

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.684/BANG/2017
Assessment Year : 2012 – 13

M/s SAP Labs India Pvt. Ltd., No.138, Export Promotions Industrial Park, Whitefield, Bengaluru-560 066. PAN – AAFCS 3649 P APPELLANT	Vs.	The Dy. Commissioner of Income-tax, Circle-6(1)(1), Bengaluru. RESPONDENT
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Appellant by	:	Shri Aliasgar Ram Purawala, C.A
Respondent by	:	Ms. Neera Malhotra, CIT

Date of Hearing	:	01-07-2021
Date of Pronouncement	:	23-07-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against the final assessment order dated 31/01/2017 passed by Ld. DCIT circle 6 (1) (1), Bangalore for assessment year 2012-13 on following grounds of appeal:

In conformity with Rule 8 of Income-tax Appellate Tribunal Rules, 1963

Each of the grounds and/or sub-grounds of the appeal are independent and without prejudice to the others.

Transfer Pricing Matters

1. On the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('learned DRP') erred in confirming the action of the learned Assessing Officer ('learned AO')/ learned Transfer Pricing Officer ('learned TPO') in making an adjustment of INR 164,09,02,396 to the provision of contract software development and related services provided to its associated enterprises. **[corresponding to ground no. 1]**
2. On the fact and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in:
 - 2.1. Rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant under Section 92D of the Act in good faith and with due diligence; **[corresponding to ground no. 2.1]**
 - 2.2. Using data, which was not contemporaneous, and which was not available in the public domain at the time of preparing the TP documentation; **[corresponding to ground no. 2.2]**
 - 2.3. Disregarding application of multiple year/ prior year data as used by the Appellant in the TP documentation; **[corresponding to ground no. 2.3]**
 - 2.4. Disregarding certain filters as applied by the Appellant in selection of the comparable companies at the time of TP documentation. **[corresponding to ground no. 2.4]**
 - 2.5. Applying/ modifying certain filters while undertaking comparability analysis; **[corresponding to ground no. 2.5]**
 - 2.6. Including following companies in the comparability analysis which are different from the Appellant in functions, asset base and risk profile –
 - Infosys Limited
 - Larsen & Toubro Infotech
 - Persistent Systems Limited

- Genesys International Corp. Limited
- Sasken Communication Technologies Limited

[corresponding to ground no. 2.6]

2.7. Not considering following company similar to the Appellant in functions, asset base and risk profile while performing comparability analysis –

- Akshay Software Technologies Private Limited
- Sankhya Infotech Limited

[corresponding to ground no. 2.7]

2.8. Erred in the computation of the working capital adjustment **[corresponding to ground no. 2.8]**

2.9. Not granting risk adjustment thereby ignoring the limited risk nature of the contract software development and related services provided by the Appellant, resulting in selection of full-fledged entrepreneurial companies as comparables; **[corresponding to ground no. 2.9]**

3. On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in incorrectly computing the margin of certain companies selected as comparables **[corresponding to ground no. 3]**

4. On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in not considering provision for bad debts, provision for doubtful debts, provision for warranties, etc. for the purpose of computing the margin of the Appellant as well as the companies selected as comparables. **[corresponding to ground no. 4]**

5. On the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in making adjustment even to the value domestic transaction of INR 10,11,94,632 instead restricting the adjustment only to the international transaction as provided under Section 92C of the Income-tax Act, 1961 ('the Act') **[corresponding to ground no. 5]**

Other than Transfer Pricing Related

6. On the facts and in the circumstances of the case and in law, the Ld. AO erred in not following the order of the Hon'ble DRP in allowing depreciation at 60% in respect of server, routers, switches and other networking equipment **[corresponding to ground no. 6]**

7. On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B and section 234D of the Act amounting to INR 264,104,392/- and INR 14,916,633/- respectively **[corresponding to ground no. 7]**

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.

Brief facts of the case are as under:

2. The Assessee filed his return of income on 23/11/2012 declaring total income of Rs.64,48,31,500/-. The return was processed under section 143 (1) of the Act. The case was selected for scrutiny and notices under section 143 (2) was issued to assessee, in response to which, representative of assessee appeared before the Ld.AO and filed requisite details as called for.

2.1 During the year under consideration, the Ld.AO observed that, assessee had international transaction with its associated enterprises that exceeded Rs. 15 crores. Accordingly, reference was made under section 92C of the Act, to the Ld.TPO. The Ld. TPO on receipt of reference called upon assessee to file economic details of the international transaction entered into by assessee with its AE.

2.2 From the details filed by assessee, Ld.TPO observed that assessee had following international transaction with its associated enterprises:

Particulars	Amount (Paid)	Amount (Recd)	Method
Software Development and related services		10,460,670,322	TNMM
IT Support Charges	1,922,226,124		TNMM
Staff Welfare Expenses	20,618,366		TNMM
Reimbursement of Travel Expenses	8,994,199		TNMM
Total	1,951,838,689	10,460,670,322	12,412,509,011

2.3 The Ld.TPO observed that assessee considered following 12 comparables having average margin of 10.01%:

Sl.	Name of the comparable	Weighted Average (%)
1	Helios & Matheson Information Technology Ltd.	12.25
2	L G S Global Ltd.	8.77
3	Melstar Information Technologies Ltd.	-7.38
4	Persistent systems & Solutions Ltd.	12.83
5	Synetairos Technologies Ltd.	13.06
6	E-Zest Solutions Ltd.	26.97
7	IDBI Intech Ltd.	4.00
8	Ideavate solutions Pvt ltd	30.64
9	Jeevan Scientific Technologies Ltd.	4.04
10	Proteans software solutions pvt. Ltd	0.43
11	Allied Digital Services Ltd. (solutions	-0.76
12	Mindtree Ltd ((IT Services segment)	14.35
Average		10.01%

2.4 The assessee computed its margin at 4.83% by using OP/TC as PLI and TNMM as most appropriate method. As margin was within the permissible range it held its transaction to be at arms length.

2.5 Dissatisfied with the selection of comparables by assessee, the Ld.TPO carried out fresh search, thereby shortlisted 14 comparables with average margin of 13%. The assessee further filed additional comparables from which the Ld.TPO accepted 2

comparables. The final list of comparables selected by the Ld. TPO consisted of following 10 companies with average margin of 23.63%

Sl. No.	Name of the Taxpayer	OP/OC
1.	Datamatics Global Services Ltd.	14.57%
2.	Genesys International Corpn. Ltd.	30.09%
3.	I C R A Techno Analytics Ltd.	17.24%
4.	Infosys Ltd.	43.10%
5.	Larsen & Toubro Infotech Ltd.	25.47%
6.	Mindtree Ltd.	15.01%
7.	Persistent Systems Ltd.	27.20%
8.	R S Software (India) Ltd.	15.34%
9.	Sasken Communication Technologies Ltd.	12.15%
10.	Spry Resources India Pvt. Ltd.	26.18%
	Average	22.63%

2.6 The Ld.TPO granted the working capital adjustment and computed the shortfall as proposed adjustment at Rs.144,21,30,393/- in the hands of assessee. The Ld.TPO also included certain domestic transaction to be forming part of the international transaction.

2.7 On receipt of the Transfer Pricing order from the Ld.TPO, the Ld.AO passed draft assessment order wherein following disallowances were computed:

Disallowance of depreciation - Rs.3,52,663/-

Disallowance of provision under section 36(1)(va)-Rs.14,97,807/-

On receipt of the draft assessment order, assessee filed objections before the DRP.

2.8 The DRP accepted the objections filed by assessee in respect of 3 comparables being Detamatics Global Services Ltd., ICRA Techno Analytics Ltd., RS Software (India) Ltd. In respect of the objection raised regarding the domestic transaction forming part

of international transaction, the DRP upheld the observations of the Ld.TPO. On depreciation on computer peripherals, DRP directed the Ld.AO to consider depreciation at 60%, and in respect of disallowance under section 36(1)(va) of the act in respect of employees contribution to provident fund and ESIC, the Ld.AO was directed to allow the deduction claimed by assessee provided the same was filed before the due date of return of income.

3. On receipt of the DRP directions, Ld.AO to excluded comparables directed by the DRP, however included the domestic transaction as a part of adjustment under section 144C of the Act, instead of restricting it only to the international transaction as provided under section 92CA of the act.

3.1 The Ld.AO thus made addition amounting to Rs.228,60,42,170/-in the hands of assessee.

4. Aggrieved by the order passed by the Ld.AO, assessee is in appeal before us now.

4.1 At the outset, Ld.AR submitted that Ground No.1 is general and therefore need not be adjudicated.

4.2 Ld.AR submitted that assessee do not wish to argue Ground No.2- 2.5, in Ground 2.6 assessee do not wish to press Sasken Communications Technologies Ltd., in Ground 2.7, assessee do not wish to press Akshay software Technologies Ltd. Assessee also do not wish to argue Ground No.3 and Ground No.4.

Accordingly these grounds are dismissed as not pressed.

5. Before we undertake the comparability analysis it is *sine qua non* to understand the functions performed, assets owned and risks assumed by assessee under the software development

service segment. The Ld. TPO in the Transfer Pricing order has analysed functions performed by assessee which are as under:

2. Functional Analysis of the Taxpayer:

The functions of the Taxpayer:

2.1 As per the agreement

SAP Labs agrees to provides SAP AG with assistance services in the fields of design, development and support of software products as explicitly request by SAP AG on a case by case basis comprising:

- The assistance in research on and design and development of new software products;
- The creation of enhancements and modifications to existing SAP AG software modules;
- The offering of support services for SAP AG software modules.

2.2 As per the TP document

SAP Labs India is a research and development and product support centre for SAP AG services. SAP Labs India researches, designs and delivers leading-edge software applications that enhance and extend SAP solution and is recognized within the SAP global organization as one of the prime contributors of innovation, quality and service. Sap India provides software development and related services to SAP AG and focuses on key areas like ERP, CRM, SRM, Netweaver, Globalization, Emerging Solutions, Custom Development, Active Global Support and Installed Base Maintenance.

2.3 Analysis of the functions performed by the Taxpayer:

SAP India provides software development and related services and focuses on key areas like ERP, CRM, SRM, NetWeaver, globalization, Emerging Solutions, Custom Development, Active Global Support and Installed Base Maintenance.

a. Software Development Services

SAP Labs India carries out software design, development and testing for SAP AG at its facility in Bangalore based on the R & D agreement with SAP AG. SAP Labs India assists in the development of new software products, enhancements and modification of existing software modules, related support services and consultancy services. An understanding of SAP India's participation in the various stages of the work undertaken and development process will determine the quantum of inputs that SAP Labs India undertakes in the value chain of the Group.

b. General Management Functions

i. Corporate Strategy Determination

ii. Finance Accounting, Treasury and Legal Function

iii. Human Resource Management

Assets owned:

5.1 In the transfer prising study report at page 91 of paper book, it has been submitted that assessee does not own any intangibles and neither does it undertake any research and

development on its own account that leads to the development of nonroutine intangibles. It has been mentioned that assessee uses the trademark, processes, know-how, technical Tata software, operating/quality standards etc their blend/owned by the AE. It has been submitted that this assessee does not own any nonroutine intangibles. Other assets owned by assessee are in respect of land, buildings, computer equipments, office equipment furniture fixtures etc which are used to carry out day to day business activities.

5.2 Risk assumed: in the TP study report reveals that assessee is a risk insulated company for SWD services to its AE and their affiliates. Except for foreign exchange risk, assessee do not undertake any other risk as compared to its AE.

5.3 Characterisation: based on the above assessee has been characterised as a risk insulated company providing services only to the AE and its affiliate.

6. **In Ground 2.6** assessee challenges inclusion of following comparables:

- Infosys Ltd.
- Larsen and Toubro Infotech Ltd.
- persistent systems Ltd.
- Genesis international Corp Ltd.

6.1 At the outset, the Ld.AR submitted that, above comparables have been considered by coordinate bench of this *Tribunal* in case of *NXP India Pvt.ltd. vs DCIT* in ITA No. 692/B/2017 by order dated 27/04/2020. It has been submitted that *NXP India*

Pvt.Ltd., was also characterised to be a captive software service provider to its AE.

6.2 The Ld.CIT.DR though objected, could not controvert the observations of this *Tribunal* in case of *NXP India Pvt. Ltd.*, (*supra*).

7. We have perused submissions advanced by both sides in light of records placed before us. We note that the functional profile of this assessee and the assessee in the decision cited by the Ld.AR are same. Above comparables have been dealt with by this Tribunal as under:

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PERSISTENT SYSEMS LIMITED

6. The assessee objected for the exclusion of this company by the lower authorities in the tally of comparables by arguing that it is engaged in OPD and there is a difference in OPD and IT services and that the assessee is having revenue from other sources and no segmental data is available. It was also submitted that in the assessment year 2012-2013, it is an abnormal year of operation and it is owning various intangibles. For this purpose, he relied on the order of the Bangalore Bench of the Tribunal in the case of *NXP Semiconductor India Private Limited* in IT(PA) No.1634/Bang/2014 for assessment year 2009-2010 – order dated 22nd July, 2015.

6.1 We have carefully gone through the order of the co-ordinate Bench in the case of *NXP Semiconductor India Pvt. Ltd.* (supra) for the assessment year 2009-2010, wherein it was observed that Persysent Systems Limited was engaged in product development and product design and analysis services is functionally different from a pure software service provider and therefore, excluded it from the list of comparables for software development services. The same view was taken in the case of *Saxo India Pvt. Ltd.* in ITA No.6148/Del/2015 – order dated 05th February, 2016, by observing that Persysent Systems Limited is engaged in running software development services as well as sale of software products. Albeit the percentage of software products in the total revenue is less, as has been noted by the TPO, and also there is no precise information about the contribution made by such small sale of

software products to the total profits of the company. As no segmental information is available in respect of this company and the figures have been adopted by the TPO at entity level, it was directed to exclude Persysent Systems Limited from the list of comparables. In the present case also, it is noticed that Persysent Systems Limited is engaged in software products development. There is a difference between the outsourced software product development and IT services, which is evident from page nos. 973 and 974 of the paper book, as under:-

“Outsourced Software Product Development (OPD) is different from IT services.

Unlike a typical IT services project, where requirements are fixed while time and money are variable, a software product development project starts with fixed time and money, thus leaving requirements as the only variable. Essentially, the product development team's task is to produce the best set of requirements within a fixed time and budget. Persistent Systems has emerged as a leader in the OPD segment – a segment which is fast growing.

OPD and outsourced IT services: the difference.

How is OPD different from outsourced IT services is an oft asked question. In IT services, projects start with well-defined requirements, and vendors use time and money as variables to arrive at a reasonable cost estimate for the project. After completion, the project goes into maintenance mode.

In product development, requirements are less clearly defined. Instead, most product developers are given ship-dates for the product that are typically determined by external factors. Once the ship-dates are identified, the budgets for the product are frozen. In product development projects, all requirements can never be

completely fulfilled in a particular version. As a result, most product companies plan multiple product versions for their product. Every team member must contribute not only to building features for the current release but must also contribute enhancements and provide feedback for future releases of the product.”

6.2 Persysent Systems Limited having revenue of 8103.64 Million from software services and other income of 323.76 million from income from other sources. Assessment year 2012-2013 is an abnormal year of operation to Persysent Systems Limited, which is evident from the annual report placed on record by the assessee in its paper book. Further, Persysent Systems Limited is having intangibles to the tune of 2402.67 million as evident from its balance sheet ended on 31.03.2012. Being so, it is not comparable to assessee's case. We, therefore, direct the TPO to exclude Persysent Systems Limited from the list of comparables.

LARSEN & TOUBRO INFOTECH LIMITED

7. The learned AR relied on the order of the ITAT Bangalore Benches in the case of *CGI Information Systems and Management Consultants Private Limited* in IT(TP)A No.586/Bang/2015 – order dated 11.04.2018 and submitted that it was excluded from the list of comparables for the reason that Larsen & Toubro Infotech Limited was a software product company and segmental information on SWD services was not available. In the present case, Larsen & Toubro Infotech Limited engaged in development of software onsite and its

overseas revenue for the financial year 2011-2012 was Rs.27,838,752,995 and domestic revenue was Rs.1,756,792,454. Further in the case of *Huawei Technologies India Pvt. Ltd.* in IT(TP)A No.1939/Bang/2017 for assessment year 2012-2013 – order dated 31.10.2018 has taken the same view that it cannot be a comparable with that of the assessee. Being so, we direct the TPO to exclude the same from the list of comparables.

INFOSYS LIMITED

8. The argument of the learned AR is that Infosys Limited is functionally different from the assessee. It owns intangible and undertakes research and development. The learned AR also submitted that it has high brand value and turnover. On the contrary, the learned DR submitted that the nature of services remains the same irrespective of whether it is engaged in providing onsite / offsite services.

8.1 We have heard the rival submissions and perused the material on record. Similar issue came up for consideration before the Tribunal in the case of *NXP Semi Conductors India Pvt. Ltd. v. DCIT* in IT(TP)A No.1634/Bang/2014 – order dated 27.07.2015, wherein it was held as under:-

“10.4.1 We have heard both parties and perused and carefully considered the material on record; including the judicial decisions cited and placed reliance upon. We find that a coordinate bench of the Tribunal in the case of Cisco Systems Services B.V., India Branch (supra), for Assessment Year 2009-10 had held that this company be excluded from the final set of

comparables on the ground that it is functionally dis-similar and different from a purely software service provider and at para 20 of the order has held as under :-

“20. We have perused the order's and heard the contentions. There is no dispute that the M/s. Cisco Systems India (P) Ltd. (supra) is an affiliate of the assessee company and engaged in similar business like that of the assessee namely rendering software services development etc. Though the said company was having other business also, with regard to its software development segment, this Tribunal held Bodhtree Consulting Ltd., Infosys Ltd., Kals Information Systems Ltd. and Tata Elxsi Ltd. to be not proper comparables. Relevant paras of the order dt.14.8.2014 is reproduced hereunder :-

26.2 Infosys Technologies Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. 3DPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-

“11.0 Infosys Technologies Ltd.

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

11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee

is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

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

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

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

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

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

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems. In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.

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

is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

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

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

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

Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.” The decision rendered as aforesaid pertains to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies.”

10.4.2 Following the above decision of the co-ordinate bench of this Tribunal in the case of Cisco Systems Services BE, India Branch (supra), we direct the Assessing Officer/TPO to omit this company from the final set of comparables as it is functionally different from the assessee in the case on hand, who is purely a software service provider.”

8.2 In the present case also, Infosys Limited is engaged in a leading global technology services corporation. The company provides business consulting, technology, engineering and outsourcing services to help clients build tomorrows enterprise. In addition, the company offers software products for the banking industry. It owns high brand value at

Rs.56,286 crore in the year 2012 and percentage of brand value to revenue is 1.67% and brand value as a percentage of market capitalization is 34.2%, and also incur huge amount for research and development at Rs.5 crore as a capital expenditure and Rs.655 crore as a revenue expenditure for the year ended 31st March, 2012. Therefore, it cannot be said to be a comparable. We, therefore, direct the TPO to exclude Infosys Limited from the list of comparables.

GENESYS INTERNATIONAL CORPORATION LIMITED

9. The learned AR submitted that Genesys International Corporation Limited was not considered as a comparable in the case of *CGI Information Systems and Management Consultants Private Limited* in IT(TP)A No.586/Bang/2015 – order dated 11.04.2018, by observing as under:-

"35. We have given a careful consideration to the rival submissions. It is clear from the material brought to the notice of the TPO by the Assessee that this company renders mapping and geospatial services. In rendering such services it develops software. But that does not mean that this company is in the business of software development. The business profile of this company as per the annual report does not show that this company is into software development service. The only line of business that this company carries on is rendering-GIS based services and this is clear from the annual report which specifies that since the company carries on only one line of business viz GIS based services there is no need to give any segmental results. In the circumstances, we are of the view that there is no basis for the TPO to conclude that this company is predominantly into software development services. The presence of intangible assets is indicative of the fact that this company is not in software development services business. The TPO has overlooked this aspect and proceeded on the basis that the presence of intangible assets would not be significant. Rule 108(2) of the Income Tax Rules, 1962 (Rules) specifically

provides that for the purposes of sub-rule (1) of Rule 10B, the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:-

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

In the given facts and circumstances, we are of the view that Genesys International Corporation Ltd., cannot be considered as a comparable company and the said company should be excluded from the final list of comparable companies. We hold accordingly."

9.1 It was also submitted that Genesys International Corporation Limited is functionally different from assessee's case and no segmental information is available and it has high research and development expenditure and intangibles. The learned Departmental Representative submitted that Genesys International Corporation Limited is not a comparable case, being so, the ratio laid down in the case of *CGI Information Systems and Management Consultants Private Limited (supra)* cannot be applied to assessee's case.

9.2 We have heard the rival submissions and perused the material on record. In the present case, CGI Information Systems and Management Consultants Private Limited and assessee are in the business of software development and it cannot be said that the case of CGI Information Systems and Management Consultants Private Limited cannot be considered as a comparable to assessee's case. Therefore, the ratio laid down in the case of *CGI Information Systems and Management*

Consultants Private Limited (supra) is squarely applicable to the assessee's case. As rightly pointed out by the learned AR, Genesys International Corporation Limited is engaged in providing Geographical Information Services comprising of Photogrammetry, Remote Sensing, Cartography, Data Conversion, state of the art terrestrial and 3D geo-content including location based and other Computer based related services. Being so, it is functionally different from assessee's case. Further, no segmental information is available. It has given gross revenue from GIS services at Rs.95,98,72,089 and there is high research and development expenditure incurred as on 31.03.2012 at Rs.10,64,10,464. Intangible is very high and also have high brand value as evidence the financial statement page 1204 to 1237. Being so, this company cannot be considered as a comparable company. We, therefore, direct the TPO to exclude it from the list of comparables.

7.1 Above views has been consistently followed by coordinate benches of this Tribunal in various case more particularly in case of *CGI Information Systems and Management Consultants Pvt. Ltd., vs ACIT reported in (2018) 94 Taxmann.com 97* for assessment year 2012-13.

Respectfully following the view taken by this tribunal we hold that the aforesaid for companies are to be excluded from the final list of comparables for the purpose of determining the arm's length margin.

Accordingly this ground raised by assessee stands allowed in respect of the comparables considered hereinabove.

8. In **Ground No. 2.7** assessee seeks inclusion of Sankhya Infotech ltd.

9. We note that this comparable has not been analysed by the Ld.TPO, and therefore we direct this comparable to Ld. TPO to be considered based on FAR with that of assessee.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

10. Ground No.5 has been raised by assessee as the Ld. AO included the value of domestic transaction for making adjustment instead of restricting the adjustment to the international transaction.

10.1 It has been submitted by the Ld. ar that the margin has been applied in respect of its domestic sales instead of restricting it to the international transaction. Statutory provisions under chapter X of the Act mandates ALP to be determined only in respect of transactions with associated enterprises. Any adjustment which is in close of domestic transactions is uncalled for under this chapter. We accordingly direct the Ld. AO/TPO to restrict the adjustment if any that may be computed are wildly or giving effect to the order only in respect of the transactions that assessee had with its associated enterprises.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

11. Ground No. 6 is in respect of the depreciation disallowed on computer peripherals at 60%.

12. The Ld.AR submitted that DRP had directed the Ld.AO to grant depreciation at 60% on computer peripherals which has not been followed while passing the final assessment order. We

thus direct the Ld. AO to comply with the directions of DRP in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

13. Assessee vide application dated 25/11/2020 has raised following additional ground No. 8:

Ground relating to other than transfer pricing matters

8. That on the facts and in the circumstances of the case and in law, the Learned Assessing Officer ('learned AO') and the Hon'ble Dispute Resolution Panel ('learned DRP') ought to grant deduction under section 37(1) of the Income Tax Act, 1961 for Education Cess and Secondary and Higher Education Cess (collectively referred to as 'Cess') paid by the Appellant during the year.

It is prayed that the deduction of Education Cess and Secondary and Higher Education Cess should be allowed to the Appellant as business expenditure under the provisions of the Act.

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.

13.1 The above additional ground is a part of the grounds relating to the determination of assessed income in the hands of assessee. It is not dispute that assessee has claimed the expenses under section 37(1) towards the education cess and secondary and higher education cess paid during the year under consideration. This as they'd being statutory nature needs to be considered while computing the tax payable in the hands of assessee It is therefore necessary for the ground to be admitted.

The additional ground therefore raised by assessee is admitted.

13.2 The Ld.A.R. at the outset submitted that the issue stands squarely covered by the decision of *Hon'ble Rajasthan High Court*

in case of *Chambal Fertilisers and Chemicals Ltd. vs JCIT* in ITA No. 52/2018 by order dated 31/07/2017.

14. Ld.CIT.DR could not controvert the above submissions of assessee.

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

15.1 *Hon'ble Rajasthan High Court* in the above referred case has held cess to be an allowable expenditure in the hands of assessee. Respectfully following the same we direct the Ld.AO to consider the claim of assessee in accordance with law.

Accordingly the ground raised by assessee stands allowed.

In the result appeal filed by assessee stands allowed only in respect of the issue contested before this Tribunal as indicated hereinabove.

Order pronounced in the open court on 23rd July, 2021

Sd/-
(B. R. BASKARAN)
Accountant Member
Bangalore,
Dated, the 23rd July, 2021.
/Vms/

Sd/-
(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-07-2021		Sr.PS
3.	Draft proposed & placed before the second member	-07-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-07-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-07-2021		Sr.PS/PS
6.	Kept for pronouncement on	-07-2021		Sr.PS
7.	Date of uploading the order on Website	-07-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-07-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order			
13.	Draft dictation sheets are attached	No		Sr.PS