 2015-16 also and in this regard, he drew our attention to page 696 of assessee's PB, which gives the details of the revenue generated by this company without any segmental break-up. Our attention was also drawn to page 682 of PB which shows that there is substantial onsite revenue activity as well as cost incurred on onsite software development. We notice from page 676 of assessee's PB that this company as part of its operating profit in Schedule-O of profit & loss account contains expenditure for 'cost of bought out items for resale' and this is a significant part of the operating expenditure. When we see the revenue in Schedule M of the profit & loss account, there is no break-up of the revenue with regard to software services and software product. In our opinion, this distinction is enough to exclude this company from the list of comparable companies as held by the Hon'ble Delhi ITAT in the case of Saxo India Pvt. Ltd. (supra) which decision was also confirmed by the Hon'ble Delhi High Court

(C) INFOSYS LTD.

39. The next company which the assessee seeks to exclude is Infosys Ltd. As far as this company is concerned, it is seen that the following are the functional dissimilarities brought to our notice:-

"Functionally dissimilar - owns intellectual properties, incurs significant R&D costs & onsite activity.

- *Engaged in diversified business activities.*
- *Involved in development of software products in addition to software services.*
- *Owns intellectual property rights.*
- *Incurs significant research and development costs.*
- *Carries out significant activities based on onsite business.*
- *Owns products such as Finacle, Edge Verve and other product based solutions.*

Extra-ordinary event of merger with Infosys Consulting India Ltd.

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Segmental profit & loss account not available.

Commands substantial brand value.

40. *The DRP, however, has not thought it fit to exclude this company by observing that this company has substantial pre-dominant revenue from software services and the growth was not attributable to any brand value. Presence of onsite activity and the expenses on R&D have all been brushed aside. **In our view, the difference pointed out by the ld. counsel for the assessee before us show that this company cannot be compared with that of the assessee** basically because of its business model, presence of onsite revenue generation and other reasons cited before us. Besides, the reason that turnover of this company is huge and more than 10 times that of the assessee.”*

8. *We notice that M/s. Infobeans Technologies Ltd. have been directed to be excluded by the coordinate bench in the case of Metric Stream Infotech (India) Pvt. Ltd. with the following observations:*

“14.3. Infobeans Technologies Ltd.,

Ld.AR submitted that this comparable was selected by authorities below as it passes all filters, based upon response received from this company under section 133 (6) of the act. He submitted that this observation is contrary to the facts and figures appearing in annual report. Referring to page 1015 Ld.AR submitted that this company is operating at CMMI Level 3 and is a software service company specialising in business application development for web and mobile. In the company overview this company has been stated to be primarily engaged in providing custom developed services to offshore clients and it provides software engineering services primarily in custom application development, content management systems, enterprise mobility, Big Data analytics. Ld.AR thus submitted that this company is functionally not at all similar with a captive service provider like assessee that this providing Ltd services to its associated enterprises.

14.3.1. On the contrary Ld. CIT DR, referring observations of DRP in para 3.6.1 submitted that the activities of company fall under the gamut of software development has categorised by company itself and that the information obtained under section 133 (6) is sufficient enough to come to such conclusions. However he submitted that this comparable also may be sent back to learnt AO/TPO for verification.

14.3.2. We have perused submissions advanced by both sides in light of records placed before us.

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It is observed that the annual report of this company categorises the diversify services provided by this company under software development segment. We also note that this company is basically into application development for web and mobile and provides customised services to its offshore clients comprising. Entire revenue received by this comparable ease under one single segment of sale of software. This company also owns software licenses.

14.3.3. In our considered opinion this comparable cannot be considered to be functioning in 100% risk mitigated environment and is a full-fledged enterprise. Such a comparable cannot be compared with a captive service provider like assessee.

Accordingly we direct this comparable to be excluded from finalist.”

9. *Following the above said decisions rendered by co-ordinate benches, we direct exclusion of Persistent Systems Ltd., Larsen & Toubro Infotech Ltd. and Infosys Ltd. & Infobeans Technologies Ltd. from the final list of comparables.”*

3.6 Further, in the assessment year 2016-17, the coordinate bench of Hyderabad Tribunal in the case of ADP Pvt. Ltd. in ITA Nos.227 & 228/Hyd/2021 dated 3.2.22 held as under:-

“4.3 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. We find substance in the submissions of the ld. AR and on going through the financial statements of Larsen & Toubro Infotech Ltd., in particular at page Nos. 1249 of paper book - Volume - 3 disclosure under the Companies Act, 2013, we observe that the company information system resource centre Pvt. Ltd. (ISRC) was amalgamated with the company with effect from September, 21, 2015 and the appointed for the scheme was October, 17 2014, which reads as under:

"Pursuant to the Scheme of Amalgamation sanctioned by the Hon'ble High Court of Bombay vide its order dated September 04, 2015, Information Systems Resource Centre Pvt. Ltd. (ISRC) was amalgamated with the Company with effect from September 21, 2015. The appointed date for the Scheme was October 17, 2014. Consequently, the entire business, assets, liabilities, duties and obligations of ISRC have been transferred to and vested in the Company with effect from October 17, 2014. ISRC was engaged in the business of software services with respect to application development, information technology support and maintenance service to OTIS Elevator Company, USA and other companies of UTC

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group and was acquired by the Company on October 16, 2014."

4.4 From the above observations, which were extracted from the financial statements, the company named ISRC amalgamated with the company (Larsen & Toubro) and profitability with this amalgamation will impact. Therefore, If an extraordinary event has taken place by way of amalgamation in a company, that company cannot be considered as a comparable as held by the co-ordinate bench of ITAT, Pune, in the case of Entercoms Solutions (P.) Ltd. v. Asstt. CIT [2022] 134 taxmann.com 59 (Pune - Trib.). Accordingly, we direct the AO/TPO to exclude this company as comparable from the list of comparables.

3.7 In view of above order of the Tribunal, we take a consistent view and we direct the AO/TPO to exclude L&T Infotech Ltd. from the list of comparables.

ii. Persistent Systems Ltd.:-

4. The Ld. A.R. submitted that the company Persistent Systems Ltd. fails related party transaction filter applied by the Ld. TPO - The appellant would like to submit that the RPT to turnover ratio of Persistent is 32.40 percent and thus, it fails the RPT filter of 25% applied by the learned TPO. The correct computation of related party filter is as below:

Particulars		Amount in INR Million
Revenue from operations	A	14,471.36
Related party transactions (Income and expenditure)	B	4,636.67
Related party transactions %	B/A*100	32.40%

4.1 The company is engaged in product development and hence it is functionally dissimilar. The Appellant submits that Persistent Systems is engaged in product development along with software development services. The Appellant would like to submit that

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Persistent is mainly involved in software product development and development of end-to-end solutions.

4.2 The company has been rejected in Appellant's own case for AY 2015-16 [ITA No.2498/Bang/2019 and since the company has the same functional profile in AY 2015-16 and AY 2016-17 (He referred Annual Report Compilation Pages: 1443, 1713) he requested to exclude this company from the list of comparable companies. The comparable has been rejected by the Tribunal in AY 2014-2015 as well in appellant's own case (EIT Services India Private Limited – ITAT Order ITA No.3399/Bang/2018).

4.3 Further, in the case of Sandisk India Device Design Centre Pvt Ltd [TS-464-ITAT-2022(Bang)-TP], AY 2016-2017 at Page 24 of the Order the Bangalore Tribunal has directed the Ld. TPO to exclude Persistent Systems Ltd from the final list of comparable under the IT Segment.

4.4 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

4.5 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of SWD/IT Segment.

4.6 The Ld. D.R. relied on the order of lower authorities.

4.7 We have heard the rival submissions and perused the materials available on record. In the case of ADP Pvt. Ltd. in the

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assessment year 2016-17, cited (supra) the coordinate bench of Hyderabad has considered this company as not comparable by observing as under:-

“6.2 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The co-ordinate bench in assessee's own case in ADP (P.) Ltd. (supra) directed the AO to exclude this company from the list of comparables for determining ALP by observing as under:

“27. As regards Persistent Systems Ltd, the objections of the assessee are as under:

(a) The Company is functionally not comparable. It is engaged in selling of the following:

i. Software products (IP);

ii. Platforms (Solutions & Integration); and iii. services (product engineering) b. There are no segmental details between software products and services.

28. In the case of Tata Elxsi, the assessee has taken the following objections:

(a) It is not functionally comparable to the assessee. In the financial statements of the company, the nature of business carried out by Tata Elxsi is given below:

(i) Corporate Information "Tata Elxsi Ltd was incorporated in 1989. The Company provides product design and engineering services to the consumer electronics, communications and transportation industries and systems integration and support services for enterprise customers. It also provides digital content creation for media and entertainment industry"

29. We find that in the case of Infor (India) (P.) Ltd. v. ACIT in ITA No. 2307/Hyd/2018, the Co-ordinate Bench of the Tribunal has considered similar objections of the assessee therein and has held that these two companies along with Thirdware Solutions Ltd is not comparable to the software development company like the assessee before us. The relevant portions has been reproduced by us in the above paras. Respectfully following the same, these two companies are also directed to be excluded from the final list of ITA No 2233 of 2018 ADP Private Ltd Hyderabad comparables. Thus, assessee's ground of appeal No. 2 is partly allowed.”

6.3 In the said decision, it has been held that the company is functionally different and engaged in diversified activities and since the revenue could not controvert the said decision nor brought any contrary decision, following the same, we direct the AO/TPO to exclude this company from the final list of comparables.”

4.8 In view of the above decision of the Tribunal, we are inclined to hold that Persistent Systems Ltd. cannot be considered as a comparable and to be excluded from the list of comparables.

iii. Infobeans Technologies Ltd.

5. The Ld. A.R. submitted that Infobeans is functionally dissimilar as it is engaged in providing custom developed services to offshore clients. The company is engaged in providing software engineering services primarily in Custom application development (CAD), Content Management Systems (CMS), Enterprise Mobility (EM), big data analytics (BDA).

5.1 It is submitted by Ld. A.R. that the Segmental information of the company is not available and the company is into diversified activities. Infobeans has been providing business IT services (comprising application development and maintenance, Big Data, UX & UI, Automation engineering services, including product engineering and lifecycle solutions, and business process management); in the Verticals of Storage & Virtualization, Media & Publishing, HR & Payroll and e commerce.

5.2 The company has been rejected in Appellant's own case for AY 2015-16 [ITA No.2498/Bang/2019 and since the company has the same functional profile in AY 2015-16 and AY 2016-17 (He referred Annual Report Compilation Pages: 448, 502). Ld. A.R. therefore requested to exclude this company from the list of comparable companies.

5.3 Further, Ld. A.R. submitted that in the case of Sandisk India Device Design Centre Pvt Ltd [TS-464-ITAT-2022(Bang)-TP], AY

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2016-2017 at Page 26 of the Order the Bangalore Tribunal has directed the Ld. TPO to exclude Infobeans Technologies Limited from the final list of comparable under the IT Segment. The relevant para from the ITAT Order is reproduced below for reference:

Quote

17.9 In respect of Nihilent Ltd., Infobeans Technologies Ltd. and Aspire Systems (India) Pvt. Ltd., Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT (supra) observed as under:

“Comparable Sought to be excluded by the assessee

Aspire System India Pvt. Ltd. (Aspire)

40. The assessee sought exclusion of Aspire from the final set of comparables for benchmarking SDS segment on the ground that it fails Related Party Transaction (RPT) filters as its RPT/ sales ratio is more than 25%. The assessee computed the significant related party transactions at 37.58% whereas the Ld. TPO computed it at 23.55%. The TPO is directed to recalculate the RPT/sales ratio by providing opportunity of being heard to the assessee. So this comparable is remitted back to the Ld. TPO to decide afresh.”

“Nihilent Analytics Ltd. (Nihilent)

44. The assessee sought exclusion of Nihilent on ground of its functional dissimilarity vis-à-vis assessee. We have examined the website information of Nihilent, made available by the assessee at page No.405 of the paper book, wherein it is mentioned that it is engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data science, cloud services etc.

45. Perusal of the disclosure of enterprise's reportable segment explanatory available at page No.A406 of the paper book shows that Nihilent is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing and financials of Nihilent available at page No.A304, A405-A406 of the paper book shows that Nihilent has only one business segment and in the absence of segmental financials, as it is into diversified business, this company cannot be a valid comparable vis-à-vis assessee, who is a low risk entity working on cost + markup model. Hence, Nihilent is ordered to be excluded as a comparable.

Nihilent Ltd.

46. The assessee sought exclusion of Nihilent Ltd. as a comparable on the ground that it is functionally dissimilar vis-à-vis assessee. This objection was also raised before the Ld. DRP but rejected. The assessee relied upon website of the company which is made available at page A412 of the paper book wherein Nihilent Ltd. is shown to be engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data signs, cloud services etc. The annual financials of this company available at page A412 & A413 of the paper book shows that it is rendering Enterprise transformation and change management, Digital transformation services and Enterprise IT services but segmental financials are not available as is apparent from its financials available at page A305, A412 & A413 of the paper book. When this company is into various segments but segmental financials are not available it cannot be a valid comparable vis-à-vis assessee which is a routine software development service provider working on cost + markup model, hence ordered to be excluded.”

“Infobeans Technologies Ltd. (Infobeans)”

49. The assessee sought exclusion of Infobeans on the ground that it is also functionally dissimilar being into providing business IT services (CAD) (application development and maintenance, Big Data, UX and UI, Automation engineering services, including product engineering and lifestyle solutions and business process management) in verticals of storage and virtualization, media and publishing, HR and Payroll and e-commerce. It is also providing software engineering services primarily in Custom Application Development (CAM), enterprise mobility and Big Data Analytics (BDA).

50. Perusal of financials available at page A303, A418 to A421, Infobeans shows that it is into diversified services but its segmental financials are not available without which it is difficult to compute the correct profit margin of the relevant segment. So Infobeans is also ordered to be excluded as a comparable being not a comparable to the assessee.”

17.10 Perusal of the annual report, filed before us in respect of the above two comparables, we note that the segmental financials are not available in respect of Nihilent and Infobeans and the RPT in respect of Aspire Systems India Pvt. Ltd. is more than 25% being the threshold limit considered by the Ld.TPO. Nothing has been placed before us by the Ld.DR in order to take a different view. Respectfully following the Hon’ble Mumbai Tribunal, we direct the Ld.TPO to exclude ***Nihilent, Infobeans and Aspire Systems*** from the final set.

Unquote

5.4 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal and the company has also been excluded in the case of Red Hat India Private Limited [TS-117-ITAT-2022(Mum)-TP] AY 2016-2017 by the Mumbai Tribunal.

5.5 In view of the above mentioned reasons, Ld. A.R. requested to to direct the AO/TPO to exclude this comparable from the final list of SWD/IT Segment.

5.6 Ld. D.R. relied on the order of Ld. DRP.

5.7 We have heard the rival submissions and perused the materials available on record. Infobeans Techonogies Ltd. was considered as comparable in the case of ADP Pvt. Ltd. by the coordinate bench of Hyderabad cited (supra) wherein it was held as under:-

“7.3 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The co-ordinate bench of this Tribunal in ADP (P.) Ltd. (supra), directed the AO/TPO to exclude this company from the list of comparables for determining ALP by observing as under:

“21. Having regard to the rival contentions and the material on record, we find that the Co-ordinate Bench of the Tribunal in the following case has considered similar objections of the assessee therein to direct exclusion of this company from the final list of comparables. For the purpose of ready reference, the relevant paragraph is reproduced below: ”

18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that

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in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee".

22. Respectfully following the same, we direct that Infobeans be excluded from the final list of comparables in this case also.

7.4 On perusal of the order of the co-ordinate bench of this Tribunal and on perusal of the financial statements of Infobeans Technologies Ltd., we observe that the company is functionally not comparable and no segmental details are available. Therefore, the co-ordinate bench did not consider this company as comparable in assessee's own case for AYs 2014-15 & 2015- 16. Respectfully following the decision of the co-ordinate bench, we direct the AO/TPO to exclude this company from the final list of comparables."

5.8 In view of the above decision of the Tribunal, we are inclined to hold that Infobeans Technologies Ltd. cannot be considered as a comparable and to be excluded from the list of comparables.

iv. Infosys Ltd.

6. Ld. A.R. submitted that the company Infosys Ltd. is engaged in diversified activities, which include IT activities, consulting activities during the current financial year. The Segmental information is not available and the segmental break-up of revenue attributable to software product segment and software services segment is not available. (He referred page 1961 of the paper book)

6.1 The company has been rejected in Appellant's own case for AY 2015-16 [ITA No.2498/Bang/2019 and since the company has the same functional profile in AY 2015-16 and AY 2016-17 (He referred Annual Report Compilation Pages: 1443, 1713) and requested to

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exclude this company from the list of comparable companies. The comparable has been rejected by the Tribunal in AY 2014-2015 as well in appellant's own case (EIT Services India Private Limited – ITAT Order ITA No.3399/Bang/2018).

6.2 Further, in the case of Sandisk India Device Design Centre Pvt Ltd [TS-464-ITAT-2022(Bang)-TP], AY 2016-2017 at Page 24 of the Order, the Bangalore Tribunal has directed the Ld. TPO to exclude Infosys Ltd from the final list of comparable under the IT Segment.

6.3 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

6.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of SWD/IT Segment.

6.5 Ld. D.R. relied on the order of Ld. DRP.

6.6 We have heard the rival submissions and perused the materials available on record. This comparable has been considered as not comparable in the case of ADP Pvt. Ltd. by the coordinate bench of Hyderabad cited (supra), wherein held as under:-

9.3 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The co-ordinate bench in assessee's own case in ADP (P.) Ltd. (supra), directed the AO/TPO to exclude this company from the list of comparables for determining ALP by observing as under:

'25. Having regard to the rival contentions and the material on record, we find that in a number of decisions including the assessee's own case, Infosys Ltd has been held to be not comparable with any other software development company such as the assessee

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due to its huge turnover and high profit margin and also as it is into software products and owns intangible intellectual property rights. In the case of Agnity India Technologies Ltd, 36 Taxmann.com 289 (Del), the Hon'ble Delhi High Court has held that Infosys Ltd is not comparable to other software development company. Relevant paragraphs are reproduced hereunder: "

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

26. Respectfully following the same, we direct the exclusion of this company from the final list of comparables.'

9.4 On perusal of the entire financial statements, we observe that the company is functionally not comparable and selling and marketing expenses are 5% of revenue and there were extraordinary events also noted i.e. transfer of product - financial & edge services as well as diversified activities like artificial intelligence, products services, platforms, consulting etc. Also onsite revenue was 52.7% and no segmental details like services, consulting products are available. In view of the above observations, the co-ordinate bench in assessee's own case for AY 2014-15 directed to exclude this company as comparable. Respectfully following the said decision, we direct the AO/TPO to exclude this company as comparable from the list of comparables.

6.7 In view of the above judgement of Tribunal, taking a consistent view, we direct the AO/TPO to exclude Infosys Ltd. from the list of comparables.

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7. In ground No. 4(b), the assessee wants inclusion of following comparables:-

- i. Isummation Technologies Ltd.
- ii. Batchmaster Software Pvt. Ltd.
- iii. DCIS Dot.com Solutions Pvt. Ltd.
- iv. Sagar Soft India Ltd.
- v. Ace Software Export Ltd.
- vi. Sasken Communication Technology Ltd.

(i) Isummation Technologies Ltd.

7.1 Ld. A.R. submitted that Isummation is primarily engaged in Software development services, which is evident from page 18 of the Annual Report and the company qualifies the quantitative filters applied by the learned TPO and hence Isummation ought to be considered as a comparable for the software development services rendered by the Appellant.

7.2 The TPO at Page 49 of the TP Order held that the data is not available in the public domain and therefore the Comparable was rejected to be included. However, the data is available in the public domain and therefore the comparable should be included in the final list of comparables (He referred page 2020 of the paper book).

7.3 Further, the comparable has been accepted by the Ld. DRP in AY 2017-18 in Appellant's own case.

7.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

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7.5 Ld. D.R. relied on the order of Ld. DRP

7.6. We have heard the rival submissions and perused the materials available on record. It has been submitted by Ld. A.R. that this comparable has been accepted by the Ld. DRP in assessment year 2017-18 in assessee's own case. As seen from the direction in para 2.11.7.1 of the order, wherein observed as under:-

“2.11.7.1 Having considered the submissions, and on perusal of the annual report, it is seen that the TPO has rejected the comparable for the reason that it fails export revenue filter. However, on examination of the financials of the company as per Note 13 forming part of financial statements the company has reported Rs.2,20,11,325/- of revenue from export sales as against total sales of Rs.220,84,825/- constituting 99.67% of the total revenue. Thus, the company satisfies the export turnover filter adopted by the TPO. In addition, the company as per the information in the annual report especially the segmental reporting the business activity of the company falls within the single primary business segment viz. Software development. As it is functionally similar and satisfies the export turnover filter, the TPO is directed to consider the company as comparable for the determination of ALP in the software development services.”

7.7 In view of the above, we do not find any reason to exclude this company viz. Isummation Technologies Ltd. from the list of comparables in the assessment year 2016-17. Directed accordingly.

ii. Batchmaster Software Pvt. Ltd.

8. The Ld. A.R. submitted that Batchmaster Software Pvt. Ltd. is primarily engaged in Software development services, which is evident from page 11 of the Annual Report and the company qualifies the quantitative filters applied by the learned TPO and hence Batchmaster ought to be considered as a comparable for the software development services rendered by the Appellant.

8.1 The Ld. TPO (at page 50 of TP Order) has alleged that the company is engaged in sale of products as is seen from the head of

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purchases shown in Note 17 on Cost of Materials Consumed. Also, the company has shown separate category of expenses for Selling and Distribution Expenses in Note 20 of the Profit & Loss Account. Hence, the company is rejected as a comparable. The Assessee submits that Batchmaster is engaged in software development services. The relevant extract from the annual report at page 11 of the Annual Report (He referred page 130 of the Annual Report compilation) makes it evident that the company is engaged in rendering software services. Below is the extract for ready reference:

II. Principal Business Activities of The Company:-			
All the business activities contributing 10% or more of the total turnover of the company shall be stated			
Sr. No.	Name & Description of main products/services	NIC Code of the Product /service	% to total turnover of the company
	Development of software	9202	100%

8.2 Further, the Ld. A.R. submitted that Batchmaster is primarily engaged in Software development services and not in sale of products. From Note 15 of the Annual Report of the company (He referred page 154 of the Annual Report compilation) it is evident that the company is primarily into sale of software development services and not sale of products.

8.3 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

8.4 Ld. D.R. relied on the order of the Ld. DRP

8.5 We have heard the rival submissions and perused the materials available on record. The main contention of the Ld. A.R. is that Batchmaster Software Pvt. Ltd. is engaged in software development services and not sale of products. However, the Ld. A.R.

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was not able to distinguish between software development services and sale of products. As rightly observed by the Ld. TPO, Batchmaster Software Pvt. Ltd. is engaged in sale of products and engaged in software development services. Being so, we do not find any infirmity in the finding of lower authorities with regard to exclusion of this company from the list of comparables.

iii. DCIS Dot.com Solutions Pvt. Ltd.

9. The Ld. AR submitted that this company clearly states on page 18 of the of the Annual Report that it is 100% engaged in Software Development Services.

9.1 The Ld. A.R. submitted that DCIS was erroneously rejected by the learned TPO in the TPO Order on account of functional dissimilarity by stating that company principal business activity is that of Information and Communication which constitutes 99.54% of the total turnover of the company. The learned TPO (at page 50 of the TP Order) also erroneously stated that the financial statements do not provide sufficient information on the business of the company.

9.2 DCIS is primarily engaged in the business of software development, which is similar to that of Assessee, which is evident from page 18 of the Annual Report (He referred page 232 of the Annual Report Compilation) and the income of the company is from the Sale of Services i.e. Software Development Services (He referred page 231 of the Annual Report Compilation).

9.3 Further, the Appellant has discussed the functional similarity and the application of quantitative filters as applied by the learned

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TPO and the company passes all the filters applied by the TPO (refer page 2012 of the paper book). Accordingly, DCIS ought to be accepted.

9.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

9.5 Ld. D.R. relied on the order of Ld. DRP.

9.6 We have heard the rival submissions and perused the materials available on record. According to Ld. A.R., M/s. DCIS Dot.com Solutions Pvt. Ltd. is also engaged in software development services and filed a copy of the financials of that company for the year ended 31.3.2016. In our opinion, this has to be examined by the AO/TPO and if it is engaged in software development as argued by the Ld. A.R., it has to be included as a comparable. Accordingly, the issue is remitted to the file of AO/TPO for fresh consideration.

iv. Sagar Soft India Ltd.

9.7 Ld. A.R. submitted that the learned TPO in in the TPO order (Page 49) has erroneously rejected Sagarsoft by stating that it fails service revenue filter. To this the Ld. A.R. stated that Sagarsoft has an IT service income to sales percentage of 100% and hence passes the aforesaid filter and must be accepted as a comparable company.

9.8 The Ld. A.R. further submitted that Sagarsoft is engaged in software development services. The relevant extract from the annual report is provided at page 2017 of the paper book which makes it evident that the company is engaged in rendering software services.

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The Appellant also submits that the company qualifies the quantitative filters applied by the learned TPO. (He referred page 2017 of the paper book)

9.9 Further, the comparable has been accepted by the Ld. DRP in AY 2017-18 in Appellant's own case. (He referred Page 63 of the Case Law Compilation).

9.10 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

9.11 Ld. D.R. relied on the order of Ld. DRP

9.12 We have heard the rival submissions and perused the materials available on record. It was the contention of Ld. A.R. that in the year 2017-18, the Ld. DPR itself included this comparable while determining the ALP in that assessment year. In our opinion, there is no reason to not include this company as a comparable in the A.Y. 2016-17. Accordingly, we direct the AO/TPO to include Sagar Soft (India) Ltd. in the assessment year 2016-17 also.

v. Ace Software Export Ltd.

10. The Ld. A.R. submitted that the learned TPO has erroneously rejected Ace Software in the TPO order at page 50 by stating that the company fails the persistent loss filter. To this the Appellant states that Ace Software has been profitable for the FYs 2015-16, 2014-15 and 2013-14 and hence passes the filter. The relevant extracts from the financial statements of Ace Software are given at page 2019 of the paper book. The company is functionally similar as it is engaged in SWD activity which is evident from page 7 of the Annual Report.

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10.1 Further, the comparable has been accepted by the Ld. DRP in AY 2017-18 in Appellant's own case. (He referred Page 66 of the Case Law Compilation)

10.2 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

10.3 Ld. D.R. relied on the order of Ld. DRP.

10.4 We have heard the rival submissions and perused the materials available on record. In this case, it was excluded by Ld. DRP in assessment year 2017-18. We do not find any reason to exclude in the assessment year 2016-17. Being so, we direct the AO/TPO to include this company in the list of comparables.

vi. Sasken Communication Technology Ltd.

11. The Ld. A.R. submitted that in the search matrix provided by the learned TPO, the company is rejected on the ground that segmental information is not available for the year. The Appellant submitted that the company does operates in two reportable segments namely; Software Services and Software Products. The learned TPO at page 15 of the TP Order has proposed to reject Sasken on the ground that the company was engaged in software products as well as software services activities. However, the Ld. A.R. submitted that the software products segment constitutes for less than 1.00% of the total revenue from operations (He referred page 81 of the Annual Report).

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11.1 The Ld. A.R. further submitted that Sasken is engaged in software development services along with other activities. From the annual report of FY 2015-16, it is evident that the company earns majority of its revenue from software services segment. Further, the Appellant submits that the segmental profit and loss account of the company is available in the standalone financials and the same can be considered for computing the mark-up for the software development segment. (He referred page 103 of the Annual Report).

11.2 The comparable has been accepted as comparable by the DRP in AY 2015-2016.

11.3 Further, Sasken Communication has been included in the judgement of Infor (India) Private Limited [TS-499-ITAT-2021(HYD)-TP] AY 2016-2017 (Page 11 of the Order). Below is the relevant extract from the ITAT Order:

5. The assessee's 4th substantive ground (having subgrounds (i) to (xiii) challenges correctness of learned lower authorities' action rejecting its comparables. Both the parties are ad idem during the course of hearing that this tribunal's co-ordinate bench's order(s) for AY.2014-15 and 2015-16 (supra) have already included M/s.Evoke Technologies Private Limited and M/s.Sasken Communication Technologies Limited; respectively. The assessee's ground Nos.4(i) and 4(iv) are accepted therefore.

11.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of SWD/IT Segment.

11.5 Ld. D.R. relied on the order of Ld. DRP.

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11.6 We have heard the rival submissions and perused the materials available on record. It was submitted that Sasken Communication Technology Ltd. has been included in the case of Info India Pvt. Ltd. in IT(TP)A No.198/Hyd/2021 dated 6.10.2021 wherein held as under:-

“5. The assessee’s 4th substantive ground (having sub grounds (i) to (xiii) challenges correctness of learned lower authorities’ action rejecting its comparables. Both the parties are ad idem during the course of hearing that this tribunal’s co-ordinate bench’s order(s) for AY.2014-15 and 2015-16 (supra) have already included M/s. Evoke Technologies Private Limited and M/s. Sasken Communication Technologies Limited; respectively. The assessee’s ground Nos.4(i) and 4(iv) are accepted therefore.”

11.7 In view of the above order of the coordinate bench of Hyderabad Tribunal, we direct the AO/TPO to include this company in the list of comparables.

12. With regard to ground No.4(f), in the case of Orion India System Pvt. Ltd., assessee wants correct computation margin since AO/TPO committed error. This issue is remitted to the AO/TPO to compute correct margin.

13. Further, the assessee wants exclusion of following comparables in IT enabled services.

- i. Infosys BPO Ltd.
- ii. SPI Technologies Pvt. Ltd.
- iii. Eclerx Services Ltd.

i. Infosys BPO Ltd.

13.1 The Ld. A.R. submitted that that Infosys BPO offers business process outsourcing solutions to its global clients by leveraging process, domain and people management expertise. The

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nomenclature in the profit and loss account indicates that the income is earned from 'Revenue from business process management services' which suggests that the company is engaged in consultancy and management services unlike the Appellant which is involved only in providing ITES as a captive service provider entity.

13.2 Further, Infosys BPO Limited has been excluded in the case of Swiss Re Global Business Solutions India (P.) Ltd. [2022] 137 taxmann.com 417 (Bangalore - Trib.) AY 2016-2017 (He referred Page 162-163 of the Case Law Compilation, Para 11 - 21). Below is the relevant extract from the order for ready reference:

11. The ld. AR submitted that Infosys BPM Ltd. should be rejected as a comparable because it is functionally not comparable, has diversified activities and lack of segmental data, different business model, brand profits, various revenue models, presence of intangibles, outsourcing costs, marketing expenses and turnover. It offers business outsourcing solutions to several clients and span across multiple industry segments. The company's catering to a variety of industries does not change the nature of functions carried out as it is committed to provide best in class services to both horizontal and vertical focus areas.

12. The DRP was of the view that just because the company is providing cloud based services over various mainframe computers, the company would not be functionally different as claimed by the assessee and rejected this plea of the assessee.

13. Regarding the plea of the assessee that this company is into high end ITES service provider, and hence not comparable, the DRP held that under TNMM, there is no requirement that the comparables should render the same or identical services. It would be sufficient, if the services fall under the broad industry segment ITES. In this regard the DRP relied on the Bangalore Tribunal decision in the case of GE India Technology Centre (P.) Ltd. v. Dy. DIT [2013] 30 taxmann.com 249/141 ITD 245 and other decisions wherein it was observed that TNMM requires only broad comparability.

14. The contention of the assessee that Infosys BPO has various Revenue Models and its revenues are generated principally on time and material basis, transaction basis and fixed price contracts and therefore, it should not be compared with the assessee, the DRP observed that as the

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assessed failed to demonstrate as to how the different methods of billing would affect the Functional comparability or impact the profitability. Unless the same is demonstrated with credible evidence, it remains a theoretical argument without any backing with facts and figures and hence rejected it.

15. The assessee pointed out that this company has reported an amount of Rs. 136 crore as 'cost of Technical sub-contractors' which constitutes about 4.45% of total revenue of the company during the year. The DRP observed that the annual report mentions that these sub-contractors are used for operational activities. This is a common practice in almost all the companies to give a small portion of the work to some other sub-contractors for a variety of reasons. This may allow the company to focus on its core activities. Sometimes it may be to meet the mismatch in certain skill-sets that are required in various projects. These expenses are incurred in the routine course of business. This cannot be held to be a criteria to affect the functional comparability of a company and more so in the facts of this case, wherein the sub-contracting expenses are about 4.45% only. This objection was accordingly rejected.

16. Regarding the lack of segment data to reject it as a comparable, the DRP was of the view that when it has been held that all the services being done by this company falls in the category of ITeS, then the absence of segmental information remains a theoretical argument.

16. The assessee has also argued that this company has significant intangibles and brand and hence not functionally comparable. The DRP noted that the expenditure incurred towards brand was just Rs. 19 crore which is meagre considering its operating revenue of Rs. 3050 crores. Further, the assessee could not point to any information from the annual report to indicate brand has contributed to the revenue growth or profitability. Therefore, the presence of brand, as such, has not affected comparability. Further, there is no information in the annual report to indicate that the company has undertaken any major R&D initiatives & own intangibles. Therefore, the presence of intangible in the form of goodwill, which is also insignificant, as the value is only Rs. 19 crore compared to the revenue from operations of Rs. 3050 crores do not have any impact on the profits of the company. Hence, these pleas were rejected by the DRP.

18. The assessee's contention that this comparable has incurred significant selling and marketing expense was also not accepted by the DRP, since from the perusal of the annual report, the DRP noted that the expenses on this count is only 4.56% of the total expenditure and which is not at all significant to affect the profitability of the comparable.

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19. Thus, in view of the discussions held above, all the grounds raised by the assessee were rejected and the action of the AO/TPO was upheld by the DRP.

20. We have heard both the parties and perused the material on record. This comparable has been considered as not comparable in SwissRe Global Business Solutions India (P.) Ltd. v. Dy. CIT [2020] 116 taxmann.com 716 (Bang. - Trib.) wherein it was observed as under :—

"We have perused submissions advanced by both sides in light of records placed before us. We note that this company is providing services in various areas of sourcing and procurement, customer services, finance and accounting legal process outsourcing, sales and fulfilment, analytics, business platforms, business transformation services, human resource outsourcing and technology solution optimisation. It is noted that this comparable also provides services in financial services and insurance, manufacturing, energy utilities communications and services and retail, consumer packaged foods, logistics and life services. Further in the annual report it has been mentioned that this comparable provides services that are different from routine back-office services. This noting itself makes this comparable not functionally similar with that of assessee.

Accordingly we direct this comparable to be excluded from finalist."

21. In view of the above order of the Tribunal, we are inclined to hold that this company should be excluded from the list of comparables.

13.3 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

13.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITeS Segment.

13.5 Ld. D.R. relied on the order of Ld. DRP.

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13.6 We have heard the rival submissions and perused the materials available on record. This company has been considered as in the case of ADP Pvt. Ltd. cited (supra) and held that this company cannot be included by observing as under:-

"16.1 Infosys BPO Ltd.: The ld. AR submitted that this company may be excluded from the final set of comparables for the reason that this company has incurred outsourcing costs for FY 2013-14, FY 2014-15 and FY 2015-16 and the outsourcing cost incurred by this company reflects a different operating model and hence cannot be compared with the assessee company. Further, he submitted that while this company operates under various revenue model as per the assignments i.e., proportional completion method on rendering services, whereas the assessee charges a mark-up on the cost incurred to provide the services. Further, he submitted that since the cost structure and revenue model of this company is different with that of the assessee, this company ought to be rejected as a comparable company. He relied on the decision of the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) wherein the co-ordinate bench excluded this company as comparable.

16.2 The ld. DR, on the other hand, submitted that presence of outsourcing cost/subcontracting cost does not affect functional comparability. Further, it reduces the operating margin of the company, which is beneficial to the assessee. He, therefore, submitted that the TPO/DRP has rightly included this company as comparable.

16.3 We have considered the rival submissions and perused the material on record as well as the orders of TPO/DRP. We find that the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) has excluded this company as comparable by observing as under:

'38. Having regard to the rival contentions and the material on record, we find we find that the Co-ordinate Bench of this Tribunal in the assessee's own case not only for the A.Ys 2009-10 for the A.Y 2010-11 has also considered this issue at Paras 6 to 9 in ITA No. 221/Hyd/2015 which reads as under:

"6. The TPO has selected many comparables and among them M/s. Infosys BPO Ltd., TCS E-serve Ltd., and Eclerx Services Ltd., were objected to on the reason of high turnover and functionally different. With reference to Infosys BPO, the objection was that the said company renders wide array of services and has high brand value and turnover is also very high. With reference to TCS E-serve Ltd., there was exceptional event as the company was taken over by Tata Consultancy Services in the year 2008-09 and heavy turnover is due to its takeover. Further, it was submitted that the company was functionally different as it has three different services and segmental information was not arrived. As far as E-clerx Services Ltd., it was submitted that this company caters to high

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end KPO services and cannot be compared to routine BPO services provided by assessee. The DRP vide para 3.10 has accepted the assessee's objections and accordingly, directed the TPO to exclude the above three companies. There are other directions of the DRP on TP adjustments on which neither party has raised grounds, except the Revenue on the above exclusion of three companies.

7. Referring to the order of the TPO, it was the contention of Ld.DR that DRP was not correct in excluding them on the basis of the turnover, whereas Ld. Counsel submitted that DRP has followed the decisions of the Co-ordinate Benches in excluding the above three comparables.

8. We have considered the rival submissions and perused the order of the DRP and Co-ordinate Benches. As far as M/s. TCS E-Serve Ltd., is concerned, the Co-ordinate Bench of ITAT in the case of M/s Hyundai Motors India Engineering P. ltd in ITA Nos. 1743/Hyd/2014 (AY.2010-11) & ITA No. 1917/Hyd/2014 (AY.2010-11) dt. 13-11-2015, has decided the issue as under:

ITA No 2233 of 2018 ADP Private Ltd Hyderabad "TCS e-SERVE LIMITED 11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs. 46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs. 1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2 We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y.2009-10 while considering the comparability of the assessee with Infosys BPO Ltd., has

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taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies (P.) Ltd., [2013] 219 Taxman 26 (Del.), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs. 15.79 crores as against the turnover of Rs. 1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS e-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs. 50 crores as against the turnover of TCS EServe Limited of Rs. 1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No. 6 is partly allowed.

8.1 Respectfully following the above decision of the Coordinate Bench, we confirm the order of DRP excluding the above company from the list of comparables.'

We observe from the financial statements of this company, that this company is functionally dissimilar and use robotics automation and diversified activities. Therefore, following the decision of the co-ordinate bench, we direct the AO/TPO to exclude this company as comparable for determining ALP.

13.7 In view of the above order of the coordinate bench of Hyderabad, we direct the AO/TPO to exclude this company viz. Infosys BPO Ltd. from the list of comparables from the final list of ITeS segment.

ii. SPI Technologies Pvt. Ltd.

14. The Ld. A.R. submitted that the company is into diversified business activities. The Company is engaged in data processing and related services, primarily in the typesetting business, including transformation of unedited manuscripts into final print-ready files, supply of structured data for electronic publishing and providing end-to-end project management services.

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14.1 SPI Technologies India Private Limited has been excluded in the case of Entercoms Solutions Private Limited [TS-548-ITAT-2021(PUN)-TP] Page 10 of the order – AY 2015-2016.

Below is the relevant extract from the order for ready reference:

“10. We, place reliance on the afore-stated judicial precedents where there is an emerging consistent view in this regard that if an extraordinary event has taken place by way of amalgamation that company cannot be considered as a comparable one and following the same parity of reasoning, we direct the Assessing Officer/TPO to exclude SPI Technologies India Pvt. Ltd. from the final set of comparables while computing international transactions in respect of the Assessee in ITes segment.”

14.2 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITes Segment.

14.3 Ld. D.R. relied on the order of Ld. DRP.

14.4 We have heard the rival submissions and perused the materials available on record. This company has been considered as not a comparable in the case of Entercoms Solutions Pvt. Ltd. in assessment year 2015-16 in ITA No.1826/Pune/2019 dated 25.10.2021 wherein held as under:-

8. We find the Hon'ble Jurisdictional High Court in the case of Pr. Commissioner of Income Tax Vs. PTC Software (I) (P) Ltd. (2019) 101 taxmann.com 117 (Bombay) has held that in case the assessee rendering ITES services to AE, a company in whose case extraordinary event of amalgamation took place during relevant year, could not be accepted as comparable and was decided in favour of the assessee. Similarly in the case of Pr. Commissioner of Income Tax Vs. J.P Morgan India (P) Ltd. (2019) 102 taxmann.com 335 (Bombay) , the Hon'ble Jurisdictional High Court on the same issue has held as follows:

“(iv) Mr. Percy Pardiwalla, learned senior counsel appearing on behalf of the respondent invited our attention to the final decision of this Court in Pr. CIT v. Aptara Technology (P.) Ltd. [2018] 92 taxmann.com 240 and Pr. CIT v. PTC Software (I) (P.) Ltd. [2019] 101 taxmann.com 117 (Bom.). In both the above decisions this Court

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has taken a view that merger/amalgamation is an extra ordinary event and would have an impact /effect on the financial results of the company. Thus, in both the aforesaid decisions, this Court upheld the view of the Tribunal that where merger/amalgamation have taken place and it is not a normal event then such a company would cease to be comparable. This of course is subject to the Revenue being able to show that amalgamation/merger did not have any effect of the profitability of the company. This has not been shown by the Revenue either to the Tribunal or before us. Therefore, this issue stands covered by the decision of this Court in Aptara Technology (P.) Ltd.'s case (supra) and PTC Software (I) (P.) Ltd.'s case (supra) in favour of the respondent. This more particularly in view of the absence of the Revenue even attempting to show that the merger and amalgamation that took place in the case of comparable M/s. Keynote Corporate Securities Limited was such that it would not have any impact on its profitability. It is true that in case of PTC Software (I) (P.) Ltd. case (supra) this question has been admitted, however, the admission was on the facts and circumstances of that case. In any case the issue now stands concluded by final orders of this Court in case of Aptara Technology (P.) Ltd. (supra) and PTC Software (I) (P.) Ltd.'s case (supra) and it is being followed.

(v) In view of the above, as the proposed question is covered by the decision of this Court, no substantial question of law arises. Thus, not entertained.”

9. That even the Pune Bench of the Tribunal in the case of Brintons Carpets Asia (P) Ltd. Vs. Deputy Commissioner of Income Tax, ITA No.1312 & 1349/PN/2015 dated 29th March, 2019 observed that the assessee before the Tribunal had first claimed that Accentia Technologies Ltd. cannot be selected in the final list of comparables as during the year under consideration, there was an extraordinary event of amalgamation. Thereafter, the Tribunal has analyzed how and what extraordinary event took place in that case and in such scenario, the company cannot be considered as comparable one and the relevant extracts in this regard are as follows:

“13.The learned Authorized Representative for the assessee has pointed out that though the CIT (A) says that there is no such amalgamation but his finding is totally incorrect. In this regard, reliance was placed on the ratio laid down by Pune Bench of Tribunal in Dover India (P.) Ltd. v. Dy. CIT [2017] 88 taxmann.com 115 (Pune - Trib.), wherein for assessment year 2010-11 itself, the said concern Accentia Technologies Ltd. was excluded being high end KPO service provider. Further, the Tribunal in BNY Mellon International Operations (India) (P.) Ltd. (supra) have noted the extraordinary event of acquisition and also amalgamation of another concern and held that the said concern could not be selected as comparable. The

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relevant findings of Tribunal are in paras 12 and 13, which read as under:—

'12. The next concern against which the assessee has raised objections is Accentia Technologies Ltd. on the ground of extraordinary events during the year under consideration. The said concern had acquired IQ group of companies in the United Kingdom and there was amalgamation of Asscent Infoserve Pvt. Ltd. with the said concern and because of these extraordinary events, the margins of said companies should not be included in the final set of comparables. The Pune Bench of Tribunal in Aptara Technologies Pvt. Ltd. v. ACIT (2016) 72 taxmann.com 352 (Pune - Trib) and Cummins Turbo Technologies Ltd. v. DCIT (2017) 79 taxmann.com 260 (Pune - Trib) has held that the said concern cannot be accepted as comparable. The Tribunal in Aptara Technologies Pvt. Ltd. v. ACIT (supra) held as under:—

"14. We find that the Tribunal in assessee's own case in assessment year 2008-09 in ITA No.2235/PN/2012, order dated 02.02.2015 had held that the said concern could not be considered as comparable because of certain extraordinary events. The said ratio was also applied in assessee's own case while benchmarking the international transaction of assessee with its associate enterprises in assessment year 2009-10 in ITA No.267/PN/2014, order dated 29.04.2015. The Tribunal vide order dated 02.02.2015 had held that the concern Accentia Technologies Ltd. could not be included in the final set of comparables holding as under:—

"13. Next, assessee had contended that Accentia Technologies Ltd. has been wrongly included by the TPO as a comparable concern. As per the assessee, the said concern was engaged in functionally different activities. It was pointed out that the said concern is engaged in providing medical transaction, billing and coding services, application development & customization (segmental data not available). Moreover, it was contended that the sales/turnover of the said concern was more than Rs. 50 crores for the year under consideration which did not meet with turnover filter applied by the assessee. On this point, it was pointed out that the assessee had selected sales/turnover filter of 1-50 crores i.e. any concerns having a turnover exceeding Rs. 50 crores were excluded. Thirdly, it was pointed out that the activities of the said concern were not comparable to the activities of the assessee.

14. The TPO has noted the aforesaid objections of the assessee in para 18.1 of his order and has rejected the same by merely noticing that 75% of the revenue/income of the said concern is from ITES and therefore it is to be considered as a comparable. Before us, the Ld. Representative for the assessee has reiterated the submissions put-

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forth before the TPO in order to justify exclusion of the said concern from the list of comparables. In particular, it has been pointed out that for the very same assessment year, the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. v. ITO, (2013) 38 taxmann.com 55 (Bang.) has excluded the said concern from the list of comparables in a similar situation following the decision of the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited v. DCIT, (2013) 32 taxmann.com 21 (Hyd.).

15. We have considered the submissions of the Ld. Representative for the assessee and also the stand of the Revenue as emerging from the order of the TPO. In our view, the ratio laid down by the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited (supra) and by the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) is squarely applicable to the present case also. The aforesaid Benches of the Tribunal found that during the year under consideration there were extraordinary events that took place in the said concern which warranted exclusion of this company as a comparable. We therefore hold that the said concern cannot be considered as a comparable."

15. Further, similar proposition has been laid down by different Benches of Tribunal while deciding the appeals relating to assessment year 2010-11 and it has been held that because of extraordinary events during the year, the concern Accentia Technologies Ltd. was not comparable to the entities engaged in ITES. Following the same parity of reasoning, we hold that Accentia Technologies Ltd. is to be excluded from the final set of comparables."

13. Following the same parity of reasoning as in Aptara Technologies Pvt. Ltd. v. ACIT (supra) and Cummins Turbo Technologies Ltd. v. DCIT (supra), we hold that Accentia Technologies Ltd. cannot be compared as comparable because of extraordinary events of acquisition and amalgamation during the year. Accordingly, we direct the Assessing Officer/TPO to exclude Accentia Technologies Ltd. from final list of comparables."

10. We, place reliance on the afore-stated judicial precedents where there is an emerging consistent view in this regard that if an extraordinary event has taken place by way of amalgamation that company cannot be considered as a comparable one and following the same parity of reasoning, we direct the Assessing Officer/TPO to exclude SPI Technologies India Pvt. Ltd. from the final set of comparables while computing international transactions in respect of the assessee in ITes segment."

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14.5 In view of the above order, we direct the AO/TPO to exclude SPI Technologies Pvt. Ltd. from the list of comparables selected for ITeS segment.

iv. Eclerx Services Ltd.

15. Ld. A.R. submitted that the company offers solutions in the nature of Knowledge Process Outsourcing (KPO) Services. The Appellant submits that the nature of the high end KPO services demanding presence of different skillsets performed by the Company cannot be compared to the low end ITES functions performed by the Appellant.

15.1 Further, Eclerx Services Limited has been excluded in the case of Swiss Re Global Business Solutions India (P.) Ltd. [2022] 137 taxmann.com 417 (Bangalore - Trib.) AY 2016-2017 (Refer Page 163 of the Case Law Compilation, Para 22-30). Below is the relevant extract from the order for ready reference:

22. Regarding exclusion of Eclerx Services Ltd., the assessee argued that this company is a KPO company and hence, it is not a good comparable. The DRP observed that there is a thin line of difference between BPO and KPO services. KPO is termed as an upward shift of the BPO industry in the value chain. Thus, BPO trying to upgrade itself as KPO is likely to render both BPO as well as KPO services in the process of evolution and therefore, such an entity cannot be considered strictly as either BPO or KPO. In view of the above, ITeS service's cannot be further classified as BPO and KPO services for the purpose of comparability analysis. Under the TNMM, functional similarity is more relevant than product similarity. The DRP noted that the functional profile of this company was similar to the assessee.

23. Regarding the amalgamation of wholly owned subsidiary Agilyst Consulting Pvt. Limited has taken place with effect from 1-4-2015, the DR observed that the assessee has not demonstrated any increase in profits due to this amalgamation. Therefore, this amalgamation has no impact on comparability. Accordingly, the plea was rejected.

24. With regard to acquisition resulting in inorganic growth, the DRP noted that the company has acquired entire shareholding of CLX Europe SPA, Italy, as on 22nd April 2015 and this acquisition was made by the company's overseas subsidiary e-Clerx Investments (UK) Ltd. Therefore, there is no merit of the objection, as the stand alone financials of this company are considered for comparability.

25. The assessee also raised the objection that there is increase in revenue, but according to the DRP, it has failed to bring on record any evidence to suggest that this abnormal inorganic growth has impacted the profit margin of the company. It is observed that the profit margin of this company has been consistently at the same level during the last few years. The ALP margin is determined with reference the average profit margin of a comparable for three years and also taking into account the defined median value of the PLIs of the comparable. These will even out such differences. The DRP was of the opinion that it will not be proper to reject a comparable only on account of inorganic growth of top line, which otherwise is functionally comparable.

26. The DRP further observed that it was consistently held that high profit margin as such cannot be reason for exclusion when it is otherwise functionally comparable. Accordingly, there is no need to reject a functionally comparable company on account of having super profits.

27. The Assessee submitted that Eclerx suffers business concentration risk unlike the Assessee, who operates as a risk-free entity. The DRP observed that as far as the limited risk in the case of captive service providers is concerned, if this argument is accepted then it cannot be compared to any company as most of the companies will be independent companies. Rather it should be compared to independent companies only as the price received for the services by them will be determined by market forces, which is not the case of the assessee. The assessee itself can be characterized as a contract service provider, which means that it operates on a cost plus model. Therefore, this argument was also rejected.

28. Thus, the DRP upheld the rejection of this company as a comparable.

29. We have heard both the parties on the issue. This company has also been considered as not comparable in assessee's own case for A.Y. 2014-15 in IT(TP)A No. 3181/Bang/2018 dated 21-5-2020 wherein it was observed as under :—

"It is noted that this company is involved in high-end KPO services whereas assessee is providing IT enabled services by rendering remote data processing in the field of reinsurance. In our opinion functions performed by this company is not similar to that of assessee even though assessee before us also carries out certain services on contract

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basis. Ld. AR has placed reliance upon decision of Hon'ble Delhi High Court in case of Rampgreen Solutions (P.) Ltd. v. CIT [2015] 60 taxmann.com 355/234 Taxman 573/377 ITR 533 Hon'ble Court had held that once a company falls into the category of high-end KPO, it cannot be functionally comparable with a BPO service provider like that of assessee.

Applying this reissue in the present case, we direct Ld.AO to eliminate this comparable from final list."

30. In view of the above order of the Tribunal, we are inclined to direct that Eclerx Services Ltd. be excluded from the list of comparables.

15.2 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

15.3 In view of the above-mentioned reasons, the Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITeS Segment.

15.4. Ld. D.R. relied on the order of Ld. DRP

15.5 We have heard the rival submissions and perused the materials available on record. This company is not considered as comparable in the case of ADP Pvt. Ltd. cited (supra) in assessment year 2016-17, wherein they excluded the comparable ground No.7 of that order vide para 17 to 17.4 wherein held as under:-

"17. Eclerx Services Ltd.: The ld. AR of the assessee submitted that this company may be excluded as comparable from the final set of comparables as this company is engaged in providing KPO services, different to low end BPO services provided by the assessee. He submitted that Safe Harbor Rules recognizes ITeS activities under tow distinct categories i.e., BPO and KPO and activities of this company falls under KPO services. He submitted that the services provided by this company of following:

- (a) Contract Risk Review,*
- (b) Margin Exposure Management,*
- (c) Online Operations and web analytics,*
- (d) CRM and business intelligence,*
- (e) Content creation,*
- (f) business process consulting.*

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17.1 He further submitted that as per NIC code provided in the annual report, this company has been classified as KPO and has been awarded as leading KPO's in India, basis award and accolades received. He submitted that this company has undertaken the following extraordinary transactions thereby impacting the operating margins:

- (a) Acquisition of CLX Europe
- (b) Amalgamation of Agilest consulting (P.) Ltd.

17.2 He relied on the decision of the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) wherein the co-ordinate bench excluded this company as comparable.

17.3 The ld. DR, on the other hand submitted that this company is engaged in rendering ITeS, therefore, functionally comparable to assessee. He submitted that amalgamation has no impact on the profits of the company. He, therefore, submitted that TPO/DRP has rightly included this company as comparable to assessee company.

17.4 We have considered the rival submissions and perused the material on record as well as the orders of TPO/DRP. We find that the co-ordinate bench in assessee's own case for AY 2014-15 cited supra has excluded this company as comparable by observing as under:

38. Having regard to the rival contentions and the material on record, we find we find that the Co-ordinate Bench of this Tribunal in the assessee's own case not only for the A.Ys 2009-10 for the A.Y 2010-11 has also considered this issue at Paras 6 to 9 in ITA No. 221/Hyd/2015 which reads as under:

"6. The TPO has selected many comparables and among them M/s. Infosys BPO Ltd., TCS e-serve Ltd., and Eclerx Services Ltd., were objected to on the reason of high turnover and functionally different. With reference to Infosys BPO, the objection was that the said company renders wide array of services and has high brand value and turnover is also very high. With reference to TCS E-serve Ltd., there was exceptional event as the company was taken over by Tata Consultancy Services in the year 2008-09 and heavy turnover is due to its takeover. Further, it was submitted that the company was functionally different as it has three different services and segmental information was not arrived. As far as E-clerx Services Ltd., it was submitted that this company caters to high end KPO services and cannot be compared to routine BPO services provided by assessee. The DRP vide para 3.10 has accepted the assessee's objections and accordingly, directed the TPO to exclude the above three companies. There are other directions of the DRP on TP adjustments on which neither party has raised

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grounds, except the Revenue on the above exclusion of three companies.

7. Referring to the order of the TPO, it was the contention of Ld.DR that DRP was not correct in excluding them on the basis of the turnover, whereas Ld. Counsel submitted that DRP has followed the decisions of the Co-ordinate Benches in excluding the above three comparables.

8. We have considered the rival submissions and perused the order of the DRP and Co-ordinate Benches. As far as M/s. TCS e-Serve Ltd., is concerned, the Co-ordinate Bench of ITAT in the case of M/s Hyundai Motors India Engineering P. ltd in ITA Nos. 1743/Hyd/2014 (AY.2010-11) & ITA No. 1917/Hyd/2014 (AY.2010-11) dt. 13-11-2015, has decided the issue as under:

ITA No 2233 of 2018 ADP Private Ltd Hyderabad "TCS eSERVE LIMITED 11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs. 46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs. 1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2 We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y.2009-10 while considering the comparability of the assessee

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with Infosys BPO Ltd., has taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies P. Ltd., (2013) 219 Taxman 26 (Del.), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs. 15.79 crores as against the turnover of Rs. 1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS E-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs. 50 crores as against the turnover of TCS e-Serve Limited of Rs. 1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No. 6 is partly allowed.

8.1 Respectfully following the above decision of the Co-ordinate Bench, we confirm the order of DRP excluding the above company from the list of comparables.

We observe from the financial statements that this company is functionally dissimilar and engaged in KPO and BPO services and amalgamation of Agilest Consulting Pvt. Ltd., vide page No. 23 of paper book volume -1 para 8 and acquisition of CLX Europe which impacts on the profits of the company. From the financial statements of the Chairman's message placed at page No. 18 of paper book volume - 1, it has been categorically stated that after acquisition of CLX Europe, the revenue has grown by 30%, which clearly shows that it impacts on the profitability of the company. These are extraordinary events. Therefore, If an extraordinary event has taken place by way of amalgamation in a company, that company cannot be considered as a comparable as held by the co-ordinate bench of ITAT, Pune, in the case of Entercoms Solutions (P.) Ltd. (supra). Accordingly, we direct the AO/TPO to exclude this company as comparable from the list of comparables."

15.6 In view of the above order of the Tribunal, we direct the AO/TPO to exclude this company viz. Eclerx Services Ltd. from the list of comparables.

Informed Technologies Ltd.

16. Assessee wants inclusion of Informed Technologies India Ltd. Ld. A.R. submitted that the Ld. TPO has alleged that the business of the company is not purely in ITES service and that the company is engaged in the diversified business (page 16 of TP order). However, upon perusal of the Annual report of Informed, it is seen that the Company is into business process outsourcing services, content development and data management techniques and caters to the securities and financial research industry. These services would classify under the nature of ITeS and therefore it is submitted that Informed is engaged in providing ITeS and is comparable to the Assessee. (He referred page 2062 of the paper book). Also, the comparable qualifies all the quantitative filters applied by the learned TPO.

16.1 Further, Informed Technology has been included in the case of Ocwen Financial Solutions (P.) Ltd. [2019] 108 taxmann.com 306 (Bangalore - Trib.) AY 2014-2015 (He referred Page 178-179 of the Case Law Compilation, Para 10). The company has the same functional profile in AY 2014-15 and AY 2016-17. The Ld. A.R. therefore requested to include this company.

16.2 The relevant extract from the Tribunal's order is reproduced below for ready reference:

"10. Informed Technologies Ltd., ('Informed')

10.1 This company 'Informed' was selected by the assessee as a comparable company in its TP study. The TPO in his order rejected this company stating that since 'Informed' is being primarily engaged in the business of Business Process Outsourcing, it fails the service income filter. On the objections filed by the assessee, the DRP concurred with the finding of the TPO by observing that the Annual Report shows that the sale of services is Rs. 2,58,53,362/- as against the total revenue of

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Rs. 3,81,86,665/- which comes to only 67.7% and therefore fails the service income filter applied by the TPO.

10.2 Before us, the learned AR for the assessee contended that this company 'Informed' is functionally comparable to the assessee as it is an ITES provider and qualifies the service income filter of 75% applied by the TPO. It was submitted that the entire service income of 'Informed' at Rs. 2,58,53,362/- is from rendering of ITES only and the TPO/DRP have wrongly considered "other income" of Rs. 1,22,85,303/- as "Service Income". In support of this contention, the learned AR drew the attention of the Bench to the relevant portion of the Annual Report of 'Informed' (placed at pages 391 to 443 of Paper Book). In this regard, reliance was placed on the decision of the Co-ordinate Bench of this Tribunal in the case of CGI Information Systems & Management Consultants (supra) wherein this company 'Informed' was held to be comparable to companies rendering ITES. It was prayed that, in the light of the above, this company 'Informed Technologies Ltd.,' be included in the final set of comparables in the case on hand.

10.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

10.4.1 We have considered the rival submissions and carefully perused the material on record. On a perusal of the Annual Report of this company 'Informed', it is seen that at page 12 thereof it is stated that this company is engaged in and operating as an ITES provider. A perusal of the TPO's order also indicates that the TPO has not disputed that this company is functionally comparable to the assessee in the case on hand; which is rendering back office ITES. From a perusal of the profit and loss account at page 30 of the Annual Report of 'Informed' it is seen that the total revenue is shown as Rs. 3,81,38,665/- and 'other income' of Rs. 1,22,85,303/-. As can be seen from Schedule 19 on page 40 of the Annual Report, the 'other income' comprises of non-operating income, interest, dividend, sale of current investments and miscellaneous income and evidently these incomes cannot be considered as operating income. The percentage of 67.7% worked out by the TPO is after considering these "other income" as service income; which is factually incorrect. It is evident from a perusal of the profit and loss account of 'Informed' that the service income is Rs. 2,58,53,362/- which is entirely the revenue from operations and therefore in our considered view, the service income filter of 75% of service income to be from ITES as applied by the TPO, is satisfied in this case. In view of this factual finding rendered in the matter, we hold that this company 'Informed Technologies Ltd.,' satisfies the service income filter and is therefore to be included in the final set of comparables. We hold and direct the AO/TPO accordingly.

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16.3 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of ITeS Segment.

16.4. Ld. D.R. relied on the order of Ld. DRP.

16.5 We have heard the rival submissions and perused the materials available on record. The contention of Ld. A.R. is that this has been considered in the case of Ocwen Financial Solutions Pvt. Ltd. (2019) 108 Taxmann.com 36 (Bang- Trib.) for the AY 2014-15, wherein it was held as under:-

“10. Informed Technologies Ltd., ('Informed')

10.1 This company 'Informed' was selected by the assessee as a comparable company in its TP study. The TPO in his order rejected this company stating that since 'Informed' is being primarily engaged in the business of Business Process Outsourcing, it fails the service income filter. On the objections filed by the assessee, the DRP concurred with the finding of the TPO by observing that the Annual Report shows that the sale of services is Rs. 2,58,53,362/- as against the total revenue of Rs. 3,81,86,665/- which comes to only 67.7% and therefore fails the service income filter applied by the TPO.

10.2 Before us, the learned AR for the assessee contended that this company 'Informed' is functionally comparable to the assessee as it is an ITES provider and qualifies the service income filter of 75% applied by the TPO. It was submitted that the entire service income of 'Informed' at Rs. 2,58,53,362/- is from rendering of ITES only and the TPO/DRP have wrongly considered "other income" of Rs. 1,22,85,303/- as "Service Income". In support of this contention, the learned AR drew the attention of the Bench to the relevant portion of the Annual Report of 'Informed' (placed at pages 391 to 443 of Paper Book). In this regard, reliance was placed on the decision of the Co-ordinate Bench of this Tribunal in the case of CGI Information Systems & Management Consultants (supra) wherein this company 'Informed' was held to be comparable to companies rendering ITES. It was prayed that, in the light of the above, this company 'Informed Technologies Ltd.,' be included in the final set of comparables in the case on hand.

10.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

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10.4.1 We have considered the rival submissions and carefully perused the material on record. On a perusal of the Annual Report of this company 'Informed', it is seen that at page 12 thereof it is stated that this company is engaged in and operating as an ITES provider. A perusal of the TPO's order also indicates that the TPO has not disputed that this company is functionally comparable to the assessee in the case on hand; which is rendering back office ITES. From a perusal of the profit and loss account at page 30 of the Annual Report of 'Informed' it is seen that the total revenue is shown as Rs. 3,81,38,665/-and 'other income' of Rs. 1,22,85,303/-. As can be seen from Schedule 19 on page 40 of the Annual Report, the 'other income' comprises of non-operating income, interest, dividend, sale of current investments and miscellaneous income and evidently these incomes cannot be considered as operating income. The percentage of 67.7% worked out by the TPO is after considering these "other income" as service income; which is factually incorrect. It is evident from a perusal of the profit and loss account of 'Informed' that the service income is Rs. 2,58,53,362/- which is entirely the revenue from operations and therefore in our considered view, the service income filter of 75% of service income to be from ITES as applied by the TPO, is satisfied in this case. In view of this factual finding rendered in the matter, we hold that this company 'Informed Technologies Ltd.,' satisfies the service income filter and is therefore to be included in the final set of comparables. We hold and direct the AO/TPO accordingly.

16.6 In view of this, we remit this issue to the file of AO/TPO to examine this issue in the light of above findings of the Tribunal cited (supra) to decide afresh, after giving an opportunity of hearing to assessee.

Crystal Voxx Ltd.:-

17. Assessee wants for inclusion of Cystal Voxx Ltd. in the list of comparables.

17.1 In this regard, Ld. A.R. submitted that the learned TPO has rejected Crystal Voxx by stating that data is not available in the public database. The Ld. A.R. highlighted that the annual reports are available in the public database. The Appellant submits that Crystal Voxx is engaged in the business of providing medical billing, coding,

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transcription, software and other enabled services. These said services would fall under the category of ITeS and therefore, the Appellant submits that Crystal Voxx is comparable to the functional profile of the Appellant.

17.2 Further, the Appellant submits that Crystal Voxx is functionally comparable and qualifies all the quantitative filters applied by the learned TPO and the Appellant.

17.3 The comparable has been accepted by the Ld. DRP in AY 2017-18 in Appellant's own case (He referred Page 72 of the Case Law Compilation).

17.4 Further, Crystal Voxx has been included in the case of Ocwen Financial Solutions (P.) Ltd. [2019] 108 taxmann.com 306 (Bangalore - Trib.) AY 2014-2015 (He referred Page 178-179 of the Case Law Compilation, Para 11). The relevant extract is reproduced below for ready reference:

“11. Crystal Voxx Ltd., ('Crystal')

11.1 This company, 'Crystal' was proposed by the assessee before TPO as an additional comparable to be included in the final set of comparables. The TPO, however, rejected the assessee's proposal on the ground that this company had not reported any earnings from export of services and therefore it is not possible to determine as to whether 'Crystal' has exports/foreign earnings more than 75% of total sales/turnover. The DRP concurred with the finding of the TPO; observing that while it is stated that "income from foreign currency" is Rs. 3,23,08,386/-, it is not clear whether this relates to export of services as this information is not available and therefore this company 'Crystal' is rejected.

11.2 Before us, it was contended that this company 'Crystal' is functionally comparable to the assessee in the case on hand as it is operating as a BPO Company which is a ITeS provider. According to the learned AR, it is very evident from a perusal of the Annual Report of this company 'Crystal' that the income in foreign currency amounting to Rs. 3,23,08,386/- is out of export of services. In support of this contention, the learned AR took us through the relevant pages of the

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Annual Report of this company, 'Crystal', which is placed at pages 474 to 497 of the paper book.

11.3 *Per contra, the learned DR for Revenue supported the orders of the authorities below in not including this company, Crystal Voxx Ltd., in the final set of comparables.*

11.4 *We have considered the rival contentions/submissions and perused the material on record. We have carefully perused the Annual Report of this company, 'Crystal'. At Note 3 of the Notes forming part of the accounts, at page 491 of the paper book, it is stated that the operations of the company predominantly relate to a single segment, namely "BPO Activity". At note 6, the income in foreign currency is shown as Rs. 3,23,08,386/-. In the Director's Report, at page 480 of the paper book, the foreign exchange earnings is given as Rs. 3,23,08,386/-. In the factual matrix of the matter, as laid out above, we are of the considered opinion that the reason ascribed by the TPO and DRP for exclusion of this company, 'Crystal' is factually incorrect. Taking into consideration that the company 'Crystal' is otherwise comparable to the assessee in the case on hand as it is operating as a BPO company which is a provider of ITES, we direct that this company, Crystal Voxx Ltd., be included as a comparable company in the final set of comparables in the case on hand. The AO/TPO are accordingly directed."*

17.5 In view of the above-mentioned reasons, we humbly request the Hon'ble Tribunal to direct the TPO to include this comparable to the final list of ITeS Segment.

17.6 Ld. D.R. relied on the order of Ld. DRP.

17.7 We have heard the rival submissions and perused the materials available on record. This company has been considered as not comparable in the case of Ocwen Pvt. Ltd. vide para 11 of that order, which is extracted as follows:-

"11. *Crystal Voxx Ltd., ('Crystal')*

11.1 *This company, 'Crystal' was proposed by the assessee before TPO as an additional comparable to be included in the final set of comparables. The TPO, however, rejected the assessee's proposal on the ground that this company had not reported any earnings from export of services and therefore it is not possible to determine as to whether*

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'Crystal' has exports/foreign earnings more than 75% of total sales/turnover. The DRP concurred with the finding of the TPO; observing that while it is stated that "income from foreign currency" is Rs. 3,23,08,386/-, it is not clear whether this relates to export of services as this information is not available and therefore this company 'Crystal' is rejected.

11.2 *Before us, it was contended that this company 'Crystal' is functionally comparable to the assessee in the case on hand as it is operating as a BPO Company which is a ITES provider. According to the learned AR, it is very evident from a perusal of the Annual Report of this company 'Crystal' that the income in foreign currency amounting to Rs. 3,23,08,386/- is out of export of services. In support of this contention, the learned AR took us through the relevant pages of the Annual Report of this company, 'Crystal', which is placed at pages 474 to 497 of the paper book.*

11.3 *Per contra, the learned DR for Revenue supported the orders of the authorities below in not including this company, Crystal Voxx Ltd., in the final set of comparables.*

11.4 *We have considered the rival contentions/submissions and perused the material on record. We have carefully perused the Annual Report of this company, 'Crystal'. At Note 3 of the Notes forming part of the accounts, at page 491 of the paper book, it is stated that the operations of the company predominantly relate to a single segment, namely "BPO Activity". At note 6, the income in foreign currency is shown as Rs. 3,23,08,386/-. In the Director's Report, at page 480 of the paper book, the foreign exchange earnings is given as Rs. 3,23,08,386/-. In the factual matrix of the matter, as laid out above, we are of the considered opinion that the reason ascribed by the TPO and DRP for exclusion of this company, 'Crystal' is factually incorrect. Taking into consideration that the company 'Crystal' is otherwise comparable to the assessee in the case on hand as it is operating as a BPO company which is a provider of ITES, we direct that this company, Crystal Voxx Ltd., be included as a comparable company in the final set of comparables in the case on hand. The AO/TPO are accordingly directed."*

17.8 Accordingly, in view of the above order, we remit this issue to the file of AO/TPO to examine it in the light of above findings of the Tribunal.

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18. No other comparable has been pressed before us in ITeS segment. Hence, other comparables not considered.

19. Next ground is with regard to non-grant of working capital adjustment. We remit this issue for the file of AO/TPO to grant working capital adjustment on actual basis.

20. With regard to ground No.10 regarding disallowance of ESOP expenses u/s 37 of the Act the Ld. A.R. submitted that the employees of the Appellant are eligible to participate/get the shares of the Hewlett Packard Enterprise Company ('Ultimate Holding Company') based on their eligibility, performance, and certain other parameters.

20.1 The shares granted to the employees of the Appellant are considered as a part of 'perquisite' taxable in the hands of employees under section 17(2) of the Act. Accordingly, the Appellant deducts the appropriate tax at source ('TDS') under section 192 of the Act.

20.2 The cost of shares granted by the Ultimate Holding Company to the eligible employees of the Appellant are cross charged to the Appellant by the Ultimate Holding Company. The actual amount cross charged by Ultimate Holding Company is claimed as a deduction by the Appellant while computing the taxable income.

20.3 During the course of assessment proceedings, the Learned AO in respect of Employee Stock Option Plan ("ESOP") cross-charges incurred by the Appellant, based on the disclosures made in the financial statements, specifically asked the following questions-

"A. Expenses incurred on remittance made to non-residents and whether section 195 of the Act, has been complied with?"

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B. In respect of ESOP cross-charges incurred by the assessee company, furnish a detailed note on modus operandi of ESOP calculation and vesting period option exercised by the employees and whether section 195 is applicable”

20.4 In response, the Appellant had furnished its response vide submission dated 9 December 2019, explaining the reasons why TDS provisions under section 195 were not applicable on the subject cross-charges, which are on cost-to-cost basis.

20.5 However, in the draft assessment order the Learned AO proceeded to adjust the ESOP expenses of INR 28,72,00,000 under section 37 of the Act (*without providing the Company any opportunity to explain allowability of expenditure*), while the Learned AO also noted his observation on non-deduction of TDS under Section 195 of Act in the Draft Assessment order.

a) AO ruling – Draft Assessment Order:

20.6 The Learned AO contented the following:

The Appellant, at the time of reimbursing the ESOP expenses to Ultimate Holding Company has not deducted TDS on the cross-charge expenses which is violative of the provisions of Section 195(1) of the Act. Consequently, the Learned AO stated that the provisions of section 40(a)(i) get triggered on the facts.

20.7 The Learned AO has relied on the decision of the Supreme Court in the case of GVK Industries vs Income Tax Officer [2015] 54 taxmann.com 347 (SC) and on the ruling of Authority for Advance Rulings (“AAR”) in the case of Danfoss Industries P Ltd (2004) 268 ITR 1.

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20.8 The Learned AO also stated that the ESOP expenditure booked by the Appellant and reimbursed to the holding company is a fictitious expenditure and is notional in nature. Also, that it is merely a strategy/ colourable device adopted for avoidance of income tax *prima facie* with a view to shift profits outside the country. Further, the Learned AO has mentioned that the ESOP expense does not satisfy the conditions of allowance as specified by section 37 of the Act and has disallowed such expenditure.

b) DRP Direction

20.9 In the directions issued, DRP panel said that they are in agreement with the following reasons provided by the Learned AO:

- the perquisite has been charged to the employee on mere amortisation of the expenses though option had not been exercised by the employees as on the date of charge of perquisite. Under such circumstances, the company cannot claim the expenditure as an allowable deduction prior to the date of exercise of option by the employee.
- Expenditure towards ESOP recharge is a fictitious cost, being discount offered on self-generated asset.
- Expenses booked by the company and reimbursed to the holding company is a colourable device for shifting of profit from India.

20.10 Further, Ld. DRP also said that even if ESOP expenses is considered as capital receipt the short collection of securities

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premium cannot be considered as expenditure and it will also be considered as capital in nature.

20.11 Ld. DRP relied on the decision of Hon'ble Supreme Court in the case of Eimco KCP Ltd. Vs CIT 242 ITR 659 and said that similar to the case referred the Company has also allotted shares in order to garner and secure the services their knowledge and know how continuously for enduring benefits of the organization and in line with the supreme court judgement, DRP said that the shares issued against assets/technical know-how cannot be claimed as revenue expenditure.

20.12 Ld. DRP relied on the following case laws while issuing the directions to the Learned AO:

- Eimco KCP Ltd. Vs CIT 242 ITR 659 (SC);
- Indian Mollasses Co. Pvt Ltd vs CIT 37 ITR 66;
- CIT vs Nainital Bank Ltd 62 ITR 638

20.13 After considering the above points, DRP agreed with the conclusion drawn by the Learned AO and rejected the objections raised by the Appellant against the proposed adjustment.

c) Appellant's Arguments:

20.14 In connection with the above adjustment made by the Learned AO, the Company places its reliance on the decision of the jurisdictional Honourable Karnataka High Court in the case of **CIT, LTU Vs Biocon Limited** (121 taxmann.com 351) (Karnataka HC), which, has *inter alia* held that ESOP expenses are deductible under section 37 of the Act.

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20.15 ESOP cross-charges represents the actual expenditure incurred by the Company in respect of its employees, who form part of the Company's business and are involved in carrying on day-to-day business operations/management. The Company also submitted the documents such as cross charge invoices, employee listing and Form 16 issued to the employees. Hence, the expense is a genuine expense and the question of these expenses being a colourable device does not arise. The Learned AO has also not alleged that the expenses are not genuine expenses. The said expenses are incurred wholly and exclusively for the business of the Company and therefore, eligible for deduction under section 37 of the Act.

20.17 The ESOP expense is nothing, but compensation paid to employees of the Company and accordingly, taxed in the hands of employees as 'Perquisites' (Company submitted the sample Form 16's of employees).

20.18 Provision of section 37(1) of the Act inter alia provides that "any expenditure laid out or expended wholly and exclusively for the purposes of the business or profession, not being in the nature of capital expenditure or personal expenses, shall be eligible for deduction in computation of total income".

20.19 The ESOP schemes for stock options enables in attracting and retaining the employees of the Company, resulting in better performance of the Company's business operations. The scheme is designed primarily to incentivise and for retaining the employees and thereby, earn more revenue by securing consistent and concentrated efforts of dedicated employees.

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20.20 Further, the share-based compensation under the ESOP scheme is construed both by the employees and the Company as a part of employment remuneration package, which is an expenditure inextricably linked to the business of the Company. Therefore, the same is deductible in nature.

20.21 Ld. A.R. submitted that the incurrence of expenditure towards ESOP for employees is a clear and explicit expenditure incurred for the employees and directly affects the performance of employees, which in-turn is critical for the Company's business and its long-term growth. Accordingly, Ld. A.R. submitted that the expenditure incurred is deductible under section 37(1) of the Act.

Applicability of TDS provisions on the remittance towards ESOP expenses

20.22 At the outset, the Company has deducted appropriate TDS under section 192 of the Act in respect of share-based compensation under ESOP schemes, which have been taxed in the hands of employees as 'perquisites' under section 17 of the Act. Accordingly, the ESOP cross charges are subject to TDS provisions under section 192 of the Act and the same is in accordance with the Circular No. 17/2014 issued by the Central Board of Direct Taxes for computation of taxable income of employees.

20.23 With regard to applicability of provisions of section 195 of the Act, Ld. A.R. submitted as follows:

- The cross charges from the Ultimate Holding Company represent the cost of these shares as incurred by the Ultimate Holding Company in respect of shares granted to employees of

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EITS and exercised by them. Accordingly, the subject cross charges and the remittances against the same does not contain any element of income, which is taxable in the hands of the Ultimate Holding Company as the same is cross-charged on cost-to-cost basis.

- Provisions of section 195 of the Act inter alia provides for deduction of TDS only in respect of any sum of which is chargeable to tax under the Act. In the absence of any income element in the subject remittance, there is no sum chargeable to tax to Ultimate Holding Company and hence the provisions of Section 195 of the Act would not apply.
- The above principle has been upheld by various Courts including the Hon'ble Supreme Court in the case of GE India Technology Cen.(P.). Ltd vs CIT [2010] 327 ITR 456 (SC). While the AO has considered the decision of GE India Technology Cen. (P.). Ltd in the FAO but without examining the facts of the case, has proceeded to conclude that ESOP cross charge is in the nature of income and are taxable under the Act.

20.24 Given the above facts and the judicial precedents, the Company submits that ESOP expense is a deductible expenditure under section 37 of the Act and provisions for section 195 of the Act is not applicable.

20.25 Case laws relied on by the Company provided by Ld. A.R. are as follows:

- CIT, LTU vs Biocon Limited (430 ITR 151) (Karnataka HC);

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- Nova Nordisk India Private Limited (ITA No. 1275/Bang/2011);
- GE Technology Cen. (P) Ltd. Vs CIT [2010] 327 ITR 456 (SC);
- CIT vs PVP Ventures Ltd. [2012] 23 taxmann.com 286/211 Taxman 554 (Mad.);
- Lemon Tree Hotels Ltd. IT Appeal No. 107/2015 dated 18-8-2015;
- Principal Commissioner of Income Tax vs Nova Technocast (P.) Ltd [2018] 94 taxmann.com 322 (Gujarat HC);
- Commissioner of Income-tax vs Prism Cement Unit [2015] 61 taxmann.com 273 (Madhya Pradesh HC);
- Commissioner of Income-tax –IV vs Himalya International Ltd. [2014] 51 taxmann.com 213 (Delhi HC);
- Indo Overseas Films vs Income Tax Officer, International Taxation [2017] 81 taxmann.com 378 (Chennai - Trib.);

20.26 Ld. D.R. relied on the order of Ld. DRP

20.27 We have heard the rival submissions and perused the materials available on record. This issue came up for consideration before the Hon'ble Karnataka High Court in the case of CIT Vs. Biocon Ltd. cited (supra) wherein it was held as under:-

“From a perusal of section 37(1) of the Income-tax Act, 1961 it is evident that the provision permits deduction of expenditure laid out or expended and does not contain a requirement that there has to be a payout. If an expenditure has been incurred, section 37(1) of the Act would be attracted. Section 37 does not envisage incurrence of expenditure in cash.

An assessee is entitled to claim deduction under the provision if the expenditure has been incurred. It is well settled in law that if a business liability has arisen in the accounting year, it is permissible as deduction, even though, the liability may have to be quantified and discharged at a future date.

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Section 2(15A) of the Companies Act, 1956, defines "employees stock option" to mean option given to whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future date to securities offered by the company at a pre-determined price. In an employees stock option plan a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at a discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vests with the employees.

The expression "expenditure" also includes a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which they are issued and the market value of the shares would be expenditure incurred for the purposes of section 37(1). The primary object of the exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, it cannot be construed as short receipt of capital.

Held, dismissing the appeal, that the deduction of the discount on the employees stock option plan over the vesting period was in accordance with the accounting in the books of account, which had been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. For assessment year 2009-10 onwards the Assessing Officer had permitted the deduction of the employees stock option plan expenses. The Revenue could not be permitted to take a different stand with regard to the assessment year 2004-05. The expenses were deductible."

21. In view of the above judgement of Hon'ble Karnataka High Court in the case of Biocon Ltd., we are in agreement with the contention of assessee's counsel in principle on this issue. However, we make it clear that the AO has to verify whether the said amount has been subject to TDS in the assessment year under consideration u/s 192/195 of the Act as argued by the Ld. A.R. before us.

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Accordingly, this issue is remitted to AO for fresh consideration in the light of above.

22. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 22nd Aug, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 22nd Aug, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.