

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

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.348/Bang/2015
(Assessment year: 2010-11)

Asst. Commissioner of Income-tax,
Circle 2(1)(1),
Bangalore.

... Appellant

Vs.

M/s.Broadcom India Research Pvt. Ltd.
(Now merged with Broadcom Communication
Technologies Pvt. Ltd.)
Campus 3A, 4th floor, RMZ Ecospace,
Bellandur Village, Varthur, Hobli,
Bangalore-560037.
PA No.AACCB6307L

... Respondent

Appellant by : Shri P.Chandrashekar, CIT(DR)
Respondent by : Shri Sharath Rao, CA.

Date of hearing : 02/06/2016
Date of pronouncement : 13/07/2016

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the revenue directed against the order of the assessment order passed u/s 143(3) r.w.s. 144C of the Income-tax Act,1961 [‘the Act’ for short] for the assessment year 2010-11.

2. The revenue raised the following grounds of appeal:
 1. *"The directions of the Dispute Resolution Panel are opposed to law and facts of the case.*
 2. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in directing the AG to exclude the expenditure incurred in foreign currency both from the export turnover as well as from total turnover for the purpose of computation of deduction u/s 10A, without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section 10A and the total turnover has not been defined in this Section.*
 3. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.*
 4. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel can make adjustment on the basis of advance received from AEs in absence of debtors and inventory in the case of assessee for calculating the cost of working capital built in the profit margin.*
 5. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel were justified in directing the TPO to adjust the profit margin of the assessee for the entire amount of advances received from AE on the ground that there is time value of money.*
 6. *On the facts and in the circumstances of the case, the Hon'ble Dispute Resolution Panel erred by not upholding the approach of the TPO in its order.*
 7. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel is*

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correct in excluding M/s ICRA Techno Alalytics Ltd, M/s Persistent Systems & Solutions Ltd, M/s Sasken Communication Technologies Ltd and M/s Persitent Systems Ltd while the comparables are qualifying all the qualitative and quantitative filters applied by the TPO.

8. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel is correct in excluding INFOSY Ltd and KALS Information Systems Ltd on the basis of decision in a different case for a different FY while the comparable is qualifying all the qualitative and quantitative filters applied by the TPO.*
9. *On the facts and in the circumstances of the case, whether the application of a new filter (Onsite Filter) is within the purview of Hon'ble Dispute Resolution Panel.*
10. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel is correct in applying the Onsite filter in Software Development segment in the case of M/s R S Software India Ltd.*
11. *On the facts and in the circumstances of the case, whether the Hon'ble Dispute Resolution Panel is correct in giving a direction which amounts to set aside an issue.*
12. *For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.*
13. *The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above."*

3. Briefly, facts of the case are that the respondent-assessee is a company duly incorporated under the provisions of the Companies Act, 1956. The assessee-company is a wholly owned subsidiary of M/s.Broadcom Netherlands BV. The assessee-

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company is engaged in providing chip design, software development and system design constituting research and development activities and exporting the results of such R&D activities in the form of customized electronic data, computer hardware and computer software to its associated enterprises i.e. Broadcom International Ltd. Cayman Island.

4. Return of income for the assessment year 2010-11 was filed on 29/09/2010 declaring a total income of Rs.83,87,525/- after claiming deduction u/s 10A to the extent of Rs.11,61,21,985/-. The assessee-company also reported the following international transactions with its Associated Enterprises (AE):

<i>Descriptions</i>	<i>Paid</i>	<i>Received</i>
Purchases	326,743	-
Provision for research and development services	-	863,139,674
Interest on CEB	822,249	-
Repayment of loan	25,475,000	-
Reimbursement of expenses	549,949	-
Remittance of ESPP contributions	33,323,341	-

The assessee-company sought to justify the consideration received for the international transaction entered with its AE to be at arm's length price [ALP]. The assessee-company had also submitted transfer pricing study report adopting TNMM as the most appropriate method and operating margin by the operating cost as the profit level indicator for the transferring pricing study. The assessee-company applied TNMM which was considered to be

the most appropriate method for purposes of bench marking the international transactions. The assessee-company's profit margin was computed at 12.01% in respect of software development services. The assessee-company claimed that the same was comparable with other comparables. For the purpose of transfer pricing study, the assessee-company had chosen 15 companies as comparable entities in respect of software development services and arithmetic average of operating profit margins of said comparables was computed at 15%. According to the assessee-company, its PLI was within the range of +/- 5% range of the arithmetic mean of the comparable entities. Hence, it was claimed that the transactions with its AE are at arm's length.

5. The Assessing Officer (AO) referred the matter to the Transfer Pricing Officer (TPO). The TPO, by order dated 28/01/2014 passed u/s 92CA of the IT Act, 1961 computed the transfer pricing adjustment at Rs.6,78,86,443/- in respect of software development services. The TPO accepted TNMM adopted by the assessee-company as well as cost + margin as a profit level indicator but rejected the transfer pricing study report. The TPO proceeded to identify a different set of comparable entities for the purpose of determining the ALP. While doing so, the Id. TPO had applied the following filters in software development services:

- Use of current year data only;
- Turnover filter i.e. excluding companies having income from *software development services less than INR 1 crore*.
- foreign exchange earnings less than 75% of total revenue in respect of software development services.
- Companies who have more than 25% related party transactions of the sales were excluded.
- Companies who have export sales less than 75% of the sales were excluded.
- Companies with employee cost less than 25% of turnover were excluded.
- Companies who have persistent losses for the last three years up-to and including FY 2009-10 were excluded.
- Companies having different financial year ending (i.e. not March 31, 2010) or data of the company does not fall within 12 month period i.e. 01/04/2009 to 31/3/2010 were rejected.
- Companies that are functionally different from the taxpayer were excluded.
- Companies that are having peculiar economic circumstances were excluded.

Applying the above filters, the TPO had rejected 11 out of 15 comparables selected by the respondent-assessee-company; accepted/rejected matrix of the comparables selected by assessee-company as under:

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Sl No	Comparables Selected by the Taxpayer	Remarks
1	Accel Transmatic Ltd.	Rejected: disqualifies RPT filter
2	Akshay Software Technologies Ltd	Rejected: No RPT details reported
3	Aztecksoft Ltd	Rejected: No data available for the FY 2009-10 in public domain
4	Bells softech Ltd	Rejected: Sakes<1cr.
5	CG-VaK software & Exports Ltd	Rejected: Fails compensation to employees filter
6	Goldstonet Technologies Ltd	Rejected: Fails compensation to employees filter
7	LGS Global Ltd	Rejected: No data available for the FY 2009-10 in public domain
8	Maars Software International Ltd.	Rejected :Different accounting year ending
9	Mascon global Ltd	Rejected: Fails compensation to employees filter
10	Mindtree Ltd	Accepted: It qualifies all the filtes applied by the TPO
11	R S Software (India) Ltd	Accepted: It qualifies all the filtes applied by the TPO
12	Saskent Communication Technologies Ltd	Accepted: It qualifies all the filtes applied by the TPO
13	Sonata Software Ltd.	Rejected: fails RPT filter
14	Tata elxsi Ltd	Accepted: It qualifies all the filtes applied by the TPO
15	Techprocess Solutions Ltd	Rejected: Fails Foreign earnings filter

Thus, the TPO rejected 11 of 15 comparables selected by the assessee-company and proceeded to identify a new set of comparables applying the above filters. The TPO finally introduced 7 comparables and finally selected the following 11 comparable companies:

Sl.No	Name	Sales	Cost	PLI
1	I C R A Techno Analytics Ltd.(seg)	11,89,81,000	9,52,33,000	24.94%
2	Infosys Ltd	2,11,40,00,00,000	1,45,81,00,00,000	44.98%
3	Kals Information Systems Ltd.(seg)	2,16,92,935	1,61,39,288	34.41%
4	Larsen & Toubro Infotech Ltd.	17,76,76,48,294	14,88,92,91,379	19.33%
5	Mindtree Ltd.(seg)	6,98,02,80,117	6,07,89,59,413	14.83%
6	Persistent Systems & Solutions Ltd.	6,67,28,828	5,78,33,452	15.38%
7	Persistent Systems Ltd.	5,04,41,30,000	3,86,97,20,000	30.35%
8	R S Software (India) Ltd.	1,61,83,71,419	1,46,73,31,694	10.29%
9	Sasken Communication Technologies	4,01,50,89,000	3,42,12,53,000	17.36%
10	Tata Elxsi(seg)	3,36,94,00,000	2,78,62,43,000	20.93%
11	Thinksoft Global Services Ltd.	74,55,94,965	63,70,04,595	17.05%
	AVERAGE MARGIN			22.71%

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6. The TPO computed average profit margin of the comparables in respect of software development services at 22.71% and after giving working capital adjustment of 1.98%, adjusted arithmetical mean of PLI was determined at 20.73%. On the above basis, the TPO computed the transfer pricing adjustment in respect of software development services:

Arm's Length Mean Margin on cost		22.71%
Less: Working Capital Adjustment (Annex.C)		1.98%
Adjusted margin		20.73%
Operating Cost		778,111,191
Arms Length Price (ALP)	120.73% of Operating cost	939,413,641
Price Received		863,235,687
Shortfall		76,177,954
Less: Sou moto TP Adjustment		8,291,511
Shortfall being adjustment u/s 92CA:		67,886,443

The AO, after receipt of the TPO order passed the draft assessment order 07/03/2014 after incorporating the TP adjustment of Rs.6,78,86,443/- and disallowing excess claim of Rs.34,12,149/- u/s 10A on account of reducing telecommunication expenditure from export turnover.

7. The AO passed draft assessment order u/s 143(3) r.w.s.144C of the Act dated 7th March 2014 proposing the above addition of Rs.6,78,86,443/- u/s 92CA and disallowing excess claim of Rs.34,12,149/- u/s 10A of the Act.

8. Being aggrieved, objections were filed before the Hon'ble DRP. It was contended *inter alia* before DRP that the TPO was

not justified in reducing telecommunication expenditure from export turnover and also in respect of TP adjustment. It was contended that the TPO was not justified in rejecting the TP study undertaken by the assessee-company and also not using the multiple years' data for selecting or rejecting companies as comparables. The assessee-company also contended that the TPO ought not to have applied the filter of 25% of relatable party transaction. All these contentions were overruled by the DRP. However, the DRP accepted the contention of the assessee that company *ICRA Techno Analytics Ltd.*, is not comparable as no segmental information of software development, software consultancy, engineering services, web development, web hosting, etc. were available. As regards Infosys Technologies Ltd., the DRP held that the same is not comparable as it is having high brand value and high intangible etc. To come to this conclusion, the DRP relied on the decision of the co-ordinate bench in the case of:

- Agnity india Technologies Vs. ITO - ITA No.3856/Del/2010
- Telcordia Technologies Pvt. Ltd. vs. ACIT - ITA No.7821/Mum/2011
- Logica Pvt. Ltd. vs. ACIT - IT(TP)A No.1129/Bang/2011/TS-131-ITAT-2013-BANG-TP
- Sonata Software Ltd. ITA No.3514/Mum/2010-ITAT-Mumbai.
- Meritor LVS India P Ltd. ITA No.405 & 523/B/11 - ITAT Bengalure
- Bearing Point Business Consulting Pvt. Ltd. ITA No.1124/Bang/2011-ITAT-Bengalure.

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8.1 As regards comparable company KALS Information Systems Ltd., the DRP held that this company is not comparable with that of assessee-company on account of functional differences. As regards Persistent Systems Ltd. DRP held that it outsources the work and is also engaged in development of products, the company was not comparable with that of the software development services company.

9.2 Regarding Sasken Communication Technologies Ltd., the DRP held that though the assessee-company did not object before the TPO for inclusion of this company, since no segmental information is available in respect of three segments of the company, the same cannot be included in the list of comparables.

8.3 As regards inclusion of Larsen & Turbo Infotech Ltd., the DRP upheld the inclusion of this company in the list of comparables overruling the objection of the assessee-company that it is functionally dissimilar.

8.4 The DRP also upheld the rejection of the comparables Akshay Software Technologies Ltd, Bells Softech Ltd., Goldstone Technologies Ltd., Maars Software International Ltd., Mascon Global Ltd., and Sonata Software Ltd., selected by the assessee-company.

8.5 In respect of risk adjustment and working capital adjustment, the DRP upheld the action of the TPO granting

working capital adjustment of 1.98%, however, directed the TPO to re-compute margins of the comparables finally retained after giving effect to working capital adjustment.

9. The AO had passed the final assessment order u/s 143(3) r.w.s.144C(13) of the Act, dated 27/01/2015 giving effect to the directions of the Hon'ble DRP and thereby accepted the returned income. Being aggrieved, revenue is in appeal before us in the present appeal.

10. The revenue had raised 13 grounds of appeal. Grounds No.1, 11, 12 and 13 are general in nature and do not require specific adjudication.

11. Grounds No.2 and 3 challenge the direction of the DRP to exclude telecommunication expenses from the total turnover as well as export turnover. This issue is squarely covered in favour of the assessee-company by the jurisdictional High Court in the case of *ACIT vs. Tata Elxsi* (349 ITR 98) wherein it is held as follows:

"From the aforesaid judgments, what emerges is that there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Sec. 10A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relating to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of s. 80HHC, the export profit is to be derived from the total

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business income of the assessee, whereas in s. 10A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component, or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. 'The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in s. 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a 'component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the total turnover means then, when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore, the formula for computation of the deduction under s. 10A, would be as under :

$$\frac{\text{Profits of the business of the undertaking} \times \text{Export turnover}}{(\text{Export turnover} + \text{domestic turnover}) \text{ total turnover}}$$

11. In that view of the matter, we do not see any error committed by the Tribunal in following the judgments rendered in the context of s. 80HHC in interpreting s. 10A when the principle underlying both these provisions is one and the same.

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Therefore, we do not see any merit in these appeals. The substantial question of law framed is answered in favour of the assessee and against the Revenue."

The directions of the Hon'ble DRP are in consonance with the law laid down by the Hon'ble Jurisdictional High Court in the above case. Therefore, we do not see any reason to interfere with the direction of the Hon'ble DRP. Hence, we dismiss the grounds of appeal Nos.2 & 3 raised by the revenue.

12. Ground No.4, 5 & 6 relates to the grant of working capital adjustment. From the perusal of the order of the DRP, it is clear that the DRP only directed to re-work the margins of the comparable finally selected after the adjustment of working capital adjustment. The DRP had not rendered any finding as to the quantum of eligible working capital adjustment. Hence, the grounds of appeal raised by the revenue and do not survive and hence, dismissed as such.

13. Ground Nos.7, 8, 9 & 10 challenge the direction of the DRP to exclude the companies viz. IRCA Techno Analytics Ltd., Persistent Systems & Solutions Ltd., Sasken Communications Technologies Ltd., and Persistent Systems Ltd., Infosys Ltd., KALS information Systems Ltd., and R S Software Ltd, which are dealt with as follows:

13.1 IRCA Techno Analytics Ltd.: The DRP deleted this company from the list of comparable on the ground that no

segmental information were available. The relevant finding of the
DRP is as under:

"3.3.1. Having heard the contention, on perusal of the annual report, it is noticed by us that the segmental information is available for two segments i.e. Services and sales. However, it is evident from the annual report that the engineering services, web development, web hosting, etc. for which no segmental information is available and therefore, the objection of the assessee is found acceptable. Accordingly, Assessing Officer is directed to exclude the above company from the comparables."

The co-ordinate bench in the case of *DCIT vs. M/s.Electronics for Imaging India Pvt. Ltd.*, [IT(TP)A No.212/Bang/2015 dated 24/2/2016] to which one of us viz., the Judicial Member was a party, also considered this company and held that it is functionally dissimilar and not comparable with that of the software development company. The relevant para is as follows:

"15. We find that the facts recorded by the DRP in respect of business activity of this company are not in dispute. Therefore, when this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, then the same cannot be regarded as functionally comparable with that of the assessee who is rendering software development services to its AE.

16. In view of the above acts, we do not find any error or illegality in the findings of the DRP that this company is functionally not comparable with that of a pure software development service provider."

Similar finding was recorded by the co-ordinate bench in the case of *Ikanos Communication India Pvt. Ltd.* in IT(TP)A No.137/2015

dated 10/11/2015. Respectfully following the decisions of the coordinate bench, we hold that this company cannot be included in the list of comparable and uphold the order of the DRP in deleting this company.

13.2 Persistent Systems & Solutions Ltd.,

The DRP deleted this company from the list of comparable on the ground that no segmental information was available. The relevant finding of the DRP is as under:

"3.3.4 Having heard the assessee, we examined the annual report from which it is noticed that the entire receipt of Z504 crores are shown from 'Sale of software services & Product'. There is no segmental information available for sale of software services & product. It is also noticed from Note-1 of Schedule-15 that the company is predominantly engaged in outsourced software product development services. The company offers complete product life cycle services.: It is also noticed from the Note H to Schedule 15 in regard to revenue recognition that the company in addition to software services also earns income from licensing of products, Royalty on sale of products, income from maintenance contract etc., In the annual report, the difference between the OPD (Outsource Product Development) has been highlighted according to which, in IT services, projects starts with well defined requirements, and vendors use time and money as variables to arrive at a reasonable cost estimate for the project. After completion, the project goes into maintenance mode. In product development, requirements are less clearly defined, state most product developers are given ship-dates for the products that are typically determined by the external factors. Once the ship-dates are defined, the budget for the products is frozen. In product development projects, all requirements can never be completely fulfilled in particular version. As a result, most product companies plan multiple product versions for their product. The function of outsource software development product is different from IT services. In

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view of the above observations from the annual report, we are of the opinion that the functions performed by the above company are not similar to the function performed by the assessee company. Therefore, the objection of the assessee in regard to exclusion of the above company from comparable is found acceptable. Accordingly, the Assessing Officer is directed to exclude the above company from the comparables.”

The revenue had not brought any evidence on record rebutting the above factual findings of the Hon'ble DRP. Now, the law is quite settled to the extent that a software development service company cannot be compared with software product company. In the absence of segmental details between two segments, this company cannot be included in the list of comparables. Accordingly, we hold that this company cannot be held to be comparable with that of a software development company.

13.3 Sasken Communications Technologies Ltd.,

The DRP deleted this company from the list of comparable on the ground that no segmental information was available. The relevant finding of the DRP is as under:

3.3.5 Having heard the objection, on perusal of the annual report, we find that no segmental information is available in respect of three segments. Hence, the TPO was not justified in retaining the above company as comparable. The company also need to be excluded other functional difference mentioned by the assessee, The Assessing Officer, is therefore directed to exclude the above company from comparable.

The revenue had not brought any evidence on record rebutting the above factual findings of the Hon'ble DRP. Therefore, we have no option but to confirm the findings of the Hon'ble DRP.

13.4 Persistent Systems Ltd. and R S Software Ltd:

The DRP deleted these companies from the list of comparables on the ground that no segmental information was available. The relevant finding of the DRP is as under:

"Considering the fact that the objections were raised by the assessee in respect of all higher margin comparables, it was found appropriate by us to examine other companies selected by the TPO as comparable in regard to their comparability. From the perusal of annual reports :-

(i) It is noticed from the perusal of the Page 45 of annual reports in the case of R.S Software (India) Limited, the expenses on foreign branches are incurred to the extent of T 12.42 crores (82%) of total expenses of 15 1crores debited in P&L account, which makes it clear that it is pre1ominantly onsite software development company and therefore, canhot be retained as comparable. The Assessing Officer is accordingly directed to exclude the above company from comparables.

(ii)In the case of Persistent Systems & Solutions Ltd, on perusal of the anhual report, it is noticed by us that the receipt of Z 6.67 crores has been shown from 'sale of software services and products'. However, no segmental information is available in regard to software services and product separately. Therefore, we are of the view that in absence of segmental information, the above company cannot be retained as comparable. The Assessing Officer is accordingly directed to exclude the above company from comparables. "

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The co-ordinate bench in the case of *DCIT vs. M/s.Electronics for Imaging India Pvt. Ltd.*, [IT(TP)A No.212/Bang/2015 dated 24/2/2016] to which one of us viz., the Judicial Member was a party, also considered this company and held as follows:

"26. Therefore, when this company is engaged in diversified activities and earning revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, etc., the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company cannot be compared with the assessee and the same is directed to be excluded from the set of comparables."

The revenue had not brought any evidence on record rebutting the above factual findings of the Hon'ble DRP. Therefore, we have no option but to confirm the findings of the Hon'ble DRP.

13.5 Infosys Ltd.,

The DRP held that Infosys Ltd., is not comparable as it is having high brand value and high intangible etc. To come to this conclusion, the DRP relied on the decision of the co-ordinate bench in the case of:

- Agnity India Technologies Vs. ITO - ITA No.3856/Del/2010;
- Telcordia Technologies Pvt. Ltd. vs. ACIT - ITA No.7821/Mum/201;
- Logica Pvt. Ltd. vs. ACIT - IT(TP)A No.1129/Bang/2011/TS-131-ITAT-2013-BANG-TP;
- Sonata Software Ltd. ITA No.3514/Mum/2010-ITAT-Mumbai;

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- Meritor LVS India P Ltd. ITA No.405 & 523/B/11 – ITAT Bengalure;
- Bearing Point Business Consulting Pvt. Ltd. - ITA No.1124/Bang/2011-ITAT-Bengalure.

The co-ordinate bench in the case of *DCIT vs. M/s.Electronics for Imaging India Pvt. Ltd.*, [IT(TP)A No.212/Bang/2015 dated 24/2/2016] to which one of us viz., the Judicial Member was a party, also considered this company and held as follows:

*"19. We have heard the Id.DR as well as Id. AR and considered the relevant material on record. We note that in the case of Agnity India Pvt. Ltd Ltd. (supra), the Delhi Bench of the Tribunal has considered the comparability of this company and the findings of the Delhi Bench of the Tribunal has been confirmed by the Hon'ble Delhi High Court. The Hon'ble Delhi High Court has observed that this company having brand value as well as intangible assets cannot be compared with an ordinary entity provide captive service. We further note that this company provides end to end business solutions that leverage cutting edge technology thereby enabling clients to enhance business performance. This company also provides solutions that span the entire software lifecycle encompassing technical consulting, design, development, re-engineering, maintenance, systems integration, package evaluation and implementation, testing and infrastructure management service. **In** addition, the company offers software product for banking industry. Thus, this company is engaged in diversified services including design as well as technical consultancy, consulting. re-engineering, maintenance, systems integration as well as products for banking industry.*

***20. In** view of the above facts that Infosys Ltd. having a huge brand value and intangibles as well as having bargaining power, the same cannot be compared with the assessee who is providing services to its AE. "*

The direction of the Hon'ble DRP is in consonance with the decision of the co-ordinate bench cited supra. No information

was brought on record by the revenue rebutting the above findings of the co-ordinate benches. Hence, we uphold the action of the Hon'ble DRP.

13.6 KALS information Systems Ltd.

The DRP deleted this company from the list of comparables on the ground that segmental information is not reliable. The relevant finding of the Hon'ble DRP is as follows:

"3.3.3 Having heard the objections, we have perused the judicial pronouncement on which the reliance has been placed by the assessee including the decision of the Hon'ble ITAT, Bangalore in the case of Trilogy E Business Software India Pvt. Ltd. vs. DCIT (ITA No.1201/Bang/2010) wherein the above company has been excluded on functional differences. Further, it is noticed by us that other income of Rs.21.03 lakhs which mainly include the interest, dividend and other income has been included in the segmental profit of software segment of Rs.55.53 lakhs and therefore the segmental information is not reliable. Therefore, in our view, the company cannot be retained as comparable, the objection is accordingly accepted and Assessing Officer is directed to exclude the company from the comparables. "

The co-ordinate bench in the case of *DCIT vs. M/s.Electronics for Imaging India Pvt. Ltd.*, [IT(TP)A No.212/Bang/2015 dated 24/2/2016] to which one of us viz., the Judicial Member was a party, also considered this company and held as follows:

"23. We have heard the Id.DR as well as Id.AR and considered the relevant material on record. The Id.DR has not disputed the fact that comparability of this company has been examined by this Tribunal in a series of decisions including in the case of Trilogy e-business Software India Ltd.(supra). We further note that in the balance sheet of this company as on

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31.3.2010 there are inventories of Rs.60,47,977/-. Therefore, when this company is in the business of software products, the same cannot be compared with a pure software development services provider. Accordingly, we do not find any error or illegality in the impugned findings of the DRP."

Therefore, this company cannot be compared both on the functionality as well as on the non-availability of segmental information. Accordingly, we uphold the action of the Hon'ble DRP in deleting this company from the list of comparable. Grounds of appeal Nos.7, 8, 9 & 10 are dismissed.

14. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 13th July, 2016

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bangalore
D a t e d : 13/07/2016

srinivasulu, sps

Copy to :

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore