# आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
# IN THE INCOME TAX APPELLATE TRIBUNAL
# PUNE BENCH "B", PUNE

**सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष**

**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

## आयकर अपील सं. / ITA No.1921/PUN/2014

**निर्धारण वर्ष / Assessment Year : 2010-11**

Approva Systems Pvt. Ltd.,
C-501, Pune IT Park,
34 Aundh Road,
Pune – 411020 .... अपीलार्थी/Appellant

PAN: AADCA4150F

Vs.

The Dy. Commissioner of Income Tax,
Circle 1(1), Pune .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Sunil M. Lala
प्रत्यर्थी की ओर से / Respondent by : Shri P.L. Kureel

| सुनवाई की तारीख / **Date of Hearing : 28.12.2016** | | घोषणा की तारीख / **Date of Pronouncement: 25.01.2017** |
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## आदेश / ORDER

**PER SUSHMA CHOWLA, JM:**

This appeal filed by the assessee is against the order of CIT(A)-IT/TP, Pune, dated 19.08.2014 relating to assessment year 2010-11 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case and in law, the learned ("ld") CIT(A) has erred in upholding certain disallowances made by the ld. Assessing Officer ("AO").*

2. ***Disallowance of deduction under section 10B of the Act***

*The ld. CIT(A) has erred in concluding that the Appellant is not eligible to claim deduction under section 10B of the Act of INR 1,60,90,049 since it's approval from the Software Technology Park of India ('STPI') is not ratified by the Board of Approval constituted under section 14 of the Industrial Development Regulation Act.*

3. ***Rejection of alternate claim of deduction under section 10A of the Act***

***WITHOUT PREJEDICE*** *to the claim of deduction under section 10B of the Act, the ld. CIT(A) has erred in denying the alternate claim of deduction under section 10A of the Act on the ground that the Appellant does not meet the fundamental condition of having been located in 'free trade zone' and claim of deduction cannot be switched from one section to another.*

4. ***Making an incorrect addition by re-computation of arm's length price***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in making an adjustment of Rs.2,12,11,149 to the income returned by the appellant by re-computing the arm's length price of the international transactions.*

5. ***Unjust rejection of TP study filters and unjust introduction of additional filters for selecting final set of comparables***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO in in applying additional filters for selecting companies as comparables, without providing cogent reasons and by ignoring the Appellant's submission for not applying the additional filters.*

*The ld. CIT(A) has erred in upholding the action of the ld. AO to reject companies having export sales less than 75% of the total sales.*

*The ld. CIT (A) has erred in confirming the action of the ld. AO in rejecting Appellant's filters for selecting companies as comparables, without providing cogent reasons.*

*The ld. CIT (A) has erred in upholding the action of the ld. AO to reject the Appellant's criteria, of applying a filter, to select companies/segments with RPT / sales less than or equal to 15% and unjustly adopting the criteria without sound/logical reasons to accept companies with RPT/Total transactions less than or equal to 25%.*

*The ld. CIT (A) has erred in upholding the action of the ld. AO to reject the Appellant's criteria, of applying an upper turnover filter, to reject companies/segments with turnover greater than Rs.200 crore. The ld. CIT(A) itself in the Appellant's case for the previous assessment year i.e. assessment year 2009-10.*

6. ***Application of Safe harbor rules***

*On the facts and in the circumstances of the case and in law, the ld. CIT (A) has erred in directing the ld. AO to follow the provisions of the Safe Harbour Rules for calculating the correct margin of Thinksoft Global Services Limited.*

7. ***Unjust selection of new comparables***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO in introducing additional companies as comparables although, companies introduced differ in functions undertaken and/or assets employed and/or risks assumed as compared to the Appellant.*

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO by including KALS Information System Ltd ("KALS") as comparable company in the final set of comparable companies, inspite of KALS being rejected by ld. CIT(A) in Appellant's own case in AY 2009-10 and by various Appellate Tribunal decisions.*

8. ***Unjust rejection of comparables selected in the TP study for FY 2009-10***

   *On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income Tax(A) has erred in confirming the action of the ld. AO in rejecting functionally comparable companies undertaking development of software, chosen by the Appellant without providing inadequate/sufficient reasons.*

9. ***Unjust inclusion of High/super profit making companies in final set of comparables***

   *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in cherry picking high/super profit making companies in final set of comparables in the order.*

10. ***Unjust exclusion of loss making companies***

    *On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income Tax(A) has erred in confirming the action of the ld. AO in rejecting loss making companies without providing adequate/cogent reasons.*

11. ***Not allowing the risk adjustment required to Operating Profit/Operating Cost of the selected comparables***

    *On the facts and in the circumstances of the case and in law, the ld. CIT(A) in confirming the action of the ld. AO erred in not granting any adjustments for differences in functions undertaken and/or assets employed and/or in risk assumed by the comparable companies' vis-à-vis the Appellant.*

12. ***Lack of Consistency***

    *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO of not accepting comparable companies selected by the ld. Transfer Pricing Officer ("TPO")/AO in previous as well as later assessment years. Thus not following consistent approach in the assessment years.*

13. ***No opportunity of verification***

    *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO in not sharing the search strategy; accept/reject matrix, source of additional comparables, selected in the final set of comparables, even after the Appellant has demanded for the same in the submissions and hearings.*

14. ***Unjust rejection of TP Study / Incorrect application of Section 92C(3) of the Act***

    *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in upholding the action of the ld. AO in rejecting the transfer pricing documentation maintained by the appellant without satisfying any of the requirements of Section 92C(3) of the Act.*

15. ***Unjust rejection of multiple year data, contemporaneous data and use of relevant financial year data***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in computing transfer pricing adjustment using the financial information of the comparable pertaining to only financial year ended March 2009 available at the time of assessment, although such information was not available at the time when the Appellant complied with the Indian TP regulations as per the Act.*

16. ***No motive, circumstances, intention of tax evasion by the Appellant***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in not appreciating that the Appellant had no motive for to shift profits since it entitled to benefit u/s 10B of the Act.*

17. ***Incorrect levy of interest under section 234B of the Act***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in confirming levy of interest under section 234B of the Act.*

18. ***Incorrect levy of interest under section 234C of the Act***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in confirming levy of interest under section 234C of the Act.*

19. ***Initiation of Penalty Proceedings***

*On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in dismissing our ground of appeal for non-initiation of penalty proceedings under section 271(1)(c) of the Act.*

*The Appellant prays for appropriate relief based on the above grounds of appeal and the facts and circumstances of the case.*

3. The learned Authorized Representative for the assessee at the outset pointed out that the issue which arises in the present appeal is in respect of deduction claimed under section 10B of the Act which is raised by way of ground of appeal No.2 and the alternate plea of prorata deduction under section 10A of the Act by way of ground of appeal No.3. He pointed out that all the other grounds of appeal are either argumentative or not pressed, except the grounds of appeal No.7 and 9 which are against inclusion of certain comparables in the final set of comparables. He also pointed out that grounds of appeal No.17 and 18 i.e. against levy of interest under section 234B and 234C of the Act are consequential and the ground of appeal No.19 against initiation of penalty proceedings were premature. Accordingly, we dismiss the grounds of appeal No.1, 4 and 5 being general in nature and grounds of appeal No.6, 8, 10 to 13 and 15 as being not pressed and grounds of appeal No.14

and 16 being argumentative in nature and ground of appeal No.19 being premature. The grounds of appeal No.17 and 18 against charging of interest under respective sections are consequential in nature.

4. Briefly, in the facts of the case, the assessee was wholly owned subsidiary of Approva US and was providing software development services and quality assurance services to its associate enterprises on exclusive basis. It also provided software maintenance and support functions like documentation of programmed code, IT integration and configuration management to its associate enterprises. For the year under consideration, the assessee had furnished the return of income declaring total income at Nil after claiming deduction under section 10B of the Act at Rs.1,60,90,049/-. The total turnover of the assessee in providing services to its associate enterprises was at Rs.14,55,76,657/-. The assessee furnished the TP study report, wherein the benchmarking of arm's length price in respect of international transactions by providing software development services to its associate enterprises was explained. The assessee applied TNMM method and adopted operating profit to total cost as the PLI in TNMM analysis. The assessee was remunerated at cost plus margin basis on the entire cost incurred for rendering such software development services. The PLI of the assessee was arrived at 11.27% and average PLI of comparables selected by the assessee was 11.88%. Since the price charged in the international transactions was higher than arithmetic mean price of the comparables, the price charged by the assessee in the international transactions in this segment was treated to be at arm's length price by the assessee. However, the Assessing Officer noted certain defects in benchmarking and the PLI margins of comparable companies were worked out at 33.92% as against PLI of the assessee at 11.27%. Similarly, deduction

claimed under section 10B of the Act was found to be not admissible since the necessary approval was not received from the Development Commissioner as prescribed by the Ministry of Commerce and Industries. The Assessing Officer thus, issued show cause notice in this regard to the assessee, which is incorporated under para 4.2 of the assessment order. The assessee objected to the rejection of filters used by the assessee and also comparables selected as per the TP study report. The assessee also made other objections to the propositions made by the Assessing Officer. However, the Assessing Officer adopted single year's data for analyzing the international transactions of the assessee with its associate enterprises. Since the assessee was 100% Export Oriented Unit (EOU), comparison was made with the companies having atleast 75% of the earning from exports. Another objection of the assessee that the concern R.Systems International Ltd. had different accounting year, was not accepted because of directions of Dispute Resolution Panel (in short 'the DRP') in assessment year 2008-09 in assessee's own case. The turnover filter was not applied by the Assessing Officer while selecting the comparables and also the loss making companies were rejected since the assessee was captive service provider and its business module was cost plus mark-up vis-à-vis companies earning super normal profits being not adopted as comparables, the TPO rejected the contention of assessee, because of similar propositions being applied by the DRP in assessment year 2008-09. Accordingly, the Assessing Officer selected five concerns as comparables whose arithmetic mean worked out to 22.88% and after allowing working capital adjustments, the average PLI of the comparables worked out to 27.48%. The arm's length price of software development services rendered by the assessee was worked out and adjustment of Rs.2,12,11,149/- was made. The Assessing Officer further held that no deduction under section 10A of the Act or section 10AA or section 10B

or Chapter VI of the Act was to be allowed in respect of enhanced income. Further, the Assessing Officer also denied the claim of deduction under section 10B of the Act to the assessee.

5. The CIT(A) upheld the order of Assessing Officer on both counts i.e. addition made on account of transfer pricing and denial of deduction under section 10B of the Act.

6. The learned Authorized Representative for the assessee pointed out that the first issue raised by way of grounds of appeal 2 and 3 is against the claim of deduction under section 10B/10A of the Act. He pointed out that during the course of assessment proceedings, the assessee had claimed the said deduction under section 10B of the Act. However, an alternate claim was made for allowing the deduction under section 10A of the Act, since the assessee was STPI unit. He further pointed out that the issue now stands covered by the order of Tribunal in assessee's own case in ITA No .1788/PN/2013 and ITA No.1803/PN/2013, relating to assessment year 2009-10, order dated 13.01.2015. He pointed out that though the Tribunal held that the assessee was not entitled to the claim of benefit under section 10B of the Act but the assessee was held to be eligible for claiming the deduction under section 10A of the Act for which, the matter was restored back to the file of Assessing Officer.

7. The learned Departmental Representative for the Revenue placed reliance on the order of CIT(A).

8. We have heard the rival contentions and perused the record. The first issue of claim of deduction under section 10B/10A of the Act arose before the

Tribunal in assessee's own case in assessment year 2009-10. The Tribunal observed that the assessee was 100% EOU registered with STPI and was claiming deduction under section 10B of the Act from assessment year 2003-04 onwards and the same was being granted to the assessee. The deduction under section 10B of the Act was denied to the assessee as it had obtained approval from the Director and Chief Executive of the STPI and not from the Development Commissioner. The Assessing Officer also rejected the alternate claim of deduction under section 10A of the Act, since no such claim was made in the return of income and the prescribed report of auditor was not filed at the time of furnishing the return of income. The Tribunal acknowledged that the assessee had filed report of accountant in Form 56F during the course of assessment proceedings and had made the alternate claim under section 10A of the Act. Relying on the ratio laid down by the Hon'ble Madras High Court in CIT Vs. Heartland KG Information Ltd. (2013) 39 taxmann.com 132 and other decisions, the Tribunal held that the assessee would be entitled to the benefit of deduction under section 10A of the Act and in order to verify the fulfillment of conditions provided in section 10A of the Act, the matter was set aside to the file of Assessing Officer. The relevant paras 11 and 11.4 of the order of Tribunal, which read as under:-

> *"11. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Bopodi unit of the assessee is registered with the STPI as a 100% EOU w.e.f., 20-05-2002. The assessee was claiming deduction u/s.10B of the I.T. Act from A.Y. 2003-04 onwards and the same was being granted to the assessee. We find during the impugned assessment year the AO disallowed the deduction claimed by the assessee u/s.10B of the Act on the ground that the assessee is not an 100% EOU within the meaning of clause (iv) of Explanation 2 to section 10B of the I.T. Act since it has obtained approval from the Director and Chief Executive of the STPI and not from the Development Commissioner. He also rejected the alternate claim of deduction u/s.10A of the Act on the ground that the assessee has not claimed the deduction u/s.10A, through filing of return of income and has not furnished the prescribed report of the auditor at the time of filing of the return of income. It is pertinent to mention here that during the course of assessment proceedings the assessee has filed the report of the accountant in Form No.56F and has made*

*alternate claim of deduction u/s.10A of the Act in case the deduction is not allowed u/s.10B. We find in appeal the Ld.CIT(A) upheld the 19 action of the AO in disallowing the claim of deduction u/s.10A of the I.T. Act.*

*11.1 So far as the alternate claim of the assessee that in case deduction u/s.10B is not allowed then he should be allowed the deduction u/s.10A, the Ld.CIT(A) rejected the same also holding that the unit of the assessee will not meet the fundamental condition of having been located in free trade zone for claiming the deduction u/s.10A. Further, according to him, the availability of the deduction from one section to another cannot be switched so easily because otherwise the legislature would not have provided 2 different sections in the first place. He accordingly rejected the claim of the assessee.*

*11.2 We find a somewhat similar issue had come up before the Hon'ble Madras High Court in the case of CIT Vs. Heartland KG Information Ltd.(Supra). In that case, the assessee was an industrial undertaking engaged in Medical Transcription business. There was another undertaking K which got approval as 100% EOU from STPI and started its new business of medical transcription during F.Y. 1999 -2000. It also had another undertaking engaged in the business of development of software exported outside India. In respect of business income earned from export the said undertaking claimed exemption u/s.10A of the I.T. Act. In July, 2001 the company K transferred its entire undertaking engaged in the export business of medical transcription along with all transcriptions, contracts, books, 20 records, all rights, all permits, warranties including computer software and export obligation to the assessee company. The transfer was recognised and allowed by the STPI. The assessee claimed deduction u/s.10B in respect of income from export. However, the AO rejected the claim on the ground that approval obtained from STPI for purpose of section 10B would not be sufficient to grant relief. According to him, the transfer was only related to machinery and thus the claim could not be sustained. He however granted deduction u/s.80HHE on alternative claim of the assessee. In appeal the Ld.CIT(A) referring to CDBT Circular File No.15/5/63(IT)(A-1) held that the benefit with the vendor company in respect of individual undertaking engaged in the manufacture of articles could be claimed by successor company for the remaining tax holiday period since the entire undertaking of the business of medical transcription was transferred to the assessee. Thus, the assessee would be entitled to have the benefit u/s10A of the Act for the remaining period. He therefore held that relief u/s.80HHE would be available to the assessee. The Hon'ble Tribunal affirmed the order of the CIT(A). On further appeal by the Revenue, the Hon'ble High Court dismissed the appeal filed by the Revenue and upheld the order of the Tribunal. While doing so, the Hon'ble High Court held that even assuming for a moment that the assessee has not referred to the section correctly, the fact remains that if the claim could be favourably considered under any of those special deduction provisions and all the conditions specified therein being satisfied 21 there is no justifiable ground exist for the revenue to contend that the assessee shall not be entitled to have the benefit of section 10A of the I.T. Act.*

*11.3 Since in the instant case although the assessee has not claimed the deduction u/s.10A of the Act in the return filed u/s.139(1), however, the assessee has claimed such an alternate deduction before the AO during the assessment proceedings itself by filing the requisite report of the accountant along with Form No.56G. Therefore, if the assessee is not eligible for deduction u/s.10B of the Act but eligible u/s.10A of the Act, we find no reason as to why such benefit should be denied to the assessee. After all these are incentive provisions and are to be liberally construed. If the assesses otherwise fulfils all the legal requirements for claiming the deduction u/s.10A of the Act but inadvertently claimed the same u/s.10B of the Act which was granted to it in the*

*past, we find no reason as to why the alternate claim of the assessee should not be accepted.*

*11.4 However, since the lower authorities have not thoroughly examined the allowability of deduction u/s.10A of the Act and merely rejected the claim on the ground that the same was not claimed in the original return filed, therefore, we in the interest of justice deem it proper to restore the issue to the file of the AO with a direction to give an opportunity to the assessee to substantiate its eligibility for deduction u/s.10A of the I.T. Act. We hold and direct 22 accordingly. Since we are restoring the issue to the file of the AO for deciding the alternate claim of the assessee for deduction/s.10A, therefore, we refrain ourselves from adjudicating the allowability of deduction u/s.10B of the I.T. Act. The grounds raised by the assessee are accordingly allowed for statistical purposes."*

9. The issue which arises before us is identical to the issue before the Tribunal in assessment year 2009-10. The year under appeal before us is assessment year 2010-11 and following the same parity of reasoning, we hold that the assessee is not entitled to the claim of deduction under section 10B of the Act. However, eligibility of deduction under section 10A of the Act in the hands of assessee merits to be verified. Accordingly, we remit this issue back to the file of Assessing Officer to verify the claim of assessee and pass order in accordance with law and also following the directions of Tribunal in earlier years. Accordingly, the grounds of appeal No.2 and 3 raised by the assessee are allowed for statistical purposes.

10. Now, coming to the second issue raised in the present appeal i.e. adjustment made on account of transfer pricing provisions. The assessee was captive service provider to its associate enterprises Approva, US. The assessee had provided software development services to its associate enterprises and in order to benchmark its international transactions, the assessee had applied TNMM method which was also applied by the Assessing Officer. The limited issue which arises before us is vis-à-vis selection / rejection of certain comparables. The assessee had drawn list of 14 comparables in its list of comparables, some of which were rejected and some

of which were accepted by the Assessing Officer. The assessee is aggrieved by the selection of KALS Information System Ltd. and Thirdware Solution Ltd. and it is pointed out by the learned Authorized Representative for the assessee that both the concerns are functionally different i.e. they are both service providers and are also product companies, hence, the same are not comparable with the assessee. He pointed out that there was no dispute that KALS Information System Ltd. was engaged in the same business but it also was providing products and hence, not to be considered as comparable while benchmarking the international transactions of the assessee. The learned Authorized Representative for the assessee pointed out that similar issue of inclusion of said companies arose before the Tribunal in earlier years and the same were rejected. He also pointed out that the Assessing Officer while conducting proceedings for assessment year 2011-12 had not selected the said concerns KALS Information System Ltd. and Thirdware Solution Ltd. as being comparable to the assessee.

11. We find that the Tribunal noted that the TPO had selected KALS Information System Ltd. and Thirdware Solution Ltd. as being comparable, whereas the case of assessee was that both the said concerns were functionally different. With regard to KALS Information System Ltd., it was pointed out that the said company was earning income from sale of application software and segmental information with respect to software services were available. In respect of Thirdware Solution Ltd., it was pointed out that the said concern was engaged in software development, trading of software licences and training implementation activities apart from software development. Another contention was raised that Thirdware Solution Ltd. was super profit earning company and was also engaged in the business of software licences

and trading of implementation activities. The Tribunal taking note of the Special Bench decision in the case of Maersk Global Centres (India) Pvt. Ltd. Vs. ACIT vide ITA No.7466/M/2012 in respect of super profits and inclusion of concern Thirdware Solution Ltd., held that the said concern was not comparable and observed as under:-

> *"29. We have considered the rival arguments made by both the sides. We find the Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. Vs. ACIT vide ITA No.7466/Mum/2012 has observed as under :*
>
> > *"99. The question No. 2 referred to this Special Bench is as to whether, in the facts and circumstances of the case, companies earning abnormally high profit margin should be included in the list of comparable cases for the purpose of determining arm's length price of an international transaction. As already observed, the issue involved in this question has become infructuous in so far as the case of the assessee before the Special Bench is concerned and the same therefore no more survives for consideration in the present case. In generality, we are of the view that the answer to this question will depend on the facts and circumstances of each case inasmuch as potential comparable earning abnormally high profit margin should trigger further investigation in order to establish whether it can be taken as comparable or not. Such investigation should be to ascertain as to whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year. The profit margin earned by such entity in the immediately preceding year/s may also be taken into consideration to find out whether the high profit margin represents the normal business trend. The FAR analysis in such case may be reviewed to ensure that the potential comparable earning high profit satisfies the comparability conditions. If it is found on such investigation that the high margin profit making company does not satisfy the comparability analysis and or the high profit margin earned by it does not reflect the normal business condition, we are of the view that the high profit margin making entity should not be included in the list of comparable for the purpose of determining the arm's length price of an international transaction. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin. Question No. 2 referred to this special bench is answered accordingly".*
>
> *29.1 We find from the details furnished by the assessee that the assessee is a software developer whereas Thirdware Solutions Ltd. is engaged in the business of sale-cum-licence of software which is available from the audited accounts, the details of which are as under :*

| *Schedule : Sales* | *As on 31-03-2009* | *As on 31-03-2008* |
|---|---|---|
| *Sale of Licence* | *22,237,588* | *3,916,427* |
| *Software Services* | *89,177,023* | *76,724,371* |
| *Export from SEZ unit* | *478,572,420* | *263,971,033* |
| *Export from STPI unit* | *162,900,630* | *168,863,049* |
| *Revenue from Subscription* | *16,433,714* | *9,293,874* |
| | *770,321,376* | *522,768,754* |

> *Apart from the above the company is also having dividend income, interest income and profit on sale of investment as well as premium of software contract totalling to Rs.2,30,48,603/- which is as per Schedule-13 "other sources". From the various decisions relied on by the Ld. Counsel for the assessee we find Thirdware Solutions Ltd. has been rejected on the ground that it is functionally dissimilar. The Hyderabad Bench of the Tribunal in the case of Intoto Software India Pvt. Ltd. Vs. ACIT and Viceversa in consolidated order dated 24-05-2013 for A.Y. 2005-06 and 2007-08 at para 26 of the order has observed as under :*
>
> > *"26. As far as Thirdware Software Solution Limited is concerned, we find from the information furnished by the said company that though the said company is also into product development, there are no softrware products that the company invoiced during the relevant financial 52 year and the financial results are in respect of services only. Thus, it is clear that there is no sale of software products during the year but the said company might have incurred expenditure towards the development of the software products."*
>
> *29.2 In various other decisions also Thirdware Solutions Ltd. has been rejected as a comparable on the ground that it is functionally dissimilar. We therefore find force in the submission of the Ld. Counsel for the assessee that Thirdware Solutions Ltd. should not be included as a comparable. We accordingly set-aside the order of the CIT(A) and direct the Assessing Officer to exclude the same from the list of comparables."*

12. Both the learned Authorized Representatives have admitted that Thirdware Solutions Ltd. was involved in similar functions as in earlier year and in view thereof, we hold that the said concern is functionally different and is to be excluded from final list of comparables.

13. Now, coming to the second concern i.e. KALS Information System Ltd. vis-à-vis other concern, the CIT(A) in assessment year 2009-10 had excluded the said concern and the Tribunal following series of decisions including Bindview India Pvt. Ltd. Vs. DCIT (2013) 34 taxmann.com 164 held that the said concern was functionally different as it was engaged in the development of software products and its sale and was not comparable to the software development services provided by the assessee. The Hon'ble Bombay High Court in CIT Vs. PTC Software (I) Pvt. Ltd. in Income Tax Appeal No.732 of 2014, vide judgment dated 26.09.2016 have also observed that KALS

Information System Ltd. is functionally not comparable to the assessee which is rendering software services to its holding company since KALS Information System Ltd. was engaged in selling of software products. Following the same parity of reasoning, we hold that KALS Information System Ltd. is not to be included in the final set of comparables in order to benchmark the international transactions. The Assessing Officer is accordingly, directed to re-compute the margins of final set of comparables. The grounds of appeal No.7 and 9 are thus, allowed. The grounds of appeal raised by the assessee are thus, partly allowed.

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

Order pronounced on this 25th day of January, 2017.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(ANIL CHATURVEDI)** | **(SUSHMA CHOWLA)** |
| **लेखा सदस्य / ACCOUNTANT MEMBER** | **न्यायिक सदस्य / JUDICIAL MEMBER** |

पुणे / Pune; दिनांक Dated : 25th January, 2017.

*GCVSR*

**<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-IT/TP, Pune;
4. आयकर आयुक्त / The CIT-I, / DIT (TP/IT), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

Assistant Registrar