

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.981/Bang/2013
(Assessment year: 2008-09)
and
Cross Objn.No.41/Bang/2016
(In IT(TP)A No.1070/Bang/2013)
(Assessment year: 2008-09)

M/s.SAP Labs India Pvt. Ltd.
No.138, Export Promotion,
Industrial Park, Whitefield,
Bengaluru-560 066.
PAN:AAFCS 3649P

...

Appellant

Vs.

Addl. Commissioner of Income-tax,
Range-12,
Bengaluru.

...

Respondent

AND

IT(TP)A No.1070/Bang/2013
(Assessment year: 2008-09)
(By the revenue)

Assessee by : S/ShriKanchun Kaushal &
Aliasger Rampurawala, CAs
Revenue by : Shri Ch.Sundar Rao, CIT(DR)

Date of hearing : 09/01/2008
Date of pronouncement : 06/04/2018

O R D E R

Per INTURI RAMA RAO, AM :

These are cross appeals filed by the revenue as well as the assessee directed against the order of the learned Commissioner of Income-tax (Appeals)-IV, Bangalore, dated 23/04/2013 for the assessment year 2008-09. The assessee also filed cross objections in ITA No.1070/Bang/2013 (revenue appeal).

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2. Brief facts of the case are that the assessee is a company duly incorporated under the provisions of the Companies Act, 1956. The assessee is a subsidiary of SAP AG, Germany. It is engaged in the business of providing software development and other related support services to SAP AG and other Group companies. It is a captive service provider and conducts its operation from various undertakings registered with the Software Technology Parks of India (STPI) scheme at Bangalore, Gurgaon and Chandigarh. The return of income for the assessment year 2008-09 was filed electronically on 30/09/2008 declaring total income of Rs.4,73,84,630/-. The assessee-company also reported the following international transactions in Form 3CEB:

2.5 International Transactions (as mentioned in the 92 CE report)

Particulars	Amount received (Rs.)	Amount paid (Rs.)
Provision of Software Development & related services	689,91,01,693	
Other Cost allocations (paid)		9,14,59,730
Data Line Charges (paid)		4,34,604
IT Support Charges (paid)		69,66,00,735
Training Charges (paid)		6,53,638
Reimbursement of travel expenses (paid)		1,20,41,583
Reimbursement of purchase of fixed assets (paid)		62,70,837
Recovery of expenses (received)	15,01,39,476	

3. The assessee sought to justify the consideration received for the above international transactions to be at arm's length. The assessee-company also submitted TP study report adopting TNMM which was considered to be the most appropriate method for the purpose of transfer pricing study and operating profit to operating cost as the Profit Level Indicator (PLI). The assessee-company's profit margin was computed at 7.62% and the same was claimed to be at arm's length with other companies rendering software development services. For the purpose of TP study, the assessee-company had chosen 16 comparables. The arithmetical average mean of the operating margin of the said comparable was computed less than 12%. According to the assessee-company, its PLI was within +/-5% of the arithmetical mean of the comparable entities. Hence, it was claimed that transactions with its AEs to be at arm's length.

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4. The Assessing Officer (AO) referred the matter to the Transfer Pricing Officer (TPO) for the purpose of bench marking the above international transactions.

5. The TPO, vide order dated 31/10/2011 passed u/s 92CA(3) of the Act, suggested TP adjustment of Rs.100,98,86,353/-. The TPO accepted TNMM adopted by the assessee-company as the most appropriate method. However, rejected TP study report submitted by the assessee-company for the reason that current year's financial data was not used by the assessee-company but average of three previous year's data was used. The assessee-company had not applied the filters of export revenue of more than 75% and employee-cost filter of more than 25% of the revenue. The TPO identified different set of comparable entities for the purpose of determining the arm's length price (ALP). While doing so, the TPO applied the following filters:

- i. Companies having export sales less than 75% of the sales were excluded.
- ii. Companies with onsite revenue greater than 75% of the export revenues from software are excluded.

By applying the above filters, the TPO finally selected the following 20 comparables:

1	Avani Cincom Technologies	25.62
2	Bodhtree Consulting Ltd	18.72
3	Celestial Biolabs	87.94
4	e-zest Solutions Ltd	29.81
5	Flextronics(Aricent)	7.86
6	iGate Global solution ltd	13.99
7	Infosys	40.37
8	Kals Information systems ltd(seg)	41.94
9	LGS Global Ltd	27.52
10	Mindtree Ltd(seg)	16.41
11	Persistent Systems Ltd	20.31
12	Quintegra Solution Ltd	21.74
13	R systems International(seg)	15.30
14	R S Software (India) Ltd	7.41
15	Sasken Communication Technologies ltd(seg)	7.58
16	Tata Elxsi(Seg)	18.97
17	Thirdware solution Ltd	19.35
18	Wipro Ltd(Seg)	28.45
19	Softsol India Ltd	17.89
20	Lucid Software Ltd	16.50
	AVERAGE	23.65

6. The TPO computed average profit margin of the comparables finally selected at 23.65% after giving working capital adjustment of 1.7%, adjusted margin of 21.95%. On the above basis, the TPO made the TP adjustment as follows:

Arm's Length Mean Margin on cost	23.65%
Less: Working Capital Adjustment (as per Annexure-C)	1.70%
Adjusted mean margin of the comparables	21.95%
Operating Cost	665,10,09,841
Arms Length Price(ALP) 121.95% of Operating Cost	811,09,06,501
Price Received	710,10,20,148
Short fall being adjustment u/s.92CA	100,98,86,353

7. The AO passed draft assessment order dated 23/12/2011 incorporating the TP adjustment suggested by the TPO and sent to the assessee. After receipt of draft assessment order the assessee filed objections before the Hon'ble DRP belatedly. Hence, the AO proceeded to pass final assessment order u/s 143(3) r.w.s 144(C) on 27/02/2012 after making the following disallowances:

- 1) TP adjustment as suggested by the TPO.
- 2) Disallowing:
 - (i) Rs.18,07,31,409/- u/s 80JJAA
 - (ii) Interest of Rs.2,99,06,766/- on a loan and
 - (iii) rent of Rs.4,72,94,681/-
- 3) reducing from the appellant's export turnover telecommunication and foreign currency expenses of Rs.60,88,79,441/- for computing deduction u/s 10A and
- 4) disallowing deduction of Rs.61,58,683/- claimed u/s 10A in respect of Chandigarh unit Rs.60,76,361/-

8. Being aggrieved, the assessee preferred an appeal before the learned CIT(Appeals), who vide impugned order had deleted the following 14 companies by applying the turnover filter of range of Rs.200 cr. to Rs.2000 cr.:

Sr. No.	Name of Company	Turnover (in crore)
1.	Avani Cincom Technologies	2.93
2.	Bodhtree Consulting Limited	10.37
3.	Celestial Biolabs	20.21
4.	e-Zest Solutions Ltd	7.66
5.	Infosys	15,672.00
6.	Kals Information Systems Limited (Seg.)	2.05
7.	LGS Global Limited	136.52
8.	Lucid Software Limited	2.35
9.	Quintegra Solution Limited	89.88
10.	R Systems International (Seg.)	144.56
11.	R S Software (India) Limited	100.36
12.	Softsol India Ltd	18.99
13.	Thirdware Solution Limited	52.28
14.	Wipro Ltd. (Seg.)	11,955.56

The Id.CIT(A) held that the application of employee cost filter and diminishing revenue or persisting loss making or different year ending filters are not appropriate. The Id.CIT(A) further held that gain on account of fluctuation of foreign exchange should be treated as operating nature.

9. Being aggrieved, the revenue is in appeal in IT(TP)A No.1070/Bang/2013 against that part of the order of the Id.CIT(A) which is against the revenue and the assessee is in appeal in IT(TP)A No.981/Bang/2013 against that part of the order of the Id.CIT(A) which is against the assessee.

10. Now we shall take up revenue appeal. The revenue raised the following grounds of appeal:

1. The order of the learned CIT(A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to exclude the reimbursement of expenses 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.

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3. On the facts and in the circumstances of the case the learned CIT(A) 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 the learned CIT(A) erred in holding that the assessee company is eligible for deduction u/s 80JJAA in respect of additional wages paid to software engineers employed in non 10A units without appreciating the fact that the software engineers cannot be equated with 'workmen' as envisaged under Rule 2(s) of Industrial Disputes Act 1947.
5. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the assessee company is entitled to claim deduction u/s 10A in respect of profits derived from the units acquired under slump sale without appreciating the fact that there is split up in the existing business of the assessee on account of such slump sale.
6. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Avani Cimcom technologies Ltd. M/s Bodhtree Consulting Ltd., M/s e-Zest Solutions Ltd. M/s Infosys Technologies Ltd., M/s Kals Information Systems Ltd., M/s LGS Global Ltd., M/s Lucid Software Ltd., M/s Quintegra Solution Ltd. M/s R Systems International Ltd., M/s RS Software (I) Ltd., M/s Softsol I Ltd., M/s Thirdware Solutions Ltd. and M/s Wipro Ltd., in Software development segment as comparables.
7. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that the TPO was not justified in applying the employee cost filter and directed to include M/s Indus Networks Ltd which was excluded in the software development services segment by using this filter.
8. On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting the diminishing revenue filter used by the TPO to exclude companies that do not reflect the normal industry trend.
9. On the facts and in the circumstances of the case the learned CIT(A) failed to appreciate that the different year ending filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.
10. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that foreign exchange loss/gain is operating in nature when, such loss/gain though linked to the operating activity is not derived from operating activity.

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11. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that domestic transaction should be excluded from the TP adjustments, in view an aggregate approach is adopted by the TPO wherein the transactions are so inextricably intermixed that the segregation of revenue and appropriate costs are impossible and the approach of the assessee to allocate costs on a ration would provide only ~~distorted~~ results.
12. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.
13. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.

11. Ground Nos.1 & 12 are general in nature and do not require adjudication. Groundno.2 & 3 challenge direction of the CIT(A) to exclude expenditure on travel and insurance and telecommunication, incurred in foreign currency, from export turnover as well as total turnover. This issue is no longer *res integra* as the Hon'ble jurisdictional High Court in the case of *CIT vs. Tata Elxsi* (349 ITR 98). held that such expenditure incurred in foreign currency should be deducted from export turnover as well as total turnover. Hence, this ground of appeal filed by the revenue is dismissed.

12. Ground No.4 challenges the findings of the Id.CIT(A) granting benefit u/s 80JJA of the Act in respect of salaries paid to newly employed employees. AO denied the claim on the ground that software engineers are not workmen. On appeal before the Id. CIT(A), the Id.CIT(A) directed the AO to grant the benefit of deduction u/s 80JJ following this Tribunal's decision in the *Texas Instruments Ltd.* reported in 115 TTJ 976, wherein it was held that software engineers, who are not in supervisory position, were eligible to be considered as workmen. However, the Id.CIT(A) had restricted the deduction to non-10A unit.

13. Before us the Id.CIT(DR) vehemently contended that software engineers cannot be treated as a workmen and therefore, assessee-company is not entitled to make a claim u/s 80JJA of the Act.

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14. On the other hand, learned counsel for assessee contended that software engineers are 'workmen' as defined under the Industrial Disputes Act and thus are eligible for deduction u/s 80JJA of the Act. He further contended that 80JJA claim can be allowed even in respect of 10A unit.

15. We heard rival submissions and perused material on record. The issue in the ground of appeal is covered by the decision of the co-ordinate bench of Tribunal in the case of the same assessee for assessment year 2007-08 in ITA No.1006/Bang/2011 dated 30/06/2016, to which one of us viz., the Hon'ble Judicial Member is a party wherein it was held as under:

“24. We have perused the orders and considered the rival contentions. The claim of assessee with regard to additional wages paid to new workman was denied for a reason that engineers who were newly employed by the assessee were not considered as workers by the lower authorities. However, in a similar situation in the case of Texas Instruments India P.Ltd, (supra), it was held by the coordinate bench at para 6 and 7 of its order, as under :

6. We have heard the rival submissions and carefully perused the records. Considering the factual position after referring to the various documents filed by the assessee, the learned CIT(A) held as under :

"According to the AO if an employee or workman is getting a salary of more than Rs. 1,600 per month he is not covered by the definition of workman. However as per cl. (iv) of s. 2(s) of the Industrial Disputes Act a worker, employed in supervisory capacity and getting a salary of more than Rs. 1,600 per month only be excluded from the definition of workman. In appellant's case the software engineers in respect of whom deduction under s. 80JJA has been claimed have not been employed in a supervisory capacity even though they may be getting a salary of more than Rs. 1,600 per month. As the software engineers were not employed in supervisory capacity they cannot be excluded from the definition of workman. Further as per the notification of the Karnataka Government, the appellant company engaged in the development of software is covered by the Industrial Disputes Act. As such, I am of the considered opinion that the appellant has satisfied all the conditions for claiming relief under s. 80JJA. However, I find that the appellant has claimed deduction of Rs.

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2,55,81,220 with reference to the additional wages of Rs. 8,52,70,736 which included the wages of Rs. 4,87,64,029 in respect of the new workmen employed during the year ended 31st March, 2000 relevant to the asst. yr. 2000- 01. As there was no claim for relief under s. 80JJAA for the asst. yr. 2000-01, the relief in respect of the workers employed in asst. yr. 2000-01 cannot be considered for relief under s. 80JJAA in the asst. yr. 2001-02. As such the appellant will be entitled for relief under s. 80JJAA of Rs. 1,09,52,012 being 30 per cent of the additional wages of Rs. 3,65,06,707 (Rs. 8,52,70,736 Rs. 4,87,64,029) in respect of the new workmen employed during the previous year relevant to the asst. yr. 2001-02. Similarly, for asst. yr. 2002-03 the appellant has claimed deduction of Rs. 4,78,05,176 being 30 per cent of the wages of Rs. 1,59,30,588 which also included the wages of Rs. 4,38,68,182 pertaining to the new workers employed in the previous year 1999- 2000. For the reasons mentioned above the appellant is not entitled for relief under s. 80JJAA in respect of the wages pertaining to the workers employed in the previous year 1999-2000. As such the appellant would be eligible for relief of Rs. 3,46,44,722 being 30 per cent of the additional wages of Rs. 11,54,82,406 (Rs. 15,93,50,588 Rs. 4,38,68,182) in respect of the workmen employed in previous years 2000-01 and 2001-02. The learned Authorised Representatives of the appellant vide order-sheet noting dt. 24th Aug., 2004 agreed that the relief under s. 80JJAA in respect of the employees who joined in the previous year relevant to the asst. yr. 2001-02 onwards only may be considered and in respect of the employees who joined in earlier years the appellant is not pressing for relief under s. 80JJAA. In the circumstances, the AO is directed to allow the relief under s. 80JJAA of Rs. 1,09,52,012 and Rs. 3,46,44,722 for asst. yrs. 2001-02 and 2002-03 respectively."

7. As stated earlier the assessee had filed the details of the software engineers employed during the years under consideration containing the names of the employees, designation and date of joining. Further, in the same list the details of total number of employees joined during both the assessment years, number of employees without supervisory roles, workmen joined, number of supervisors joined and workmen joined and relieved during the years under consideration. A cursory perusal of this list shows that the assessee had claimed deduction in respect of employees, who had joined as engineers in their respective field such as systems engineer, test engineer, software design engineer, IC design engineer, lead engineer etc. A cursory perusal of those lists establishes that the assessee had claimed deduction in respect of the engineers employed not in the category of supervisory control. All these details were filed before the AO during assessment

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proceedings. These facts were not properly considered by the AO. Further, from the order of the CIT(A), it is seen that he had taken note of the notification issued by the Government of Karnataka and concluded that as per the notification issued, the assessee company engaged in the development of software is covered by the Industrial Disputes Act, 1947. Further it is not the case of the Revenue that the assessee did not fulfil the conditions extracted elsewhere in this order. Considering all those factual matters we do not find any infirmity in the order of CIT(A) according relief to the assessee. In fact he had clarified the relevant portions related to Industrial Disputes Act, 1947 and IT Act while granting relief to the assessee which are extracted at pp. 5 and 6 of this order. After carefully considering the same, we are inclined to accept the reasons shown by the learned CIT(A). The learned CIT-Departmental Representative could not assail the finding IT(TP)A.1006/Bang/2011 Page - 44 reached by the learned CIT(A) by bringing in any valid materials. The order of the CIT(A) is confirmed. It is ordered accordingly. There is no case for the Revenue that assessee had failed to file details of software engineers employed by it. In our opinion software engineers newly employed by it fell within the meaning of the word 'workmen'.

25. However coming to the second limb of the reasoning given by the lower authorities, which is section 80A(4), the said section is reproduced hereunder :

-(4) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "*C-Deductions in respect of certain incomes*", where, in the case of an assessee, any amount of profits and gains of an undertaking or unit or enterprise or eligible business is claimed and allowed as a deduction under any of those provisions for any assessment year, deduction in respect of, and to the extent of, such profits and gains shall not be allowed under any other provisions of this Act for such assessment year and shall in no case exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be.

26. A reading of the above section would show that once an assessee's claim is allowed under section 10A, 10AA, 10B or 10BA, then to the extent such deduction has been allowed, no other deduction could be allowed under any other provision of the Act. Assessee had claimed deduction of its income u/s.10A of the Act in respect of its units 2, 3 and 4. As per the assessee even if deduction under section 10A of the Act is allowed for these units, a further deduction u/s.80JJA of the Act, is also allowable. Argument of the assessee's counsel is that the limitation put in by Section 80A(4) of the Act, would apply only to profit linked deductions. There can be no dispute that deduction under Section 10A of the Act, is profit linked. In so far as deduction u/s.80JJA

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is concerned, a look at sub-section (1) of the said section is required, which is reproduced below :

80JJAA(1) : Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing, there shall, subject to the conditions specified in sub-section (2) be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

27. A reading of the above sub-section would clearly show that the deduction is given on profits and gains derived from industrial undertaking engaged in manufacture or production of article or thing. It is only for quantification of the amount that 30% is applied. In our opinion the deduction is very much linked to the profits of the undertaking. We are therefore unable to accept this line of argument taken by the counsel. In the result, we hold that assessee is not eligible for deduction u/s.80JJAA of the Act, in respect of its units 2, 3 and 4. However, denial of such claim in respect of unit-1, where it was not claiming any deduction, in our opinion is incorrect. We, therefore set aside the orders of authorities below for the limited purpose of quantifying the eligible deduction u/s.80JJAA in respect of Unit-1. In the result, ground no.6 is treated as partly allowed for statistical purpose. ”

In the light of above decision of the co-ordinate bench in the assessee's own case, we do not find any fallacy in the order of the Id.CIT(A). Therefore, the ground of appeal raised by the revenue is dismissed.

16. Ground No.5 challenges the direction of the Id.CIT(A) directing the AO to allow deduction u/s 10A of the Act with respect to the unit acquired viz. Virsa Systems Pvt. Ltd. which had STP unit in Chandigarh after obtaining necessary approval from STPI. This unit was acquired by the assessee-company as part of global acquisition on a slump sale basis. Thereafter, the assessee-company had applied to STPI for transfer of this undertaking from Versa Systems Pvt. Ltd., to the assessee-company. In the light of this approval, the assessee made a claim u/s 10A in respect of profits earned by that unit. However, the AO had disallowed the claim placing reliance on the provisions of sub-section (7A) of section 10A of the Act. On appeal before the Id.CIT(A), the claim came to be allowed after placing reliance on CBDT circular No.1 of 2013

dated 17/01/2013 wherein it was clarified that the benefit u/s 10A will be continued in case of slump sale.

17. Being aggrieved, the revenue is in appeal before us. The Id.CIT(DR) placed reliance on the order of the AO whereas the learned counsel for assessee placed reliance on the decision of the Tribunal for assessment year 2007-08 wherein this Tribunal, following the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Sonana Software Ltd.*(343 ITR 397).

18. We heard rival submissions and perused material on record. This issue is covered in favour of the assessee by the decision of this Tribunal for the assessment year 2007-08 cited supra wherein it has been held as follows:

“42. We have perused the orders and heard the rival contentions. It is not disputed that the Chandigarh unit came to the assessee through a slump sale. M/s. Virsa had given this undertaking to the assessee as a going concern. That such transaction was a slump sale has not been disputed by any of the lower authorities. It is also not disputed that the said M/s. Virsa was eligible for deduction u/s.10A of the Act and was claiming such deduction in the earlier years for such unit. Hon'ble Bombay High Court in the case of *Sonata Software Ltd.*, (supra) in a similar situation had held as under :

8. The issue before the court is whether the two requirements, cast in negative terms, have been fulfilled. Clause (ii) of sub-section (1) of section 10A stipulates that the industrial undertaking must not be formed by splitting up or reconstruction of a business already in existence. In other words, the test in law is as to whether the undertaking is formed by splitting up or reconstruction of a business already in existence. In *CIT v. Gaekwar Foam and Rubber Co. Ltd.* [1959] 35 ITR 662 (Bom) a Division Bench of this court construed the provisions of section 15C of the Indian Income-tax Act, 1922, section 15C(2)(i) contained a similar provision that the section would apply to an industrial undertaking which is not formed by the splitting up or the reconstruction of a business already in existence or by the transfer to a new business of building, machinery or plant used in a business which was being carried on before April 1, 1948. In that case, there was a IT(TP)A.1006/Bang/2011 Page - 55 partnership firm and its assets and goodwill were taken over by the assessee for a stated consideration and against the allotment of shares to the three partners in the assessee-company. The Assessing Officer had

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rejected the claim of exemption under section 15C on the ground that the assessee was formed by the reconstruction of the business already in existence. The Appellate Commissioner took a different view which was affirmed by the Tribunal. The Division Bench of this court held that the reconstruction of a business connotes that the original business is not to cease functioning and the undertaking must continue to carry on the same business in an altered form. On the other hand, if the ownership of a business or an undertaking is transferred that would not constitute a reconstruction. The Division Bench held as follows (page 669) :

"The reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning, and its identity is not to be lost or abandoned. The concept essentially rests on changes but the changes must be constructive and not destructive. There must be something positive about the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be--and this is brought out by the section itself--of a 'business already in existence'. There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alterations and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. Thus, for instance, if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganization of the business on sounder lines or alterations in the mode or method or scope of the activities of the business or in its personnel or infusion of new blood in the management or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would certainly be no more than reconstruction of the business if it is substantially the same business carried on by substantially the same persons."

Reconstruction, the Division Bench held, means that substantially the same business is carried on and substantially the same persons carry it on (page 671) :

"The emphasis, it will be noticed, is on two things--when substantially the same business was carried on and substantially the same persons were carrying it on. It is also to be noticed that the learned judge draws a clear distinction between a reconstruction and a sale of an undertaking. In the case of a sale, there can be no question of reconstruction. Now, in these matters, we have to look at the substance of the transaction and not the form. If looking at the substance of the transaction, it is a sale, then the concept of recon

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struction must be ruled out for in such a case there is no scope for speaking about any reconstruction of an existing business."

9. The judgment of the Division Bench of this court in Gaekwar Foam [1959] 35 ITR 662 (Bom) was approved by the Supreme Court in a judgment in Textile Machinery Corporation Ltd. v. CIT [1977] 107 ITR 195 (SC). The Supreme Court, in that case, dealt with the issue as to whether within the meaning of section 15C(2)(i) of the Indian Income-tax Act, 1922, the industrial undertakings which consisted of a steel foundry division and jute mill division were not formed by the reconstruction of a business already in existence. The Supreme Court observed that in order to be entitled to the benefit of section 15C the following facts would have to be established by the assessee (page 206) :

"(1) investment of substantial fresh capital in the industrial under taking set up ;

(2) employment of requisite labour therein ;

(3) manufacture or production of articles in the said undertaking ;

(4) earning of profits clearly attributable to the said new under taking ; and IT(TP)A.1006/Bang/2011 Page - 57 (5) above all, a separate and distinct identity of the industrial unit set up."

10. The Supreme Court was of the view that the new undertaking must not be substantially the same old existing business. Even if a new business is carried on but by piercing the veil of the new business it is found that there is employment of the assets of the old business, the benefit will not be available. From this perspective the court held that a substantial investment of new capital is imperative.

11. The Tribunal, in the present case, has come to the conclusion that where a running business is transferred lock, stock and barrel by one assessee to another assessee the principle of reconstruction, splitting up and transfer of plant and machinery cannot be applied. According to the Tribunal, the benefit of section 10A attaches to the undertaking and not to the assessee which owns the undertaking. The benefit of section 10A was held to have attached itself to the STP unit of the software division which was owned by IOCL till October 19, 1994, and it was owned by the assessee subsequent to that date. What is material, according to the Tribunal, is not who owns the undertaking but whether the undertaking is entitled to the benefit available under section 10A. As regards the issue of transfer by IOCL to the assessee, the

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Tribunal noted that section 10A(9) was substituted by the Finance Act, 2000, with effect from April 1, 2002. Section 10A(9) provided that where during any previous year the ownership or beneficial interest in an undertaking of the business is transferred by any means, the deduction under sub-section (1) shall not be allowed to the assessee for the assessment year relevant to such previous year and the subsequent years. The Tribunal noted that if a transfer between IOCL and the assessee were to be effected after April 1, 2001, that would result in the undertaking being disentitled to the benefit under section 10A. This was a pointer to the fact that prior to the substitution a transfer of ownership or beneficial interest in the undertaking would not disentitle an assessee to the benefit of section 10A. (As a matter of fact it may also be noted that the provisions of section 10A(9) were omitted by the Finance Act, 2003, with effect from April 1, 2004).

43. Thus it has been held by the Hon'ble Bombay High Court that slump sale could not be considered as a reconstruction of business. Similar view was also taken by the coordinate bench in the case of LG Soft India P. Ltd (supra). We are therefore of the opinion that assessee was eligible for claiming deduction u/s.10A of the Act, for its Chandigarh unit for the balance sheet for the period of availability of deduction u/s.10A of the Act. We therefore set aside the orders of lower authorities in this regard and remit the issue back to the AO for consideration afresh in accordance with law for verifying whether the claim for deduction u/s.10A of the Act, on Chandigarh unit is within the total period for which such deduction is available under the said section. Ground 10 of the assessee is allowed for statistical purpose.”

Respectfully following the decision of the co-ordinate bench for earlier year, this ground of appeal filed by the revenue is dismissed.

19. Ground No.6 challenges the direction of the Id.CIT(A) excluding the following companies applying the turnover range for Rs.200 to Rs.2000 cr.:

- i. M/s. Avani Cimcom Technologies,
- ii. M/s. Bodhtree Consulting Limited,
- iii. M/s. E-zest Solutions Limited,
- iv. M/s. Infosys Technologies Ltd.,
- v. M/s. Kals Information Systems Limited (Seg.),
- vi. M/s. LGS Global Ltd.,
- vii. M/s. Lucid Software Limited,
- viii. M/s. Quintegra Solution Limited,
- ix. M/s. R Sytems International Ltd.,
- x. M/s. R.S. Software (I) Ltd.,
- xi. M/s. Softsol India Ltd.,
- xii. M/s. Thirdware Solution Limited and
- xiii. M/s. Wipro Ltd. (Seg.).

20. This issue is covered in favour of the revenue by the decision of the Hon'ble Delhi High Court in the case of *Chrystcapital Investment Advisors (India) (P.)Ltd. vs. DCIT* (376 ITR 183)(Delhi) wherein it was held that unless it is demonstrated that turnover has got an impact on the profitability of a concern, turnover cannot be relevant criteria to decide the comparability. The relevant paragraph is extracted herein:

“33. Such being the case, it is clear that exclusion of some companies whose functions are broadly similar and whose profile - in respect of the activity in question can be viewed independently from other activities- cannot be subject to a per se standard of loss making company or an "abnormal" profit making concern or huge or "mega" turnover company. As explained earlier, Rule 10B (2) guides the six methods outlined in clauses (a) to (f) of Rule 10B(1), while judging comparability. Rule 10B (3) on the other hand, indicates the approach to be adopted where differences and dissimilarities are apparent. Therefore, the mere circumstance of a company - otherwise conforming to the stipulations in Rule 10B (2) in all details, presenting a peculiar feature - such as a huge profit or a huge turnover, ipso facto does not lead to its exclusion. The TPO, first, has to be satisfied that such differences do not "materially affect the price...or cost"; secondly, an attempt to make reasonable adjustment to eliminate the material effect of such differences has to be made.ö

This ratio was followed by this Tribunal in several cases, for example, *NTT Data Global Delivery Services Ltd. vs. Ass. CIT* (69 taxmann.com 7)(Bang) and *Societe Generale Global Solution Centre (P.) Ltd. vs. DCIT* (69 taxmann.com 336)(Bang). Following the ratio of the above decisions, we hold that turnover is not relevant criteria for deciding comparability. Accordingly, this ground of appeal is allowed.

21. Ground No.7 challenges the direction of the Id.CIT(A) in rejecting the employee cost filter as not appropriate to apply in search process for comparables. Now it is trite law that employee cost filter is appropriate in search process of comparables as employee cost filter is a key value driver. Reliance in this regard can be placed on *Mentor Graphics P.Ltd. vs. DCIT* [TS-7-ITAT-2007(Del.)] and *ST Microelectronics P. Ltd. vs. CIT* [TS-243-ITAT-2011(Del)]. In the light of these decisions, the ground of appeal raised by the revenue is allowed.

22. Ground No.8 challenges the finding of the Id.CIT(A) in rejecting diminishing revenue filter. The reasoning adopted by the Id.CIT(A) is as under:

113. I have considered the appellant's submissions on this aspect. The reason given by the TPO for applying the diminishing revenue and persistent losses filters is that the filters are designed to eliminate companies which are not in line with the trend of growth witnessed in the software industry. However, use of these filters depends on "trends" over a period of time" and is contrary to the TPO's own stand that only current year's data are required to be used.

114. Growth of the Indian software industry cannot be attributed solely to existing companies, but also to new companies being set up, which in turn depends upon the entry and exit barriers that characterise an industry. Moreover, revenue may not always be a true indicator of a company's performance, which may also depend on its own business cycle. A company with increasing revenues over a period of time does not necessarily reflect better performance, as increase in expenses in the corresponding period can be higher than that in revenues and consequently, the company may still incur losses. Conversely, a company with diminishing revenues over a period of time may not necessarily be performing badly, if it still has a good profit margin achieved through cost efficiency. I, therefore, disapprove of the use of this filter.

Further this Tribunal has been taking a consistent view that turnover filter is not relevant criteria for comparability of the company. Similarly diminishing revenue cannot be relevant criteria and therefore the ground of appeal filed by the revenue is dismissed.

23. Ground No.9 challenges the finding of the Id.CIT(A) in rejecting different year ending filter. The provisions of sub-section (4) of 10B provide that the data to be used in analyzing comparability of uncontrolled transactions with an international transaction shall be the data relating to the financial year in which international transaction had been entered into. In the light of the plain provisions of the law, we do not see any reason to differ from the finding of the Id.CIT(A). Hence the ground of appeal filed by the revenue is dismissed.

24. Ground No.10 challenges the finding of the Id.CIT(A) that the gain arising out of variations in foreign exchange currency is operating in nature.

The only issue in the ground of appeal pressed, relating to TP adjustment is whether Foreign Exchange gain made an account of sale proceeds can be treated as operating in nature. The Hon'ble Delhi High Court in the case of *Pr.CIT vs. Ameriprise India Pvt. Ltd.* in ITA No.206/2016 dated 23/03/2016 has categorically held that foreign exchange gain earned by the assessee in relation to sale/purchase emanating from international transactions should be treated as operating in nature. In the light of the ratio laid down in the case of *Ameriprise India Pvt. Ltd.* (supra), we do not find any reason to differ with the order of the Id.CIT(A). Hence, the ground of appeal is dismissed.

25. The next ground of appeal challenges the finding of the Id.CIT(A) that TP adjustments should be confined to international transactions alone.

From the provisions of chapter X of the Act, it is clear that adjustment which has to be done to arrive at ALP is only in respect of transactions with the AE. The same reasoning was followed by the Hon'ble Bombay High Court in the following cases:

- i) *CIT vs. Tara Jewels Exports Pvt. Ltd.* (ITA No.1814 of 2013)
- ii) *CIT vs. Thyssen Krupp Industries India (P) Ltd.* (ITA No.2201 of 2013); and

- iii) *CIT vs. Goldstar Jewellery Design Pvt. Ltd.* (ITA No.2237 of 2013)

In the light of the above settled position of law, we do not find any reason to differ from the finding of the Id.CIT(A). Hence, the ground of appeal raised by the revenue is dismissed.

26. In the result, the appeal filed by the revenue is partly allowed.

27. The assessee raised the following grounds of appeal:

e grounds mentioned herein are without prejudice to one another.

That the order passed by the Ld. Commissioner of Income-Tax (Appeals) ['CIT (Appeals)'] under section 250 of the Income-tax Act, 1961 ('Act'), to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.

- (a) That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) and the learned AO erred in not allowing full deduction under section 80JJAA of the Act amounting to Rs 180,731,409.
 - (b) That the learned AO and the learned CIT (Appeals) erred in invoking the provisions of section 80A(4) in respect of deduction claimed under section 80JJAA for 10A units.
 - (c) That the learned AO and the learned CIT (Appeals) erred in not appreciating the Appellant's contention that, deduction under section 80JJAA is computed based on the expenditure incurred by the Appellant on salary / wages paid to "new workmen" and therefore section 80JJAA is an expenditure-based deduction and not linked to the profits or gains of the undertaking.
 - (d) That the learned AO and the learned CIT (Appeals) erred in concluding that, incomes referred to in sections under Heading "C – Deductions with respect to certain incomes" are arrived at after setting off all expenditure against revenue and a further deduction under section 80JJAA of identical expenditure or of a part would amount to double claim of deduction.
 - (e) That the learned CIT (Appeals) has not appreciated the Appellant's contention that, deduction under section 80JJAA is limited only to the residual profits forming part of the gross total income of the assessee, i.e. after the claim of deduction under section 10A of the Act.
3.
 - (a) That the learned CIT (Appeals) erred in confirming the disallowance made by the learned AO in re-allocating the interest expense to the extent of Rs. 12,980,367 relating to Unit-1 (non 10A unit) to Unit-2 (10A unit).
 - (b) That the learned CIT (Appeals) erred in not appreciating the fact that, loan was taken for construction of campus housing Unit-1 and accordingly, no interest was to be apportioned to Unit-2.
 - (c) That the learned CIT (Appeals) erred in not considering the Appellant's submissions and holding that, the loan was not completely utilised for construction of building, but for other purposes such as working capital and other business needs and accordingly, directed the AO to apportion 20% of total interest expenditure, based on the actual floor area occupied.
 4.
 - (a) That the Ld. CIT (Appeals) erred in confirming the disallowance made by the learned AO in re-allocating the rent expense to the extent of Rs. 47,294,681 relating to Unit-1 (non 10A unit) to Unit-2 (10A unit).
 - (b) That the learned CIT (Appeals) and the learned AO erred in considering the facts incorrectly and presuming that the Appellant has shifted its private custom bonded warehouse from Unit-2 (10A unit) to Unit-1 (non 10A unit).
 5. That the Ld. AO and the CIT (Appeals) erred in consequently levying interest under section 234B, 234C and 234D of the Act.
 6. That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.

28. The assessee-company also raised the following additional grounds of appeal:

Transfer Pricing Matters

7. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) - IV ('CIT(A)') erred in confirming the action of the Ld. Assessing Officer ('AO')/ Transfer Pricing Officer ('TPO') in making an adjustment to the extent of Rs. 48,61,77,068/- to the provision of contract software development and related services provided to its associated enterprises.
8. On the fact and in the circumstances of the case and in law, the Ld. CIT(A)/ AO/ TPO erred in:
 - 8.1. Rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant under Section 92D of the Act in good faith and with due diligence;
 - 8.2. Using data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation;
 - 8.3. Disregarding application of multiple year/ prior year data as used by the Appellant in the TP documentation;
- 8.4. Disregarding certain filters as applied by the Appellant in selection of the comparable companies at the time of TP documentation;
- 8.5. Applying/ modifying certain filters while undertaking comparability analysis;
- 8.6. Including companies i.e Persistent Systems Limited and Tata Elxsi (Seg) in the comparability analysis which are different from the Appellant in functions, asset base and risk profile;
- 8.7. Not granting risk adjustment based on actual differences in the risk profile between the Appellant and the comparable companies.
9. On the facts and circumstances of the case and in law, the Ld. CIT(A)/ AO/ TPO erred in including cost-to-cost reimbursement of expenses received, as part of the operating cost and operating income in computation of arm's length price.
10. On the facts and in the circumstances of the case and in law, the TPO erred in introducing E-zest Solutions Limited in its comparability analysis which is functionally dissimilar to the Appellant.

It is prayed that E-zest Solutions Limited be excluded from the set of comparables considered by the Ld. TPO for comparability analysis.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

29. Ground No.1 is general in nature and does not require adjudication.

30. Ground No.2 challenges restriction of deduction of section 80JJA of the Act to only to non-10A unit invoking the provisions of section 80A(4) of the Act. This issue was covered against the assessee in assessee's own case in earlier year for assessment year 2007-08. The relevant paragraph is extracted in revenue appeal. The ground of appeal raised by the assessee is dismissed.

31. Ground No.3 is not pressed and is accordingly dismissed.

32. Ground No.4 challenges re-allocation of rent expenses relating to non-10A unit. It was submitted as under:

During the FY 2007-08, the Appellant had paid rent amounting to Rs. 47,294,681/- to Millenia Realtors Private Limited, in respect of the approved private bonded warehouse for Unit-1 (non-10A), situated at RMZ Nxt, Sonnenahalli Village, KR Puram Hobli, Mahadevapura.

During the year, Unit-1 (non-10A) was carrying on its activities from owned premises at Campus, #138, EPIP, Whitefield and various other rented premises. During the year, Unit-1 (non-10A) had de-bonded premises at Phase-3, Salarpuria GRTech Park and SECON. Resources of the floors de-bonded were shifted to newly bonded floors (which was bonded on August 3, 2007) at RMZ nxt in Block 2B fourth & fifth floor and Block 2C fourth floor for business operations of Unit-1 (non 10A). Accordingly, the rent paid for the same was claimed as deduction by the Company from Unit-1 (non 10A). Details of the premises held by Unit-1 (non-10A) as on 1st April 2007, premises bonded & de-bonded during FY 2007-08 for Unit-1 (non-10A) is placed at Page 1216 to 1218 of the Paper Book.

Also, Unit-2 (10A) was carrying on its activities from various rented premises approved as private bonded warehouse by Customs and STPI. On October 23, 2007, Unit-2 (10A) de-bonded premises at Salarpuria GR Tech Park , RMZ nxt in Block 2A fourth floor and ITPL. The floors de-bonded from Unit-2(10A) are not in control of the Company after de-bonding and none of its units were using these premises after de-bonding. Resources of the de-bonded premises were shifted to newly bonded premises at Phase-3

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and RMZ Block 2B ground, first, second third floor & Block 2C fifth floor. Details of the premises held by Unit-2(10A) as on 1st April 2007, premises bonded & de-bonded during FY 2007-08 for Unit-2(10A) is placed at Page 1219 to 1221 of the Paper Book.

However, the AO reallocated the rent expenditure to unit II enjoying 10A benefit by holding as under:

- The floors bonded by Unit-1(non-10A) at RMZ were same as floors de-bonded by Unit-2(10A) at RMZ.
- The Company had shifted bonded floors from Unit-2(10A) to Unit-1(non-10A) in order to shift the expenditure of STP unit to non STP Unit.

The action of the AO came to be confirmed by the Id.CIT(A). Being aggrieved, the assessee is before us in the present ground of appeal.

33. It was contended before us that there was no shifting of private custom bonded warehouse from unit II (10A unit to unit I i.e. non-10A unit) and the date of de-bonding of private warehouse by 10A unit was later than the date of bonding by unit I i.e. non10A unit and even the floor space of the premises bonded and de-bonded are different. It was further submitted that the AO had re-allocated the rent based on presumptions and assumptions which is not permitted.

34. We heard rival submissions and perused material on record. From the perusal of the chart placed at page 28 of the written submissions placed before us, it is clear that there was no shifting of bonded warehouse from unit II to unit I. No addition can be made based on presumptions/assumptions. Thus, we allow this ground of appeal.

35. The additional grounds No.7 to 11 seeks to exclude the following comparables:

- i. Avani Cimcon Technologies Ltd ('Avani')
- ii. Bodhtree Consulting Limited ('Bodhtree')
- iii. E-Zest Solutions Ltd.
- iv. Infosys Technologies Ltd.
- v. Kals Information Systems Ltd.(seg.)

- vi. Persistent Systems Ltd.
- vii. Quintegra Solutions Ltd.
- viii. Tata Elxsi Ltd. (seg)
- ix. Thirdware Solutions Ltd.
- x. Wipro Ltd. (Seg.)
- xi. Softsol India Ltd.
- xii. Lucid Software Ltd.

Avani Cimcon Technologies Ltd ('Avani'):

36. This company was selected by the TPO, which was contested by the assessee-company. On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores.

36.1 Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter. Hence, the assessee-company is challenging the inclusion of this company on the ground that this company is into both software development services as well as development of products like Dxchange, Travel Solutions, Insurance Solutions, Customer Appreciation & Relationship Management Application (CARMA), Content Management systems etc. The website of the company indicates that it has developed a software product by name 'DXchange' and no segmental information is available. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

36.2 We heard rival submissions and perused the material on record. The comparability of Avani Cimcon Technologies Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

519. Vis-a-vis Avani Cimcon Technologies Ltd, findings of the Tribunal in the case of *M/s. Broadcom Communications Technologies P. Ltd* (supra), appears at para 5 of the order which is reproduced hereunder :

5. Avani Cincom Technologies Ltd.

5.1 This company was selected by the TPO as a comparable in spite of the objections of the assessee to the exclusion of this company as a comparable on

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the ground that this company is not functionally comparable to the assessee as it is into software products whereas the assessee only provides software development services to its AEs. The TPO rejected the assessee's objections on the ground that this company had categorised itself as a pure software developer, like the assessee and hence selected this company as a comparable. In coming to this conclusion, the TPO relied on information directly submitted by the company in response to enquiries under Section 133(6) of the Act.

5.2 Before us, the learned Authorised Representative reiterated the assessee's objections to inclusion of this company on the ground that it is not functionally comparable to the assessee as it is into software products. In support of this contention, the learned Authorised Representative placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for A.Y. 2008-09.

5.3 Per contra, the learned Departmental Representative supported the order of the TPO in including this company as a comparable.

5.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. We find that a co-ordinate bench of this Tribunal on the decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for A.Y. 2008-09 had held that this company be omitted from the set of comparables as it was functionally dis-similar from a company which only provides software development services to its AEs, like the assessee in the case on hand. At paras 7.6.1 and 7.6.2 of its order, the co-ordinate bench held as under :-

¶ 7.6.1 We have heard both parties and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the final set of comparables only on the basis of information obtained under section 133(6) of the Act. In these circumstances, it was the duty of the TPO to have necessarily furnished the information so gathered to the assessee and taken its submissions thereon into consideration before deciding to include this company in its final list of comparables. Non-furnishing the information obtained under section 133(6) of the Act to the assessee has vitiated the selection of this company as a comparable.

7.6.2 We also find substantial merit in the contention of the learned Authorised Representative that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected on the basis on any search process carried out by the TPO but only on the basis of information collected under section 133(6) of the Act. Apart from placing reliance on the judicial decision cited above, including the assessee's own case for Assessment Year 2007-08, the assessee has brought on record evidence that this company is functionally dis-similar and different from the assessee and hence is not comparable. Therefore the finding excluding it from the list

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of comparables rendered in the immediately preceding year is applicable in this year also. Since the functional profile and other parameters by this company have not undergone any change during the year under consideration which fact has been demonstrated by the assessee, following the decisions of the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt.22.2.2013, and in the case of Triology E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011), we direct the A.O./TPO to omit this company from the list of comparables.ö

5.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for A.Y. 2008-09, we direct the Assessing Officer / TPO to exclude this company, i.e. Avani Cincom Technologies Ltd. from the list of comparables in the case on hand.”

36.3 Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Avani Cimcon Technologies Ltd., from the list of comparables.

Bodhtree Consulting Limited ('Bodhtree'):

37. This company was selected by the TPO, but not contested by the assessee-company before the TPO. However, inclusion of this company was challenged before the Id.CIT(A) on the grounds of functional differences.

37.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

37.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that Bodhtree is in business of software products and has a hybrid service business model. It is engaged in providing open and end web solutions, software consultancy and design & development of software using latest technology and Bodhtree is a specialist entity offering niche IT services in software engineering,

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data management and document digitization. It was further submitted that the website of the Company mentions that the company offers product solutions in the areas of Data Quality, Business Intelligence, and Life sciences to a reputed customer base worldwide and its products include Spend Data Management Solution (SDMS), Multi Industry Data Anomaly Solution (MIDAS), data cleansing and integration software, Patent Asset Management (PAM), and Patent Search and Patent Analysis Tool (PSPAT). Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

37.3 We heard rival submissions and perused the material on record. The comparability of M/s.Bothdree Consulting Ltd., had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“20. Vis-a-vis M/s. Bodhtree Consulting Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 6 which is reproduced hereunder :

6. **Bodhtree Consulting Ltd.**

6.1.1 This company has been selected as a comparable by the TPO. The assessee objected to the inclusion of this company in the list of comparables both before the DRP and also before us on the grounds that it is functionally different as it is a product oriented company into software consulting, web services integration, data management, data clearing services, etc.

6.1.2 Before us, the learned Authorised Representative placed reliance on the decision of a co-ordinate bench of this Tribunal in the case of NXP Semi-Conductors India P. Ltd. (supra) for A.Y.2008-09 and the decision of the Mumbai Bench of the ITAT in the case of Nethawk Networks India Pvt. Ltd. (supra) for A.Y. 2008-09 wherein Bodhtree Consulting Ltd., was excluded from the list of comparable companies on account of being functionally different from a provider software development services to its AE as it has software products and a hybrid service business model.

6.2 Per contra, the learned Departmental Representative supported the orders of the TPO in including this company in the list of comparable companies.

6.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements relied upon by the assessee. We find that this company; i.e. Bodhtree Consulting Ltd. has been excluded from the list of comparables for providers software development services in the judicial decisions cited by the assessee (supra at para 6.1.2 of this order). The relevant portion at para 15 of the order in the case of NXP Semi-conductors India (P) Ltd. (supra) is extracted hereunder :-

õ 15.

Bodhtree Consulting Ltd.

15.1 This company has been selected as a comparable by the TPO. The assessee has objected to the inclusion of this company as a comparable, both before the DRP and this Bench, on the grounds that this company is functionally different as it has software products and a hybrid service business model. In the proceedings before us, the learned Authorised Representative placed reliance on the decision of the co-ordinate benches of this Tribunal in the cases of Mindtech (India) Ltd. (supra) and CISCO Systems (India) Pvt. Ltd., in IT(TP)A No.271/Bang/2014 dt.14.8.2014, both for Assessment Year 2009-10, wherein this company was excluded from the list of comparables. It was submitted by the learned Authorised Representative that though these cited decisions were rendered for Assessment Year 2009-10, the facts and circumstances of the case are similar for Assessment Year 2008-09 as well and applies to the year under consideration. The learned Authorised Representative prays that in view of the above, this company be excluded from the list of comparables.

15.2 Per contra, the learned Departmental Representative supported the orders of the authorities below in including this company in the list of comparable companies.

15.3.1 We have heard both parties and perused and carefully considered the material on record, including the judicial decisions cited by the Id. A.R. We find that this company has been excluded from the set of comparables for software development service companies in both the aforesaid decisions cited by the assessee. In Mindtech (India) Ltd., the relevant portion of the order at para 16 thereof it has been held as under :-

õ 16. We have considered the rival submissions. The Special Bench of the ITAT in the case of Maersk Global Centres (supra) had an occasion to deal with the question as to whether high profit margin making companies should be excluded as a comparable. The Special Bench after considering several aspects held in para 88 of its order that the potential comparable companies cannot be excluded merely on the ground that their profit is abnormally high. The Special bench held that in such cases it would require further investigation to ascertain the reasons for unusually high profit and in order to establish

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whether the entities with such high profits can be taken as comparable or not. In the light of the aforesaid decision of the Special Bench and in view of the admitted position that the assessee follows Fixed Price Project model where revenues from software development is recognized based on software developed and billed to clients, there is a possibility of the expenditure in relation to the revenue being booked in the earlier year. The results of Bodhtree from FY 2003 to 2008 excluding FY 2007 as given by the learned counsel for the assessee were also perused. Perusal of the same shows, that there has been a consistent change in the operating margins. The chart filed by the assessee in this regard is given as an annexure to this order. It appears to us that the revenue recognition method followed by the assessee is the reason for the drastic variation in the profit margins of this company. In the given circumstances, we are of the view that it would be safe to exclude Bodhtree Consulting from the final list of comparables chosen by the assessee. We hold and direct accordingly.ö

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude M/s.Bodhtree Consulting Ltd. Ltd., from the list of comparables.

E-Zest Solutions Ltd.:

38. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it functionally different.

38.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

38.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company is into diversified activities such as outsourced product engineering, product development, technology consulting, business consulting which are normally regarded as high-end ITES services. The services fall under the category of KPO services. Therefore, should be

excluded. Further, no segmental data is provided in the annual report of the company for the year under consideration. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

38.3 We heard rival submissions and perused the material on record. The comparability of M/s.E-Zest Solutions Ltd., had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“22. Vis-a-vis M/s. e-Zest Solutions Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 8 which is reproduced hereunder :

8. **e-Zest Solutions Ltd.**

8.1 This company was selected by the TPO as a comparable inspite of the assessee's objections to its inclusion as a comparable on the ground that it was functionally different from the assessee. The TPO rejected the assessee's objections on the ground that as per the information received under Section 133(6) of the Act this company is engaged in software development services and qualifies all the filters applied.

8.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables on the ground that it is functionally different to the assessee. It was submitted that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for A.Y. 2008-09, has held that this company is to be excluded from the list of comparables to a provider of software development services as it is rendering product development services and high and technical services which come under the category of KPO services.

8.3 Per contra, the learned Departmental Representative supported the order of the TPO including this company in the list of comparables.

8.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables to a provider of software development services as it is into product development services and high end technical services which come under the category of KPO Services; holding as under at para 14.4 thereof :-

ō 14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has

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included this company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133(6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q Information Systems (India) (P) Ltd. Supra that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The A.O. / TPO is accordingly directed.ö

8.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer / TPO to omit this company from the list of comparables in the case on hand.”

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude E-Zest Solutions Ltd., from the list of comparables.

Infosys Technologies Ltd.

39. This company was selected by the TPO, which was contested by the assessee-company.

39.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

39.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company provides end-to-end business solutions that leverage technology thereby enabling its client to enhance business performance including technical consulting, design, development, re-engineering, maintenance, systems integration, package evaluation and

implementation, and testing and infrastructure management services. The Director Report states that Income is from software service and products. However, no segmental information is available as regards profits earned on account of software services and software products. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

39.3 We heard rival submissions and perused the material on record. The comparability of Infosys Technologies Ltd., had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“23. Vis-a-vis M/s. Infosys Technologies Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 9 which is reproduced hereunder :

9. **Infosys Technologies Ltd.**

9.1 This company was selected as a comparable by the TPO in spite of the assessee's objections to its inclusion as a comparable on the grounds of its scale of operations and brand attributable profit margins. The TPO, however, brushed aside the assessee's objections on the ground that turnover and brand aspects were not materially relevant in the software development services segment.

9.2 Before us, the learned Authorised Representative contended that this company ought to be omitted from the list of comparables as it is not functionally comparable to the assessee since it commands substantial brand value, owns IPRs and is a market leader in software development activities, whereas the assessee in the case on hand is merely a provider of software services to its AEs and does not possess any brand value or own any intangibles or IPRs. In support of this proposition, the learned Authorised Representative placed reliance on the decision of a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra).

9.3 Per contra, the learned Departmental Representative supported the order of the TPO/DRP in including this company in the list of comparables to the assessee.

9.4.1 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncement relied on by

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the assessee. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables as it has huge revenue from software product development, Owned IPR and was not purely a provider of software services by observing at paras 11.4 thereof as under :-

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

9.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer to omit this company from the list of comparables in the case on hand.

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Infosys Technologies Ltd. from the list of comparables.

Kals Information Systems Ltd. (Seg.)

40. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it is functionally different.

40.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this, revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

40.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company derives its revenues primarily from software development services and software products. Besides, the company is also engaged in providing training, translation and interpretation services. The financials has two segments i.e. Application Software and Training. But there is no further bifurcation between software services and products. Inventory holding on account of software development products is around 43% of total current assets. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

40.3 We heard rival submissions and perused the material on record. The comparability of Kals Information Systems Ltd., had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“24. Vis-a-vis M/s. Kals Information Systems Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 10 which is reproduced hereunder :

10. **KALS Information Systems Ltd**

10.1 This is a comparable selected by the TPO inspite of the assessee's objections to its inclusion in the list of comparables on the grounds that it is functionally different and that the segment details were inconsistent with respect to software services revenue and software products revenue. The TPO, however, rejected the assessee's objections and included this company in the list of comparables by relying on the information received in reply to notice under Section 133(6) of the Act.

10.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables as it is functionally different, being into software products, whereas the assessee in the case on hand is merely into provision of software development services. It was submitted that the rejection of this company as a comparable to providers of software development services has been upheld by a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra).

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10.3 Per contra, the learned Departmental Representative supported the TPO's action in including this company in the final list of comparables.

10.4.1 We have heard both parties and perused and carefully considered the material on record, including the judicial decision relied on by the assessee. We find that the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables as it was into development of software products and hence not comparable to a provider of software services; observing as under at para 10.4 of the order :-

ö 10.4 We have heard both parties and perused and carefully considered the material on record. We find from the record that the TPO has drawn conclusions as to the comparability of this company to the assessee based on information obtained u/s.133(6) of the Act. This information which was not in the public domain ought not to have been used by the TPO, more so when the same is contrary to the Annual Report of the company, as pointed out by the learned Authorised Representative. We also find that the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in the case of Triology E-Business Software India Pvt. Ltd. (supra) have held that this company was developing software products and was not purely or mainly a software service provider. Apart from relying of the above cited decisions of co-ordinate benches of the Tribunal (supra), the assessee has also brought on record evidence from various portions of the company's Annual Report to establish that this company is functionally dis-similar and different from the assessee and that since the findings rendered in the decisions of the co-ordinate benches of the Tribunal for Assessment Year 2007-08 (cited supra) are applicable for this year i.e. Assessment Year 2008-09 also, this company ought to be excluded from the list of comparables. In this view of the matter, we hold that this company i.e. KALS Information Systems Ltd., is to be omitted from the list of comparable companies. It is ordered accordingly.ö

10.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer to omit this company from the list of comparables in the case on hand."

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd*

(supra) we direct the AO/TPO to exclude Kals Information Systems Ltd., from the list of comparables.

Persistent Systems Ltd.

41. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it functionally different.

41.2 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

42.3 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company is engaged in providing 'Outsourced Product Development Services' to independent software vendors and enterprises. The company offers complete product life cycle services from end to end. No bifurcation is available between the two activities of the company, being sale of software services and products. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

42.4 We heard rival submissions and perused the material on record. The comparability of Persistent Systems Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“25. Vis-a-vis M/s. Persistent Systems Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 12 which is reproduced hereunder :

12. **Persistent Systems Ltd.**

12.1 This company was selected as a comparable by the TPO overruling the objections of the assessee that this company, being into

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development of software products engaged in product design and analytic services is functionally different from the assessee who is only a provider of software development services. The TPO rejected the assessee's objections on the ground that this company is mainly, a software development service company, and as per the details filed/obtained under Section 133(6) of the Act 96% of its revenues are from software development services.

12.2 Before us, the assessee objected to the inclusion of this company in the list of comparables on the ground that it is functionally different, being engaged in software designing and analytic services and is therefore not comparable to a provider of software development service provider, as is the assessee in the case on hand. The learned Authorised Representative submitted that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company, being engaged in product development and product design services, is to be omitted from the list of comparables to providers of software development services.

12.3 Per contra, the learned Departmental Representative supported the orders of the authorities below in including this company in the list of comparables.

12.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement relied on by the assessee. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables as it is functionally different from a provider of software development services, being engaged in product development and product design services. At para 17.3 of this order the co-ordinate bench has held as under :-

¶ 17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.¶

12.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to omit this company from the list of comparables in the case on hand.”

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Persistent Systems Ltd. from the list of comparables.

Quintegra Solutions Ltd.

43. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that the company is having peculiar economic circumstances and as an extraordinary event of acquisition of another company.

43.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

43.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company provides a full range of custom high end IT solutions such as development, testing, maintenance, SAP, product engineering and infrastructure management services), proprietary software products and consultancy services in IT on various platforms and technologies. During the year under consideration, the company has developed certain proprietary products portfolio and acquired copy rights for the same in Flexible Home Building (HBfx), Hospital Management and Information System (HMIS) in healthcare and EduCampus in Education verticals as products. During the year, the company made a key strategic acquisition of PA Corporation Inc. ('PAC'), a US-based information technology corporation providing a broad range of services. PAC has core competencies in high-end IT consulting and leadership in middle space IT

services, enabling Quintegra to leverage across multiple points in the value chain. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

43.4 We heard rival submissions and perused the material on record. The comparability of Quintegra Solutions Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“26. Vis-a-vis M/s. Quintegra Solutions Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 13 which is reproduced hereunder :

13. Quintegra Solutions Ltd.

13.1 This company was selected as a comparable by the TPO inspite of the objection of the assessee to its inclusion in the list of comparables on the ground that there were peculiar economic circumstances in the form of acquisitions made during the year. The TPO rejected the assessee's objections holding that this company qualifies all the filters applied.

13.2 Before us, the assessee objected to the inclusion of this company as a comparable on the ground that it is functionally different as it is engaged in product engineering services and not in software development services. It was also submitted that this company was engaged in developing proprietary software products and has IPRs and is functionally different from a provider of software development services, as is the assessee in the case on hand. In support of its contentions, the assessee relied on the decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 where it was held that this company was to be omitted from the list of comparables.

13.3 Per contra, the learned Departmental Representative supported the orders of the authorities in including this company in the list of comparables.

13.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision relied on by the assessee. We find that the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company, being engaged in product engineering services, having substantial R&D activity resulting in the creation of proprietary software products and IPRs, is functionally different from a

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mere provider of software development services is to be omitted from the set of comparables; observing as under at paras 18.3.1 to 18.3.3 of the order :-

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

18.3.2 We also find from the Annual Report of Quintegra Solutions Ltd. that there have been acquisitions made by it in the period under consideration. It is settled principle that where extraordinary events have taken place, which has an effect on the performance of the company, then that company shall be removed from the list of comparables.

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

13.4.2 Following the decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to omit this company from the list of comparables in the case on hand.

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Quintegra Solutions Ltd. from the list of comparables.

Tata Elxsi Ltd.(seg)

44. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it is functionally

different and possess significant R&D activity and possess intangible assets and also fails the onsite filter.

44.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

44.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company operates into two segments: 1) System Integration services and 2) Software Development services. Software Development services segment is further diversified into sub-services/ activities being, 'Product Development services', 'Design Engineering services', 'Visual Computing Labs' for which no segmental information is available. Business Units of company include Embedded Product Design services, Animation and Visual Effects, System Integration Services. The financials indicate that the R&D activities has resulted in the creation of Intellectual properties. On perusal of the annual report, it can be seen that the company has R & D expenses of 3.39% of sales. On perusal of the annual report, it can be seen from the description of the activities performed in the embedded software service segment that the company has invested in R&D efforts in developing reusable software components, licensable IPs, etc. The company is engaged in IP development in communication and multimedia technologies. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

44.3 We heard rival submissions and perused the material on record. The comparability of Tata Elxsi Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“27. Vis-a-vis M/s. Tata Elxsi Ltd (seg), findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 15 which is reproduced hereunder :

15. **Tata Elxsi Ltd. (Seg)**

15.1 This company was a comparable selected by the TPO inspite of the assessee's objections to its inclusion in the set of comparables on the ground that it is a product company which has significant R&D activity, IPRs, etc and is therefore functionally dis-similar from the assessee who is a provider of software development services. The TPO, however, rejected the contentions put forth by the assessee and included this company in the set of comparables on the ground that he has taken only the software development and services segment for comparability purposes.

15.2 Before us, it was submitted that this company is not functionally comparable to the assessee as it performs a variety of activities under the software development and services segment, namely, product design, innovation design engineering and visual computing labs, as is reflected in the Annual Report of the company and therefore it is not purely a provider of software development services like the assessee. The learned Authorised Representative also submitted that the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) has held that this company is to be omitted from the list of comparables for providers of software development services, like the assessee in the case on hand.

15.3 Per contra, the learned Departmental Representative supported the orders of the authorities below in including this company in the list of comparable companies.

15.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision relied on by the assessee. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables to a provider of software development holding as under at paras 13.4.1 and 13.4.2 of its order extracted hereunder :-

¶ 13.4.1 We have heard both parties and carefully perused and considered the material on record. From the details on record, we find that this company is predominantly engaged in product designing services and not purely software development services. The details in the Annual Report show that the segment “software development services” relates to design services and are not similar to software development services performed by the assessee.

13.4.2 The Hon'ble Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. V ACIT (ITA No.7821/Mum/2011) has held that Tata Elxsi Ltd. is not a software development service provider and therefore it is not functionally comparable. In this context the relevant portion of this order is extracted and reproduced below :-

¶ 1. Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned Authorised

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Representative that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable portion.ö

As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.ö

15.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to omit this company from the list of comparables in the case on hand.”

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Tata Elxsi Ltd. from the list of comparables.

Thirdware Solutions Ltd.

45. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that its turnover is more than Rs.,500 crores.

45.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

45.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company is engaged in implementation and consulting services of software based on ERP and Business Intelligence. M/s.Thirdware also earns revenues from sale of user licenses and subscription. Software development services rendered by the company comprise of

implementation and consulting services of developed and *traded software*. There are no segmentals for software development services and product development services and the financials indicate that the production and sale of developed and traded software cannot be expressed in any generic unit and therefore, segmental data is not available. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

45.3 We heard rival submissions and perused the material on record. The comparability of Thirdware Solutions Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“28. Vis-a-vis M/s. Thirdware Solutions Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 16 which is reproduced hereunder :

16. Thirdware Solutions Ltd.

16.1 This company was included in the list of comparables despite the objections of the assessee to its inclusion in the list of comparables on the ground that its turnover was in excess of Rs.500 Crores.

16.2 Before us, the assessee objected to the inclusion of this company as a comparable for the reason that apart from software development services, it is in the business of product development, trading in software, giving licenses for use of software and that segmental details are not available. It was also submitted that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) in its order for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables for providers of software development services.

16.3 Per contra, the learned Departmental Representative supported the orders of the TPO in including this company in the list of comparables.

16.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision relied upon. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 had held that since this company is

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engaged in product development and earns revenue from sale of licenses it is to be omitted from the list of comparables for software development services, holding as under at para 15.3 of the order :-

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

16.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to omit this company from the list of comparables in the case on hand.”

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Thridware Solutions Ltd., from the list of comparables.

Wipro Ltd.(seg)

46. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it is functionally different and the revenue from software development services is less than 75% of total revenue and possess high turnover brand value.

46.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores.

46.2 Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter. Hence, the assessee-company is challenging the inclusion of this company on the ground that this company on the ground that the company is engaged in Information Technology Services, R&D Services, Business Processing Outsourcing and other business. The company caters to various industries and is leading India based provider of IT services and Products. Wipro is a giant company and a market leader assuming all risks leading to higher profits. During the year under consideration, the company has earned revenue from software development services (as considered by the TPO) of Rs 11955.6 crore which is 16.83 times higher than the revenue of the Appellant. There are no segmentals available for revenue from sale of product and services. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

46.3 We heard rival submissions and perused the material on record. The comparability of Wipro Ltd. (seg.) had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

“29. Vis-a-vis M/s. Wipro Ltd (seg), findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 17 which is reproduced hereunder :

17. **Wipro Ltd.**

17.1 This company was selected as a comparable by the TPO in spite of the assessee's several objections to its inclusion in the list of comparables on the grounds of functional dis-similarity, brand value, size, etc.

17.2 Before us, the learned Authorised Representative contended that this company i.e. Wipro Ltd. is not functionally comparable to the assessee as it owns significant intangibles; both in the nature of customer related and technology related intangibles. It was submitted that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra) has held that this company be omitted from the list of comparables for providers of

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software development services since it is into product development, owns significant IPRs, has immense brand value, etc.

17.3 Per contra, the learned Departmental Representative supported the TPO's action in including this company in the final list of comparables.

17.4.1 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncements cited and relied upon. We find that the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the list of comparables for providers of software development services for the following reasons as laid out at paras 12.4.1 and 12.4.2 of its order which is extracted hereunder :-

ö 12.4.1 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison.

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

17.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Ltd. (supra), we direct the Assessing Officer / TPO to omit this company from telecommunication expenses list of comparable companies.”

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd*

(supra) we direct the AO/TPO to exclude Wipro Ltd., from the list of comparables.

Softsol India Ltd.

47. This company was selected by the TPO, but contested by the assessee-company before the TPO on the ground that it is functionally different.

47.1 On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

47.2 Hence, the assessee-company is challenging the inclusion of this company on the ground that this company it has related party transactions (RPT) of 18.3%; thereby failing the RPT filter of 15%. Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

47.3 We heard rival submissions and perused the material on record. The comparability of Softsol India Ltd., had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

30. Vis-a-vis M/s. Softsol India Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 14 which is reproduced hereunder :

14. Softsol India Ltd.

14.1 This company was selected as a comparable by the TPO inspite of the assessee's objections that it was functionally different and dis-similar from the assessee. The TPO rejected the assessee's objections on the ground that as per the company's reply to the information called for under Section 133(6) of the Act, the company has categorised itself as a pure software developer and therefore included this company as a comparable to the assessee in the case on hand who was also a provider of software development services.

14.2 Before us, the learned Authorised Representative submitted that this company ought to be excluded from the list of comparables as a co-ordinate bench of this Tribunal in its order in 3DPLM Software Solutions Ltd. (supra) has held that this company is to be excluded as a comparable as it has related party transactions (RPT) of 18.3%; thereby failing the RPT filter of 15%.

14.3. Per contra, the learned Departmental Representative supported the order of the TPO in including this company in the list of comparables.

14.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision relied on by the assessee. We find that a co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has held that this company is to be omitted from the set of comparables observing / holding as under at para 19.3 of the order :-

¶ 19.3 We have heard both parties and perused and carefully considered the material on record. We find that the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 has excluded this company from the set of comparables for the reason that RPT is in excess of 15% following the decision of another bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2011. As the facts for this year are similar and material on record also indicates that RPT is 18.3%, following the afore cited decisions of the co-ordinate benches (supra), we hold that this company is to be omitted from the list of comparables to the assessee in the case on hand.¶

14.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to exclude this company from the list of comparables in the case on hand.

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Softsol India Ltd., from the list of comparables.

Lucid Software Ltd.

48. This company was selected by the TPO. On appeal, the Id.CIT(A) deleted this company from the list of comparables by applying turnover filter of range of Rs.200 crores to Rs.2000 crores. Being aggrieved by

this revenue was in appeal before us in IT(TP)A No.1070/Bang/2013 wherein we held that turnover is not an appropriate filter.

48.1 Hence, the assessee-company is challenging the inclusion of this company on the ground that the company is a provider of software products and services to the global NDT (Non Destructive Testing) and material sciences industry. Lucid has developed proprietary software known as 'Mullam'. Lucid amortizes expenditure in relation to this software on a deferment basis. Approximately 28% of total capital employed is invested in product development expenditure. No bifurcation is available between the two activities of the company, being software development services and sale of software products.

48.2 Reliance in this regard was placed on the decision of the co-ordinate bench of Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd. vs. Asst.CIT* in IT(TP)A No.1682/Bang/2012 dated 26/08/2015.

48.3 We heard rival submissions and perused the material on record. The comparability of Lucid Software Ltd. had come up for consideration before co-ordinate bench of this Tribunal in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra). The relevant portion is extracted hereunder:

31. Vis-a-vis M/s. Lucid Software Ltd, findings of this coordinate bench in the case of M/s. Broadcom Communications Technologies P. Ltd (supra), appears at para 11 which is reproduced hereunder :

11. Lucid Software Ltd.

11.1 This company was selected as a comparable by the TPO. Before the DRP, the assessee objected to the inclusion of this company in the list of comparables but the DRP retained this company as a comparable on the ground that it is a pure software development services provider and does not have any revenue by way of sale of products/licenses.

11.2 Before us also, the assessee objected to the inclusion of this company as a comparable on the grounds that it is into software product development and is therefore functionally different from the assessee in the case on hand. In this context, the learned Authorised Representative submitted that the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 has omitted this company from the list of comparables on the ground that it is into development of software

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products and therefore is functionally different from provider of software development services.

11.3 Per contra, the learned Departmental Representative supported the orders of the authorities below in including this company as a comparable.

11.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the decision relied on by the assessee. We find that the co-ordinate bench in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09 excluded this company from the list of comparables observing that this company, being into development of software products, is functionally different from a provider of software development services, as is the assessee's in the case on hand and therefore ought to be excluded from the list of comparables. At para 16.3 of this order the co-ordinate bench held as under :-

ö 16.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the company i.e. Lucid Software Ltd., is engaged in the development of software products whereas the assessee, in the case on hand, is in the business of providing software development services. We also find that, co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 (IT(TP)A No.845/Bang/2011), LG Soft India Pvt. Ltd. (supra), CSR India Pvt. Ltd. (supra); the ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) and the Delhi ITAT in the case of Transwitch India Pvt. Ltd. (supra) have held, that since this company, is engaged in the software product development and not software development services, it is functionally different and dis-similar and is therefore to be omitted from the list of comparables for software development service providers. The assessee has also brought on record details to demonstrate that the factual and other circumstances pertaining to this company have not changed materially from the earlier year i.e. Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09. In this factual matrix and following the afore cited decisions of the co-ordinate benches of this Tribunal and of the ITAT, Mumbai and Delhi Benches (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.ö

11.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of 3DPLM Software Solutions Pvt. Ltd. (supra) for Assessment Year 2008-09, we direct the Assessing Officer/TPO to exclude this company from the list of comparables in the case on hand.

Respectfully following the ratio of the decision of the co-ordinate bench in the case of *M/s.Hewlett-Packard (India) Software Operation P.Ltd* (supra) we direct the AO/TPO to exclude Lucid Software Ltd from the list of comparables.

In the result, the appeal filed by the assessee as well as the revenue is partly allowed.

49. The cross objection filed by the assessee is dismissed as the delay in filing cross objections within prescribed time is not properly explained.

Order pronounced in the open court on 06th April, 2018

Sd/-
(SUNIL KUMAR YADAV)
JUDICIAL MEMBER

Place : Bengaluru.

D a t e d : 06/04/2018

srinivasulu, sps

Copy to :

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

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore