IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri D.S. Sunder Singh, Accountant Member

ITA No.2233/Hyd/2018		
Assessment Year:2014-15		
M/s. ADP Private Ltd Hyderabad PAN:AANCA8983A	Vs.	Dy. Commissioner of Income Tax, Circle 1(1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri H. Srinivasulu	
Revenue by:	Sri Srinivas Reddy, DR	
Date of hearing:	10/09/2020	
Date of pronouncement:	18/12/2020	

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2014-15 against the final assessment order passed u/s 143(3) r.w.s. 92CA of the Act dated 30.10.2018.

2. Brief facts of the case are that the assessee company ADP (P) Ltd, is a captive service provider of its AE's, i.e. it provides software development services (SDS in short) and I.T. Enabled Services (ITeS) to its group companies. It filed its return of income for the A.Y 2014-15 on 28.11.2014 declaring an income of Rs.144,21,34,890/- under the normal provisions and book profits of Rs.148,81,42,550/- u/s 115JB of the Act. During the assessment proceedings u/s 143(3) of the Act, the AO noticed that

during the relevant financial year, the assessee has entered into international transactions with its Associated Enterprises (AEs). Therefore, the matter was referred to the TPO for determination of the Arms' Length Price (ALP) of the international transactions. The TPO rejected the TP study of the assessee and conducted his own search for the comparables for both SDS and ITeS and proposed adjustments to the ALP. Further, he also proposed adjustment towards interest on receivables. Thus, the total of the adjustment proposed was Rs.122,56,40,217/- u/s 92CA of the Act. Accordingly, the draft assessment order was proposed by the AO. The assessee raised its objections to the said proposal before the DRP and the DRP vide directions dated 11.9.2018 gave certain directions to the TPO which resulted in enhancement of the adjustment u/s 92CA of the Act from Rs.122,56,40,217/- to Rs.128,64,17,966/-. In compliance thereof, the final assessment order has been passed, against which, the assessee is in appeal before us by raising the following grounds:

> *"CONCISE GROUNDS OF APPEAL*
>
> *1. On the facts and in the circumstances of the case and in law, the Learned Transfer Pricing Officer i.e. the Deputy Commissioner of Income-tax (Transfer Pricing Officer)-3, (hereinafter referred to as 'the Ld. TPO') and the Ld. AO under the directions issued by Hon'ble DRP, erred in making an addition to the Appellant's total income of Rs. 128,64,17,966 (based on the provisions of Chapter X of the Income-tax Act, ('the Act') and the said addition being wholly unjustified are liable to be deleted.*
>
> *2. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in accepting the following companies engaged in software development services as comparables, without appreciating that the said companies were functionally dissimilar to the Appellant, have high economies of scale, fail the peculiar economic circumstances filter, have presence of brand and intangibles, abnormal profits, undertake research and development activities, have onsite expenses and do not have segmental data:*

• E-lnfochips Limited
• Thirdware Solutions Limited
• Infobeans Technologies Limited
• Infosys Limited
· Persistent Systems Limited
• Larsen & Toubro lnfotech Limited
· Tata Elxsi Limited
• Mindtree Limited ~
• R S Software (India) Limited

3. On the facts and in the circumstances of the case and in contrary to law, the Ld. TPO erred and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in accepting the following companies engaged in information technology enabled services as comparables, without appreciating that the said companies were functionally dissimilar to the Appellant, have high economies of scale, fail the peculiar economic circumstances filter, have onsite expenses, have significant sub-contracting costs and do not have segmental data:
• Infosys BPO Limited
• eClerx Services Limited
• Crossdomain Solutions Private Limited ~~
• Microland Limited +-'
• MPS Limited

• Microgenetics Systems Limited ~ ~

4/ On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in rejecting the following companies engaged in software development services as a comparables, without appreciating that the said companies were functionally comparable to the Appellant:
• Evoke Technologies Private Limited
• E-Zest Solutions Limited
• Mavenc Systems Ltd
• SagarSoft (India) Limited
• iSummation Technologies Private Limited
• Akshay Software Technologies Limited
• Goldstone Technologies Limited
• Sankhya Infotech Limited

5. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in rejecting the following companies engaged in Information Technology Enabled services as a comparables, without appreciating that the said companies were functionally comparable to the Appellant:

• Allsec Technologies Limited

- *Informed Technologies Limited*
- *Jindal Intellicom Limited*
- *Caliber Point Business Solutions Limited*
- *Ace BPO Services Private Limited*

6. Without prejudice to the above grounds on rejection of functionally dissimilar comparable companies, on the facts and in the circumstances of the case and in law, the Ld. TPO erred by incorrectly computing the margin of following comparable companies:

- *E-Infochips Ltd*
- *Thirdware*
- *Persistent Systems Limited*
- *Tata Elxsi Limited*
- *Infosys BPO*
- *Microland Limited*

7. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in rejecting ~ the transfer pricing analysis / study prepared by the Appellant, without appreciating that none of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied.

8. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in considering provision for bad and doubtful debts as a non-operating expenditure while computing the PLI.

9. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in not allowing Working Capital Adjustment in accordance with the provisions of Rule 10B of the Income-tax Rules, 1962 to account for differences between the international transactions undertaken by the Appellant, being a captive unit, and those undertaken by the alleged.

10. On the facts and in the circumstances of the case and in law, the Ld. AO erred in not considering the fact that the working capital adjustment evaluates the outstanding receivable in a controlled scenario vis-a-vis uncontrolled scenario and that differential impact of working capital of the Appellant vis-a-vis its comparables has already been factored in the pricing/ profitability of the Appellant. And hence, levying interest on receivables amounts to double adjustment.

> *11. The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Members to decide this appeal according to law".*

3. This case was taken up for hearing through Virtual hearing and both the parties were heard. At the time of hearing, the learned Counsel for the assessee submitted that Ground No.1 is general in nature and needs no adjudication. Grounds 2 and 4 relate to the ALP adjustment of the international transaction for providing Software Development Services (SDS in short) while Grounds 3 & 5 relates to ALP adjustment of the international transaction for providing ITeS services and Ground No.6 relates to both software development services and ITeS, wherein the assessee is seeking correct computation of the margins of the comparable companies mentioned thereunder. As regards Ground Nos.7 & 8, it is submitted that the assessee does not wish to press the same and they are accordingly rejected.

4. As regards the transaction of software development services of Rs.8,87,48,15,645/- is concerned, brief facts are that the assessee provided software development services relating to employer services to its group companies. In its TP study, the assessee selected 22 companies as comparable to the assessee and arrived at the arithmetic mean of such comparables at 9.73% and since the margin of the assessee was higher at 18%, it reported its transactions to be at ALP. The TPO, however, did not accept the assessee's contention and rejected all the comparables selected by the assessee except for four companies i.e. (i) L&T Infotech; (ii) Mindtree Ltd., (iii) Persistent Systems Ltd and (iv) R.S. Software (India) Ltd. Thereafter, he proceeded to select the

comparables from the Prowers and Capitaline Databases and selected 13 companies as comparable to the assessee whose average margin was 35.44%. The assessee objected to the comparables selected by the TPO. The assessee also proposed additional comparable companies. However, the TPO did not accept the assessee's contentions, and arrived at the following 12 companies as comparables whose average margin was 34.31%:

S.No	Company Name	OR	OC	OP	OP/OC%
1	SQS India BFSI Ltd	2,00,60,78,494	1,64,09,33,805	36,51,44,689	22.25
2	Tata Exisi Ltd (Seg)	6,82,70,22,000	5,58,25,94,000	1,24,44,28,000	22.29
3	Mindtree Ltd	30,43,40,00,000	25,01,90,00,000	5,41,50,00,000	21.64
4	RS Software (India) Ltd	3,51,88,20,000	2,83,71,11,000	68,17,09,000	24.03
5	Tech Mahindra Ltd (Seg.)	1,70,13,90,00,000	1,37,39,35,00,000	32,74,55,00,000	23.83
6	e-Infochips Ltd	2,05,61,12,437	1,13,59,89,199	92,01,23,238	81.00
7	Larsen & Toubro Infotech Ltd	45,48,03,71,882	36,66,51,02,339	8,81,52,69,543	24.04
8	Cigniti Technologies Ltd	55,62,98,162	43,58,38,603	12,04,59,559	27.64
9	Infosys Ltd	44,65,00,00,000	3,27,41,00,00,000	1,19,04,00,00,000	36.36
10	Persistent Systems Ltd	11,85,11,70,000	8,71,00,90,000	3,14,10,80,000	36.06
11	Infobeans Technologies Ltd	33,01,56,390	23,23,74,867	9,77,81,523	42.08
12	Thirdware Solutions Ltd	2,06,75,74,000	1,37,37,08,000	69,38,66,000	50.51
	Average				**34.31**

5. Thereafter, the TPO also observed that there were outstanding receivables of Rs.30,55,85,989/- from the related parties. He held that for the relevant A.Y, the interest on the outstanding receivables is an international transaction and after allowing credit period of 30 days, he adopted SBI PLR rate and proposed an adjustment of Rs.57,71,844/- towards interest on receivables. In accordance with the TPO order, the AO proposed the draft assessment order against which the assessee preferred its objections to the DRP.

6. (i) In so far as software Development Services is concerned, the DRP directed exclusion of certain companies i.e. SQS India, BFSI Ltd, Tech Mahindra and Cigntic Technologies Ltd from the final list of comparables. It also confirmed the denying of the working capital adjustment and risk adjustment.

(ii) In so far as the ITeS is concerned, the DRP directed exclusion of only one company i.e. BNR Udyog Ltd. It also confirmed the denial of working capital adjustment and risk adjustments.

(iii) As regards interest on outstanding receivables, the DRP confirmed the credit period of 30 days granted by the TPO and directed the TPO to adopt a reasonable rate that could be available to the assessee on short term deposits.

7. Thus, the TPO proposed the adjustment of Rs.75,36,53,673/-.

8. On receipt of the TP order, the draft assessment order was proposed by the AO to bring this amount to tax. Aggrieved, the assessee preferred its objections to the DRP. The DRP directed exclusion of 3 Companies i.e. SQS India BFSI Ltd, Tech Mahindra Ltd, Cigniti Technologies Ltd from the final list of comparables. As regards the additional companies proposed by the assessee as comparable to the assessee, the DRP accepted only one company i.e. CG-VAK Software & Software Exports Ltd as comparable to the assessee. It however, directed the TPO to examine whether Sagar Soft India Ltd, satisfied the filters other than functional

similarity adopted by him. Thus, the DRP has granted partial relief to the assessee.

9. In grounds of appeal No.2 and 4, the assessee is seeking exclusion and inclusion of some comparable companies. At the time of hearing, the learned Counsel for the assessee submitted that though the assessee has raised its objections against 9 companies, the assessee is not objecting to Mindtree Ltd and RS Software (India) Ltd as being comparable to the assessee. Therefore, their comparability is not being considered at this stage. The objection of the assessee to the following companies are dealt with as under:

10) **E-Infochips Ltd**

Assessee's objections:

a) This company is engaged in IT, ITES and products (physical) and the relevant extract the relevant extract from Page 98 of Paper Book Volume 2 is given below:
The company is primarily engaged in Software Development and IT enable services and products which is considered the only reportable business segment as per Accounting Standard AS-17 Segment Reporting prescribed in companies accounting standards notified under section 21(3C) (which continues to be applicable in terms of General Circular 15/2013 dated Sept.13,2013 of the Ministry of Corporate Affairs in respect of Section 133 of the Companies Act, 2013) and other relevant provisions of the companies Act, 1956.
Therefore, it is not functionally comparable on account of mixed services and products.

b) The Annual Report of this company does not disclose the segmented details as it is not functionally comparable and the relevant extract from Page 98 of Paper Book Volume 2 is given below:

Geographical Segment	*2013-14*	*2012-13*
USA	*1,625,751,612*	*1,64,583,858*
India	*91,964,693*	*90,641,655*
Rest of the world	*338,396,132*	*225,872,410*
Total	*2,056,112,437*	*1,481,097,923*

c) The company imports raw material and converts them into electronic boards and printed circuits. Thus, this company is engaged in production of physical products and not in software development services, exclusively. The relevant extract from Pages 119,122 and 123 of Paper Book Volume 2 are given below:

Revenue from sale of products	*5,12,40,116*	*9,41,39,571*
Revenue from sale of services	*200,48,72,321*	*138,69,58,352*

Details of Raw materials, spare parts and components consumed

Unless otherwise specified all monetary values are in INR

Details of raw materials, spares and components consumed	*Raw materials consumed (Member)*			
Subclassification of raw materials, spare parts and components consumed (Axis)	*Imported Members*		*Indigenous Member*	
	1/4/2013 to 31/03/2014	*1/4/2012 to 31/03/2013*	*1/4/2013 to 31/3/2014*	*1/4/2-12 to 31/03/2013*
Additional information on profit and loss A/c				
Details of raw materials, spare parts and components consumed (Abstract)				
Details of raw materials, spare parts and components consumed (Line Items)				
Value consumed	*1,78,21,068*	*5,06,44,253*	*15,99,348*	*8,65,362*
Percentage of consumption	*91.76%*	*98.32%*	*8.24%*	*1.68%*

Value of imports of raw materials			*3,35,87,489*	*4,31,64,414*

d) This company has revenue from information consultancy INR 29.70 crores and the relevant extract from page 123 of Paper Book Volume 2 is given below:
Revenue information technology consultancy: 29,70,84,153 35,70,87,748
Hence, it is not a comparable.

e) This company has incurred research & development expenditure of INR 2.34 crores and the relevant extract page 121 of Paper Book Volume 2 is given below:

Research Development expenditure: (F) 2,34,16,061 (G) 2,40,48,644

f) This company has reflected inventory of physical products for INR 2.78 crores in the balance sheet. The relevant information is provided in pages 28 and 77 of Paper Book Volume 2.

g) This company has internally generated intangible assets for a sum of INR 56.65 lakhs. The relevant information is provided in page 65 of Paper Book Volume 2

h) This Company has abnormal profits of 81.91 %

i) The Appellant relied on the following case laws in support of its contention that for the above reasons, E-Infochips is not comparable to the assessee.

Case laws Volume 5 and 6:

i.Labvantage Solutions Pvt. Ltd. vs ACIT ITA No. 927 & 2400/Ko1!2017

ii.RedKnee (India) Technologies Pvt. Ltd. ITA No. 486/Pune/20 16

iii.Metric Stream Infotech (India) Pvt. Ltd. vs ACIT

iv. PCIT vs Saxo (India) Pvt. Ltd. (Pg 364 - Para 10 & 10.2) [IT AT order approved by Delhi High Court]

v. Cadence Design Systems (I) (P) Ltd. vs ACIT ITA No. 6315 (Delhi) of 2015

vi.Infor India Pvt. Ltd. Vs DCIT IT A No.2307/Hyd/2018

vii.Kony India (P) Ltd ITA No. 2305/Hyd/2018

viii. Software Paradigm Infotech P Ltd. - IT(TP)A No. 994/Bang/20J6 dated 15-2-2019
ix. ST -Ericson India P Ltd - ITA 6247/Del/20 14

11. The learned DR, on the other hand, relied on the findings of the TPO and the DRP on this issue.

12. Having regard to the rival contentions and the material on record, we find that similar objections were taken by other companies carrying on similar activities before the Tribunal for the A.Y 2011-12 and also for A.Y 2014-15 and the Tribunal had directed the exclusion of E-Infochips Ltd for the very same reasons. For the purpose of completeness and ready reference, the relevant paras of the relevant decisions of the Coordinate Benches and the decision of the Hon'ble Delhi High Court are reproduced hereunder:

(1) **Asstt.CIT vs. Labvantage Solutions (P) Ltd (2018) 93 Taxmann.com 440 (Kolkata-Trib). Para-7 reproduced below:**

7. With regard to arm's length computation of software services, we find that the assessee had sought exclusion of E-1nfochips Ltd from the list of final camparables for which Ground No. 3 A. is raised by the assessee. We find that during the Asst Year 2012- I 3, the company amalgamated one of its wholly owned subsidiary, namely E-lnfochips Bangalore Ltd w.e.f. 1.4.2011 which is evident from the fact reported in their annual report for the financial year 20 I I _ I 2 enclosed in page 1 054 of the paper book. Pursuant to the said amalgamation, E-lnfochips Bangalore Ltd's functions, assets as well as risks too got merged with that of E-lnfochips Ltd w.e.f. 1.4.2011. We find from the nature of business mentioned in the business profile of the said cam parable enclosed in page 1118 of the paper book, that the said comparable 's engaged in IT, 1TES and sale of products for which segmental information is not available. The assessee herein does not have ITES. Hence no comparison could be made for want of segmental data. We also find [hat the co-ordinate bench decision of Delhi Tribunal in the case of Alcatel Lucent India Ltd. v. Dy. CIT .2016] 74 taxmann.com 105 (Delhi-Trib) dated 24.8.2016 for the Asst Year 2011-12 had rejected this comparable for being engaged in diversified services and for want of information of segmental data. We find that this decision has been approved by the Hon'ble Delhi High Court in the case of PCIT v. Alcatel Lucent India Ltd. in ITA No. 515/2017, dated 18.7.2017. The Id AR stated that the Id DRP in Asst Year 2013-14 (i.e succeeding assessment year) had accepted that the said comparable is not *functionally comparable with the assessee's profile. We find this fact to be correct from the record of Asst Year 201314 which is also before us along with this appeal. Hence we have no hesitation in holding that E-Infochips Ltd is not functionally comparable to the assessee and accordingly we direct the Id TPO to exclude the same from the final list of comparables. Accordingly, the Ground No. 3.4 raised by the assessee is allowed".*

(2) ITAT Pune Bench in ITA No.486/PUN/2016 dated 29.6.2018 in the case of Redknee (India) Technologies (P) Ltd vs. Dy. CIT

"8. *We have heard the rival submissions and perused the material on record. In the present appeal, assessee is mainly aggrieved by the inclusion of E-Infochips Limited as comparable. It is assessee's submission that if E-Infochips Limited is excluded, then international transactions will be within the Arms Length Price and no adjustment to the ALP would be required. It is an undisputed fact that assessee is engaged in providing software development services only to it's Associated Enterprises (A.Es), who were located in United States. We find that TPO has included EInfochips Limited as a comparable company to assessee company on the directions of DRP.The Annual Report of E-Infochips Limited which is placed by the assessee in the Paper Book reveals that EInfochips Limited is engaged in diversified activities and is having income from software development, hardware maintenance, information technology consultancy and information technology services and is also engaged in the manufacturing and trading of printed electronic circuit boards. The annual accounts of EInfochips Limited placed in Paper Book also reveals that it is engaged in trading and manufacturing activities. It is also a fact that segmental information in relation to the various activities of the E-Infochips Limited are not available in the Annual Report. In view of the fact about non-availability of segmental data with respect to the various activities undertaken by it, we are of the view that margins of E-Infochips Limited cannot be applied to benchmark the international transactions undertaken by the assessee with it's A.Es. We further fmd that in case of DCIT Vs. M/s. Philips India Limited (supra) and Ness Technologies (India) Private Linited (supra), which were also engaged in the activities similar to assessee (i.e., providing software services to its group concerns based on the specifications provided) in A.Y. 2011-12, the Coordinate Bench of the Tribunal, while deciding those appeals directed the exclusion of E-Infochips Limited as a comparable company. In view of the aforesaid facts, we are of the view that EInfochips Limited cannot be considered as comparable to arrive at Arms Length Price and therefore we direct its exclusion from comparables. Before us, it is assessee's contention that if EInfochips Limited is excluded from the final set of corn parables, the margin of the assessee would fall within 2: 5% range vis-a-vis margin of the residual comparables and thus in view of proviso to Sec.92C(2) of the Act, no addition would survive* *and therefore even other grounds raised would be rendered infructuous. We therefore, direct the AO to re-compute the margins of comparables by excluding E-Infochips Ltd from the list of comparables and thereafter compute the TP adjustment, if any, in the hands of the assessee. Thus, the grounds of the assessee are allowed for statistical purposes".*

(3) ITAT Bangalore Bench in the case of Metric Stream Infotech (India) (P) Ltd, vs. Asstt. CIT in ITA No.493/Bang/2016 dated 10-07-2018

"9. As far as E-lnfochips Ltd. is concerned, this Tribunal in the case of Electronic Imaging India Pvt. Ltd. supra) vide para 9 of its order had held that this company was a software development and ITeS providing company and software development product company. The Tribunal held that no segmental data of this company was available and therefore it is difficult to compute the operating margin from software development services and therefore this company should be excluded from the list of comparable companies.

10. As far as ICRA Techno Analytics Ltd. is concerned, the Tribunal in the case of Electronic Imaging India (P) Ltd. (supra) vide para 10 of its order held that this company is not functionally comparable with a company providing software development service.

11. As far as Persistent Systems & Solutions Ltd. is concerned, this Tribunal in the case of Electronic Imaging India Pvt. Ltd. (supra) held that this company was not functionally comparable and is also engaged in development of software products vide para 8 of its order.

12. In view of the aforesaid decisions on the comparability of the aforesaid 4 companies, we hold and direct exclusion of the aforesaid 4 companies from the list of comparable companies. The TPO is directed to compute the arithmetic mean of comparable companies after excluding the 4 companies".

(3) Saxo India (P) Ltd vs. Asstt.CIT reported in (2016) 67 Taxmann.com 155.

"10.1 The Transfer Pricing Officer included this company in the list of comparables. On being called upon to explain as to why it should not be considered as a comparable, the assessee contended that there was functional dissimilarity inasmuch as this company was engaged in software development and IT enabled services and also Products. The Transfer Pricing Officer observed that the revenues of this company from Products was only 15% of total revenue and at the same qualified to be eligible for comparison. The DRP did not allow any relief.

10.2 After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, *information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables".*

(5) Delhi High Court in the case of Pr.CIT vs. Saxo India Ltd in ITA No.682/2016 dated 28.09.2016.

"4. The assessee appealed to the ITAT, which upon its detailed consideration of the materials, accepted the plea with respect to four comparables and directed that they should be excluded. The assessee's contention with respect to E-Infochips, Persistent Systems & Solutions Ltd, Larsen & Toubro Infotech Ltd and Sasken Communications Technologies Ltd were accepted. The revenue is aggrieved by these as well as exclusion of Wipro Technology Services Limited.

5. It is argued on behalf of the revenue that the rationale adopted by the IT AT with respect to lack of segmental data vis-a-vis four of the comparables is contrary to the records. Learned counsel highlighted that with respect to each of the four companies, i.e. E-Infochips, Larsen and Toubro Infotech Ltd., Persistent Systems & Solutions Ltd. and Saken Communications Technologies Ltd., the documentary evidence pertaining to each of them in the form of annual reports and other material collected from internet resources were analysed elaborately. On the basis of these, the TPO was able to accurately segregate the volume of transactions allocable to software product sales as opposed to software technology services. In these circumstances, the argument about lack of segmental data could not have been a broad brush reasoning by the ITAT to reject the comparables which otherwise indicated high profit margins. It was also contended that apart from this, there is no reason worthwhile for the exclusion of Wipro Technology Services Limited on the list of comparables".

"*10. On a comparison with the data available and made available. undoubtedly, the object of the statute is to "pull in transactions which otherwise escaped the radar of tax assessment under one head or the other. The transfer pricing methodology - shorn of its* *details is an attempt by each nation to locate the incidents of income which would be subjected to levy within its jurisdiction where international transactions are involved. This exercise does not compare with other income assessments where the methodology adopted in their domestic jurisdiction will differ". The TNMM method depends on accurate data with respect to all the three elements - wherever they apply. In the Comparable Uncontrolled Price (CUP) method - which is premised upon the elements in Rule 10B(1)(a), the methodology adopted is the price charged or paid for property transfer or services provided in the Comparable Uncontrolled transaction. Therefore, the nature of the transaction and the appropriate filter determines the elements that are to be considered in TNMM. Therefore, the costs, sales and assets employed wherever relevant are to be applied. From this perspective, the revenue's contention that segmental data was available, cannot be accepted. The mere availability of proportion of the turnover allocable for software product sales per se cannot lead to an assumption that segmental data for relevant facts was available to determine the profitability of the concerned comparable".*

(6) ITAT Delhi Bench in the case of Cadence Design Systems (I) (P) Ltd vs. Asstt.,CIT (2018) 93 Taxmann.com 227 (Delhi).

*Para 38***.**

For similar reasons stated above, we are of the considered opinion that in so far as the assessee is a captive software development service provider, M/s. E-0-Infochips Ltd is not a good comparable and while upholding the stand of the assessee, we direct the library ever to delete this from the list of comparables".

(7) ITAT Hyderabad Bench in the case of M/s. Infor India (P) Ltd in ITA No.161 and 2307/Hyd/2018 dated 6.8.2019

Para 85.

85. As regards E-Infochips Ltd is concerned, the contention of the assessee is that it is functionally different as it is engaged to software development of software products and ITeS and that there is no segmental data. The TPO & DRP have rejected the objections of the assessee. The learned Counsel for the assessee has referred to the disclosure of segments explanatory wherein the company has disclosed itself as primarily engaged in software development and ITeS services and products, as reportable as per AS17. Further, at page 897, there is an inventory in the balance sheet and at page 899 there is classification of inventories. However, we do not find any revenue from sale of products. Therefore, it cannot be accepted that this company is into product development. The other objection of the assessee is that it has abnormal profit of 79.76% during the relevant A.Y and therefore, it has witnessed super normal profit of 38% on a

> *year on year basis. This objection of the assessee is acceptable because, in the other cases of Infosys Ltd, L&T Infotech Ltd and Mindtree Ltd, we have held that not only high turnover but even where the comparables have earned super normal profit, they also have to be excluded. Respectfully following the same, we direct the TPO to exclude this company from the final list of comparables. Thus, the assessee's grounds of appeal on exclusion of the companies are partly allowed".*

13. We find that the activities of E-Infochips Ltd are the same for the A.Ys 2011-12 and 2014-15. Therefore, the above decisions are clearly applicable to the A.Y before us. Thus, respectfully following the decisions of the Coordinate Benches above, we direct the TPO to exclude this company from the final list of comparables.

14. **Thirdware Solutions:**

Assessee makes the following submissions to demonstrate that Thirdware Solution is not a proper comparable to it.

a) It is functionally dissimilar as it is engaged in sale of products for INR 206.75 Cr and the relevant extract from Page 400 of Paper Book Volume 2 is given below:

   (Revenue from sale of products: 20,675.74 13,225.84)

b) Thirdware Solution is engaged in software development services, consultancy and software products, whereas the assessee renders only software development services. The relevant extract from Page 320 of Paper Book Volume 2 is given below:

   "Details of material changes occurred during period affecting company's business operations. 1. Corporate Information Thirdware Solutions Ltd (the Company) is a public company domiciled in India and incorporated under the provisions of the Companies Act, 1956. This company is engaged in the business of Software Development and Consultancy

Services. The company caters to both domestic and international markets".

c) In the annual report, there are no segmental details between software services and software products and the relevant extract from page 382 of Paper Book Volume 2 is given below:

"The company's operation comprises of software development, implementation and support services.
Primary segmental reporting is based on geographical areas, viz., domestic = India (product and services) and Institutional = Rest of the World Exports -Software Services).
In primary segment, revenue and all expenses, which relates to a particular geographical segment, are reported. Fixed Assets, Current Assets, Loans and Advances, Current Liabilities and Provisions are classified based on specific geographical segment's business. The company maintain separate books of account for the reported segments.
Wherever the costs are directly identifiable with the reported segment, it has been booked to that segment. Wherever common expenses are incurred, those expenses have already been considered for allocation and relevant entries in the books of account have been passed. Hence there are no unallocable expenses.
Further, cash, investment (net of provision) and Bank balances are reported at the enterprise level. Current assets and current liabilities relating to the specific business segments are identified and reported. Those, which are not identifiable, are reported as common assets/ liabilities"

d) During the year, Thirdware had no sales from the software services and the relevant extract from page 400 of Paper Bok Volume 2 is given below.

Revenue from sale of services	*0*	*0*

e) During the year, this company was engaged in the trading of software products and purchased products for a sum of INR 40.21 Cr as given below:

Purchase of stock-in-trade	*4,021.19*	*2,482.34*

f) Thirdware Solutions has transferred its software products on license basis and during the year, it has earned revenue of INR 7.98 lakhs from sale of licenses and also derived revenue from training and subscription for INF 59.32 lakhs.

g) Thirdware company also develops intangibles and the relevant extract from Pages 375 of Paper Book Vol.2 is given below:

"Intangible assets internally developed by the company are capitalized at the total cost attributable towards the development of the product and is amortised on the straight line method over its estimated useful life of three years, as perceived by the management.

h) Thirdware's profit and loss a/c reflects INR 7.58 lakhs paid to selling agents which establishes the fact that Thirdware is selling products.

i) Excluded in own case – Thirdware Solutions was excluded in the earlier years order of the Tribunal in own case of ADP.

ITA No.471/Hyd/2011 – Page 10 and 17 of the ITAT order:

"9. After considering the submissions on either side and examining the materials on record, we find that the issue relating to comparability of aforesaid companies objected by assessee are covered by various decisions of different benches of the Tribunal for the very same AY. In case of Ness Innovative Business Pvt. Ltd. Vs. Dy.CIT In ITA No. 472 to 553 and 1175/Hydl2011, dated 18/06/14"...

"Coordinate Bench rejected Bodh Tree Consulting Ltd. Exensys Software Solutions Ltd., Sankhya Infotech Ltd., Foursoft Ltd.. Thirdware solutions Ltd. Tata Elxsi Ltd. and Infosys Technologies Ltd. by observing as under:

"In view of the aforesaid, accepting the submissions of learned AR, we direct AO/TPO to exclude aforesaid companies from the list of comparables. This ground of assessee is allowed".

Further, the learned Counsel for the Assessee relied on the following decisions in support of his contentions that this company has to be excluded:

(i) Infor Global Solutions (India) Pvt. Ltd.

(ii) CIT vs Intoto Software India (P) Ltd.

(iii) CIT vs DE Shaw India Software (P) Ltd.

(iv) PCIT vs T Erricson India (P) Ltd.

(v) Intoto Sotware India (P) Ltd vs ITO

(vi) Planet Online (P) Ltd.

(vii) Dialogic Network (India) (P) Ltd.

(viii) Pubmatic India (P) Ltd.

(ix) Infor India Pvt. Ltd. Vs DCIT ITA No.2307/HydI2018

(x) Kony India (P) Ltd ITA No. 2305/Hyd/2018

15. The learned DR, however, relied upon the findings of the TPO as well as the DRP and prayed that this company be held as comparable to the assessee.

16. Having regard to the rival contentions and the material on record, we find that in the cases relied upon by the learned Counsel for the assessee, the assessees therein had also raised similar objections and the Tribunal has held Thirdware Solutions to be not comparable to the assessee. We find that the assessee before us is carrying on similar activities as the companies in those cases and therefore, the decisions taken by the Tribunal in those cases are applicable to the assessee before us. For the sake of ready reference, the relevant paras of the Tribunal orders are reproduced hereunder:

(1) ITA No.520/Mum/2012 – Infor Global Solutions Ltd vs. Dy.CIT

xi) THIRDWARE SOLUTIONS LTD.
"36. This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that this company is involved in the activities of software development services as well as development of product. However, no segmental details are available. Thus, he submitted that this company cannot be treated as a comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions: -

i) ACIT vs. Tech Mahindra Ltd., [2018) 91 taxmann.com 329;
ii) Ness Innovative Business Services Pvt. Ltd. vis DCIT, [2014) 151 ITD 190;
iii) LSI Technologies India Pvt. Ltd. vis ITO, [2015) 60 taxmann.com 405;
iv) PCIT vis S. T. Ericsson India Pvt. Ltd. ITA no.821/2017, dated 31.01.2018;
v) S. T. Ericsson India Pvt. Ltd. vis ACIT, ITA no.1672/Del./ 2014;
vi) Dialogic Networks India Pvt. Ltd. vis ACIT, ITA no. 7280/Mum/ 2012, dated 27.07.2018; and
vii) Accenture Services Pvt. Ltd. vis ACIT, [2018) 96 taxmann.com 400

37. The learned Departmental Representative submitted, before the Transfer Pricing Officer the assessee has not objected to the selection of this company as a comparable. He submitted, only in subsequent stages, the assessee has objected to selection of the aforesaid company by raising new grounds. He submitted, since the issue of development of product by this company and unavailability of segmental details, were not raised before the Transfer Pricing Officer, it requires verification.

38. We have considered rival submissions and perused materials on record. Though, it may be a fact that the assessee may not have objected to selection of this company before the Transfer Pricing Officer, however, the assessee raised objections against selection of Infor Global Solutions India Pvt. Ltd. this company before the DRP as well as before us. The grievance of the assessee is, the company being involved in development of products and since no segmental details are available in the annual report, it cannot be treated as comparable. The Co-ordinate Bench in Tech Mahindra Ltd. (supra) having found this company to be involved in development of software product and trading in software licenses has held that it cannot be a comparable to a software development service provider. Similar view has been expressed in the other decisions cited before us by the learned Authorised Representative. Since, many of these decisions relate to very same assessment year, following the ratio laid down in these decisions, we hold that this company cannot be a comparable to the assessee".

(2) ITA Nos.1196 & 1197/Hyd/2010 - Intoto Software India Private Ltd. Vs. ACIT

23. The other companies which are objected to by the assessee are Flextronics Software Limited, Foursoft Limited and Thirdware Software Solution Limited. As far as these three companies are concerned, the learned Counsel appearing on behalf of the assessee submitted that they are into both software as well as product development. He submitted that the TPO has taken note of the fact these companies are also into product development but has selected these companies as comparables by applying the filter of more than 70% of its revenue being from software development services. The learned Counsel *submitted that the functions of these companies are different from the assessee who was into sole activity of software development for its associated enterprise. He submitted that the TPO has allocated the expenditure in the proportion of the revenue of these companies from software services and software products and has adopted the figure as segmental margin of the company and has taken these companies as comparables. He submitted that by taking the proportionate expenditure, the correct financial results would not emerge. He submitted that nothing prevented the Assessing Officer/TPO from obtaining the segmental details from the respective comparable companies before adopting them as comparable companies and before taking the operating margin for arriving at the arms length price. He submitted that wherever the segmental details are not available, then the said companies should not be taken as comparables. For this purpose, he placed reliance upon the decision of the Bangalore Tribunal in the case of First Advantage Offshore Services Pvt. Ltd. vs. Dy. DCIT in ITA.No.1252/Bang/2010 wherein these companies were directed to be excluded from the list of comparables.*

24. The learned D.R. however, supported the Orders of the authorities below.

25. Having heard both the parties and having gone through the material on record, we find that the TPO at page 37 of his order has brought out the differences between a product company and a software development services provider. Thus, it is clear that he is aware of the functional dissimilarity between a product company and a software development service provider. Having taken note of the difference between the two functions, the Assessing Officer ought not to have taken the companies which are into both the product development as well as software development service provider as comparables unless the segmental details are available. Even if he has adopted the filter of more than 75% of the revenue from the software services for selecting a comparable company, he ought to have taken the segmental results of the software services only. The percentage of expenditure towards the development of software products may differ from company to company and also it may not be proportionate to the sales from the sale of software products. Under section 133(6) of the I.T. Act, the TPO has the power to call for the necessary details from the comparable companies. It is seen that the Assessing Officer/TPO has exercised this power to call for details with regard to the various companies. As seen from the annual report of Foursoft Limited which is reproduced at page 7 of the TPO's Order, the said company has derived income from software licence also and AMCs.

26. As far as Thirdware Software Solution Limited is concerned, we find from the information furnished by the said company that though the said company is also into product development, there are no softrware products that the company invoiced during the relevant financial year and the financial results are in respect of services only. Thus, it is clear that there is no sale of software products during the year but the said company might have incurred expenditure towards the development of the software products.

27. As far as Flexitronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional dissimilarity between the assessee and *these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the assessee- company to bring them on par with the assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables".*

(3) ITA No.2071/Hyd/2011 - M/s. CNO IT Services (India) P) Ltd vs. ACIT

"27. Flextronics Software Limited and Thirdware Software Solutions Limited:- The assessee has objected to these two companies to be treated as comparable mainly on the ground that both these companies are into product development. We find that in case of Intoto Software India (P) Ltd. (<;upra) the co-ordinate Bench of this Tribunal having found that these two companies are functionally different as they are into product development has directed excluding these companies tor comparability analysis. Respectfully following the decision of the Coordinate Bench of this Tribunal in case of Intoto Software India (P) Ltd. (supra) we also direct the Assessing Officer/TPO to exclude both these companies".

(4) ITAT Delhi Bench (2017) 79 Taxmann.com 207 – St.Ericsson India (P) Ltd vs. Addl. CIT

"THIRD WARE SOLUTIONS LIMITED

47. This is again TPO's own comparable and assessee sought to exclude this company from the list of comparables on the ground of non-comparable services i.e application implementation, management and development services. TPO rejected objections raised by the assessee by observing that software development, implementation and support services are various subsegments of software development services only and require employment of software engineers and retained this company as a comparable for benchmarking international transactions.

48. However, perusal of the annual report of this company, available at page 1735 to 1782 of the Paper Book Vol.IV, goes to prove that the substantial revenue of this company is from sales and operating sales of licence; software services, export from SEZ unit, export from STPI unit and revenue from subscription. It is also apparently clear that software services segment accounts for Rs 8.91 crores out of the total sales of Rs. 77 crores whereas segmental results are not available. So, when this company's substantial revenue is from other various business segments like *sale of licence, software services and segmental results are not available, this company cannot be a valid comparable for benchmarking the international transaction, hence ordered to be excluded".*

(5) ITA No.1810/Hyd/2012- Intoto Software India P.Ltd vs. ITO

7. Thirdware Solutions Ltd 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."
"7.4. Therefore, respectfully following the decisions of the Coordinate Bench of the Tribunal (supra), we direct that these companies be excluded from the list of final comparables".

(6) ITA No.464 & 608/Hyd/2014- Planet Online Private Limited,Vs.ACIT

10.6 As far as Thirdware Solutions is concerned, assessee has sought exclusion of the aforesaid company because it is into product development and purchase and sale of licences. It is further contention of assessee that though segmental details for sales is available but no expenditure bifurcation is available, which makes it impossible to correctly determine the operating margin of software services. On a perusal of the break-up of sales of this company as on 31 st March, 2009, the contention of assessee appears to be correct. Further, ITAT Bangalore Bench in case of 3DPLM Software Solutions Ltd. Vs. DCIT (supra), has held as under:

"15.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the Planet Online Pvt. Ltd.

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."

10.7 The ld. DR has not brought any material to our notice to demonstrate that the aforesaid finding of the coordinate bench will not be applicable to AY under consideration. Therefore, following the view expressed by the ITAT Bangalore Bench, we exclude this company from the list of comparables".

(7) **ITA No.7280/Mum/2012 - Dialogic Networks (India) Pvt. Vs. ACIT**

37. The thirteenth comparable under dispute is Thirdware Solutions Ltd. This company is engaged in application implementation, application management and application development. Accordingly company is not a pure software development company. This company is also engaged in trading of software which is evident from the financials of the company. It is also engaged in the purchase and sale of license as is apparent from page 167 of Paper book. We noted that this company has not disclosed any segmental information in the annual report. We therefore agree with the contention of the assessee's counsel that this company is functionally different and cannot be taken to be comparable to assessee. Our aforesaid view is duly supported by the decision of Bangalore Bench of this Tribunal in the case of Infor (Bangalore) P. Ltd Vs ACIT (ITA 1550/Rang/2012) (AY 2008-09) wherein it was held as under:-

"31 Coming to Thirdware Solutions Ltd (seg), findings of the Tribunal in the above mentioned case of 3DPLM Software Solutions Ltd(supra), appear at Para nos. 15.1 to 15.3 which is reproduced hereunder:

15. 1 This company was proposed for inclusion in the list of comparables by the TPO. Before the TPO , the assessee objected to the inclusion of this company in the list of comparables on the ground that its turnover was in excess of Ps. 500 Crores. Before us, ITA No . 7 2 80 / Mu m /2 0 12 the assessee has 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 and trading in software and giving licenses for use of software. In this regard. the learned Authorised Representative submitted that: -

(i) This company is engaged in pro duct development and earns revenue from sale of licences and subscription. It has been pointed out from the Annual Report that the company has not provided any separate segmental profit and loss account for software development services and product develop ment services. In the case of E -Gain communications Pvt Ltd. (2008 - TII- 04-I TA T-PUNE- TP), the Tribunal has directed that this company be omitted as a comparable for software service providers, as its income includes income from sale of licences which has increased the margins of the company The

Learned A.R prayed that in the light of the above facts and in view of the afore cited decision of the Tribunal (supra). this company ought to be omitted from the list of comparables.

15 2 Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the list of comparables.

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 IT(TP)A.1550/Bang/2012 Page-29 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 F -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 Rune Tribunal (supra). we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand. " No contrary decision was brought to our knowledge. We therefore hold that this company be excluded from comparable as selected by TPO and we direct the AO accordingly".

(8) **ITA No.655/PUN/2017- M/s. PubMatic India Private Limited. Vs. ACIT**

20. Now, coming to the next concern i.e. Thirdware Solutions Ltd., which is functionally dissimilar as it was deriving revenue from sale of license and software services export from SEZ units and revenue from subscription, etc. Our attention was drawn to the financials of said concern placed at pages 708 onwards of Paper Book and it was pointed out that the company had imported raw materials and was also owning intangibles and hence, made it in-comparable to the assessee. In the absence of any segmental details being available, we find merit in the plea of assessee.

21. The Pune Bench of Tribunal in Approva Systems Pvt. Ltd. Vs. DCIT in ITA No.1921/PUN/2014, relating to assessment year 2010-11, order dated 25.01.2017had excluded Thirdware Solutions Ltd. being not comparable to a concern which was providing software services. The relevant findings are as under:-

"11. We find that the Tribunal noted that the TPO had selected KALS Information System Ltd. and Thirdware Solution Ltd. as being comparable, whereas the case of assessee was that both the said

concerns were functionally different. With regard to KALS Information System Ltd., it was pointed out that the said company was earning income from sale of application software and segmental information with respect to software services were available. In respect of Thirdware Solution Ltd., it was pointed out that the said concern was engaged in software development, trading of software licences and training implementation activities apart from software development. Another contention was raised that Thirdware Solution Ltd. was super profit earning company and was also engaged in the business of software licences and trading of implementation activities. The Tribunal taking note of the Special Bench decision in the case of Maersk Global Centres (India) Pvt. Ltd. Vs. ACIT vide ITA No.7466/M/2012 in respect of super profits and inclusion of concern Thirdware Solution Ltd., held that the said concern was not comparable and observed as under:-

"29. We have considered the rival arguments made by both the sides. We find the Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. Vs. ACIT vide ITA No.7466/Mum/2012 has observed as under :

Schedule: Sales	*As on 31.3.2019*	*As on 31.3.2018*
Sale of Licence	*22,237,588*	*3,916,427*
Software Licence	*89,177,023*	*76,724,371*
Export from SEZ	*478,572,420*	*263,971,033*
Export from STPI	*162,900,630*	*168,863,049*
Revenue from sub.	*16,433,714*	*9,293,874*
	770,321,376	*522,768,754*

"99. The question No. 2 referred to this Special Bench is as to whether, in the facts and circumstances of the case, companies earning abnormally high profit margin should be included in the list of comparable cases for the purpose of determining arm's length price of an international transaction. As already observed, the issue involved in this question has become infructuous in so far as the case of the assessee before the Special Bench is concerned and the same therefore no more survives for consideration in the present case. In generality, we are of the view that the answer to this question will depend on the facts and circumstances of each case inasmuch as potential comparable earning abnormally high profit margin should trigger further investigation in order to establish whether it can be taken as comparable or not. Such investigation should be to ascertain as to whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year. The profit margin earned by such entity in the immediately preceding year/s may also be taken into consideration to find out whether the high profit margin

represents the normal business trend. The FAR analysis in such case may be reviewed to ensure that the potential comparable earning high profit satisfies the comparability conditions. If it is found on such investigation that the high margin profit making company does not satisfy the comparability analysis and or the high profit margin earned by it does not reflect the normal business condition, we are of the view that the high profit margin making entity should not be included in the list of comparable for the purpose of determining the arm's length price of an international transaction. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin. Question No. 2 referred to this special bench is answered accordingly".

29.1 We find from the details furnished by the assessee that the assessee is a software developer whereas Thirdware Solutions Ltd. is engaged in the business of sale-cum-licence of software which is available from the audited accounts, the details of which are as under :

Apart from the above the company is also having dividend income, interest income and profit on sale of investment as well as premium of software contract totalling to Rs.2,30,48,603/- which is as per Schedule-13 "other sources". From the various decisions relied on by the Ld. Counsel for the assessee we find Thirdware Solutions Ltd. has been rejected on the ground that it is functionally dissimilar. The Hyderabad Bench of the Tribunal in the case of Intoto Software India Pvt. Ltd. Vs. ACIT and Viceversa in consolidated order dated 24-05-2013 for A.Y. 2005-06 and 2007-08 at para 26 of the order has observed as under :

"26. As far as Thirdware Software Solution Limited is concerned, we find from the information furnished by the said company that though the said company is also into product development, there are no softrware products that the company invoiced during the relevant financial 52 year and the financial results are in respect of services only. Thus, it is clear that there is no sale of software products during the year but the said company might have incurred expenditure towards the development of the software products."

29.2 In various other decisions also Thirdware Solutions Ltd. has been rejected as a comparable on the ground that it is functionally dissimilar. We therefore find force in the submission of the Ld. Counsel for the assessee that Thirdware Solutions Ltd. should not be included as a comparable. We accordingly set-aside the order of the CIT(A) and direct the Assessing Officer to exclude the same from the list of comparables."

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

(9) **ITA No.2307/Hyd/2018- M/s. Infor (India) P Ltd Vs. ACIT**

77. As regards Tata Elxsi Ltd, Thirdware Solutions Ltd and Persistent Systems Ltd are concerned, we find that their comparability to the assessee has been considered in the assessee's own case for the A.Y 2007-08 and it is submitted that there is no change of activities of either the assessee or the comparables during the relevant A.Y before us i.e. A.Y 2014-15.

78. The learned DR has not rebutted this contention of the assessee. Therefore, respectfully following the decision of the Coordinate Bench at Mumbai in ITA No.520/Mum/2012 dated 4.12.2018, in the case of Infor Global Solutions India (P.) Ltd. v.Deputy Commissioner of Income Tax, we direct the exclusion of these three companies from the final list of comparables. For the sake of ready reference, the relevant paras are reproduced hereunder:

"29. We have considered rival submissions and perused materials on record. The primary and fundamental reason on the basis of which assessee seeks rejection of the aforesaid comparable is, it is also engaged in the development of product and segmental details are not available. Notably, in case of LSI Technologies India (P.) Ltd. (supra), the Co-ordinate Bench while examining the comparability of the aforesaid company to a software development service provider, has rejected this company as a comparable considering the fact that it is engaged in product development and product design services. The same view has been reiterated by the Tribunal in the other decisions cited by the learned Authorised Representative. Since, many of these decisions pertain to the impugned assessment year, respectfully ITA Nos 161 and 2307 of 2018 Infor India P Ltd Hyderabad.

following the aforesaid decisions of the Tribunal, we direct the Assessing Officer to exclude this company from the list of comparables.

35. We have considered rival submissions and perused materials on record. On a perusal of the documents placed in the paper book it appears that this company is engaged in various activities including development of niche product and development services. Thus, the company is functionally different from the assessee. Considering the aforesaid aspect, the Co-ordinate Bench in case of Telcordia Technologies India (P.) Ltd. (supra), which is for the very same assessment year, has excluded this company as a comparable. Similar view has also been expressed in the other decisions cited by *the learned Authorised Representative. Thus, keeping in view the decisions of the Tribunal referred to above, we hold that this company cannot be a comparable to the assessee.*

38. We have considered rival submissions and perused materials on record. Though, it may be a fact that the assessee may not have objected to selection of this company before the Transfer Pricing Officer, however, the assessee raised objections against selection of this company before the DRP as well as before us. The grievance of the assessee is, the company being involved in development of products and since no segmental details are available in the annual report, it cannot be treated as comparable. The Co-ordinate Bench in Tech Mahindra Ltd. (supra) having found this company to be involved in development of software product and trading in software licenses has held that it cannot be a comparable to a software development service provider. Similar view has been expressed in the other decisions cited before us by the learned Authorised Representative. Since, many of these decisions relate to very same assessment year, following the ratio laid down in these decisions, we hold that this company cannot be a comparable to the assessee".

17. Thus, we direct the TPO to exclude this company i.e. Thirdware Solutions from the final list of comparables.

18. Infobeans Technologies Ltd

Assessee's objections to this company are as follows:

a) This company is not totally engaged in software development services but it is also engaged in export of goods. The relevant extract from page 783 and 795 of Paper Book Volume 3 is given below:

Earnings in foreign Exchange

a)	*Export of goods/services calculated on FOB Basis*	*329,659,883*	*216,854,891*
	Total	*329,659,883*	*216,854,891*

b) This company is also engaged in providing service relating to Storage and virtualization, media and publishing and E-commerce.

c) There are no segmental details in the annual report between services and goods therefore, it cannot be compared with the assessee

d) This company is engaged in sale of goods as can be inferred from the MODVAT deposit INR 25,000 and Sales Tax deposit INR 10,000.

e) This company cannot be compared as it has earned super profits i.e. 42.09%

f) Without prejudice to the above submissions the correct margin is 41.85% and not 42.09%. This fact was submitted to the DRP.

19. The assessee further submitted that in the computation of margins of this company profit from mutual fund has been considered as operating income for the purpose of computing operating profit margin of comparables proposed by the TPO. Since the profit derived from the mutual funds are not related to the business activity, the same needs to be treated as non-operating and the correct margins are to be recomputed. Further, the assessee also placed reliance on the following decisions in support of his contentions for the exclusion of Infobeans Technologies Ltd from the final list of comparables.

i) Pubmatic India (P) Ltd, Pune, ITAT ITANo.655/PUN/207

ii)Kony India (P) Ltd ITA No.2305/Hyd/2018

20. The learned DR, however, submitted that the services rendered by Infobeans are also similar to the services rendered by the assessee and there is no separate income from sale of goods. According to him, the income from sale of services only is being depicted as "income from sale of goods". Therefore, according to him, this company has to be retained as comparable to the assessee. As far as computation of the correct margin of Infobeans

is concerned, he submitted that the issue may be remitted to the file of the TPO for adopting the correct margin of the Company.

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

> "ITA No.655/PUN/207 dated 19-3-2018 in the case of Pubmatic India (P) Ltd vs. ACIT
>
> *"18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee".*

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

23. **Infosys Ltd**

Assessee's objections to this company are as under:

a) This company is functionally different and during the relevant previous year, it had extra-ordinary events. This Company is engaged in multi activities and therefore is functionally not comparable to the assessee. It is submitted that Infosys had acquired a company, namely, Lodestone Holding AG on 22 October 2012 and the impact on the current year profit was INR 220 Cr. Further, Infosys Consulting India was merged with Infosys Limited w.e.f. 23 August 2013. The relevant extracts from Annual report pages 180 and 205 187 20130fPa er Book Volume 2 are reproduced under:

> ***Lodestone Holding AG***
> *On October 22.20 12,lnfosys acquired 100% of the outstanding share capital of Lodesone Holding AG, a global management consultancy firm headquartered in Zurich, Switzerland. The acquisition was executed through a share purchase agreement for an upfront cash consideration of Rs.1,187 crore and a deferred consideration of up to Rs.608 crore.*

b) Infosys is not comparable because it has re-organized the segments and consequently comparison is not possible.

c) It has huge turnover INR 44341 Cr whereas the assessee's turnover is INR 543.04 cr.only.

d) Infosys has revenue from sale of products for a sum of INR 1810 Cr.

e) Infosys develops Intellectual Property Rights and spends a sum of INR 30 Cr

f) Infosys incurs huge selling and marketing expenditure of INR2390 Cr whereas the assessee has no such expenditure.

g) Infosys's business model is different and onsite revenue constitutes 51.1% whereas the entire revenue of the assessee is offshore .

h) Infosys has incurred INR 77 Cr on brand building and no such expenditure incurred by the assessee.

i) Infosys incurred a sum of INR 873 Cr on R&D which is more than assessee's turnover.

j) In assessee's own case the ITAT has not considered Infosys Ltd as a comparable from A.Y 2005-06 to A.Y 2007-08 along with Tata Elxsi.

24. The learned DR, on the other hand, supported the orders of the authorities below.

25. Having regard to the rival contentions and the material on record, we find that in a number of decisions including the assessee's own case, Infosys Ltd has been held to be not comparable with any other software development company such as the assessee due to its huge turnover and high profit margin and also as it is into software products and owns intangible intellectual property rights. In the case of Agnity India Technologies Ltd, 36 Taxmann.com 289 (Del), the Hon'ble Delhi High Court has held that Infosys Ltd is not comparable to other software development company. Relevant paragraphs are reproduced hereunder:

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

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

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

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

i. Software products (IP);

ii. Platforms (Solutions & Integration); and

iii. services (product engineering)

b. There are no segmental details between software products and services.

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

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

i) Corpoprate Information

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

29. We find that in the case of Infor (India) (P) Ltd vs. ACIT in ITA No.2307/Hyd/2018, the Coordinate Bench of the Tribunal has considered similar objections of the assessee therein and has held that these two companies along with Thirdware Solutions Ltd is not comparable to the software development company like the assessee before us. The relevant portions has been reproduced by us in the above paras. Respectfully following the same, these two companies are also directed to be excluded from the final list of

comparables. Thus, assessee's ground of appeal No.2 is partly allowed.

30. As regards Ground No.4 seeking inclusion of the companies, the learned Counsel for the assessee submitted that he is not pressing for inclusion of E-Zest Solutions Ltd, Marveric Systems Ltd, I Summation Techologies (P) Ltd, Akshay Software Technologies Ltd, Goldstone Technologies Ltd and Sankhya Infotech Ltd. Thus, in effect, the assessee is seeking inclusion of only Evoke Technoloies (P) Ltd and Sagarsoft India Ltd.,

31. As far as Evoke Technologies Ltd is concerned, the TPO has rejected the said company as a comparable on the ground that from the annual report of the said company, it is noticed that the stand alone financials reported from 2013-14 include revenue and net profit figures of one Branch outside India also. The learned Counsel for the assessee brought to our notice that in the case of Infor (India) (P) Ltd, the Coordinate Bench of this Tribunal in ITA No.2307/Hyd/2018 has held as under:

> "*73. As regards Evoke Technologies is concerned, the contentions of the assessee are that this company is functionally similar to the assessee, whereas the TPO & DRP have held that the financials of this company include the revenue of one branch outside India which are unaudited and hence are not reliable. The learned Counsel for the assessee however, drew our attention to page 963 of the Paper Book, which is part of the Annual Report of Evoke Technologies Ltd wherein the revenue of Indian Branch of assessee is separately shown. Taking the same into consideration, we direct the AO/TPO to reconsider the comparability of this company by taking the revenue from Indian Branch only. Thus, the ground for Maveric Systems Ltd is rejected and for Evoke Technologies Ltd is allowed for statistical purposes.*

32. Since the issue is similar, we direct the AO/TPO to reconsider the comparability of this company to the assessee by taking the revenue from Indian Branch only.

32. As regards Sagarsoft Ltd is concerned, it is the case of the assessee that the DRP has already directed the AO/TPO to consider the same, but the AO/TPO has not taken it as a comparable while passing the final assessment order. Since the Revenue is not in appeal against the directions of the DRP, we direct the TPO to give effect to the order of the DRP. Thus, ground of appeal No. 4 is partly allowed for statistical purposes.

33. As regards the transaction of I.T. enabled Services, in its TP Study, the assessee had adopted 11 companies as comparables, but the TPO rejected all the companies and selected 8 companies as comparable whose average margin was 35.46%. The assessee objected to the selection of the said comparables, but the TPO rejected the same and arrived at a final set of 7 companies as comparables to the assessee whose average margin was at 33.13%.He rejected the working capital adjustment as well as the risk adjustment claimed by the assessee with regard to ITeS also and proposed an adjustment of Rs.46,62,14,700/-. In this regard, the assessee is seeking exclusion of Infosys BPO and Eclrex from the final list of comparables. The other companies listed in the ground of appeal No.4 are not pressed by the assessee.

34. As regards Ground No.3, at the time of hearing, the learned Counsel for the assessee submitted that the assessee is not challenging the comparabilities of three companies i.e. Cross Domain Solutions (P) Ltd, Microland and Micro Genetic Systems Ltd. Therefore, in effect, the assessee is challenging the

comparability of only Infosys BPO Ltd, E-Clerex Services Ltd and NPS Ltd.

35. As regards Infosys BPO Ltd is concerned, the assessee's objections are as under:

a) The assessee is a captive service provider to its AEs and it uses its brand for its business purposes and Infosys is a top global brand .

b) This company is not functionally similar and is engaged in different activities which are not comparable to the assessee.

c) This company incurred huge marketing and selling expenses of INR 103 crores which constitutes about 5% of the revenue.

d) This comparable also incurred INR 5 crores on brand building exercise.

e) He further submitted that in the assessee's own case for the A.Y 200-11, this Tribunal has held this company to be a non-comparable to the assessee.

36. The Objections of the assessee with regard to E-Clerx Services are as follows:

a) This company is engaged in rendering of ITeS services. It has both voice and non-voice based services and predominantly voice-based. Eclerx is a Knowledge Process Outsourcing Company and functionally it cannot be compared with the assessee.

b) In Eclerex there are 3 segments i.e. financial services, sales & marketing services and cable and Telecom services.

c) This company has substantial outsourcing expense of INR 11.10 crores which constitutes 15.71% of revenues.

d) The financials of Eclerx are unreliable.

e) This company has super profits

f) In the assessee's own case, the Tribunal in A.Y 2009-10 and 2010-11 held this company to be excluded from the list of comparables and the relevant portion from the orders are reproduced as below:

A.Y 2009-10 – ITA No.134/Hyd/2014

4. Eclerx Services Ltd.:

4.1 The ld. AR objecting to the aforesaid company being treated as comparable, submitted that the said company has diversified services and KPO Services. He submitted that in the following rulings ITAT rejected the said company as comparable:

1. HSBC Electronic Data Processing India Pvt. Ltd., ITA No. 247&295/Hyd/14.

2. M/s Capital IQ Information Systems (India) Pvt. Ltd., ITA No. 124/Hyd/14.

3. TNS India Pvt. Ltd., ITA No. 604 & 419/Hyd/14.

4. Excellence Data Research , ITA No. 159/Hyd/14

5. Hyundia Motor Engg. P. Ltd., ITA No. 255/H/14

6. OSI Systems Pvt. Ltd., ITA No. 683&542/H/14 4.2 In the case of Capital IQ Information Systems India Pvt. Ltd., (supra), the coordinate bench has held as under:

"18.2 We have considered the issue and examined the Annual report and the objections of the assessee. As seen from the annual report, the above company is involved in diverse nature of services and there was no segmental data for diversified service port folio. Moreover, this company can be considered as KPO and we are of the opinion that this company is not comparable to assessee's services. We, therefore, direct the AO/TPO to exclude this company."

4.3 The ld. DR, on the other hand, relied on the orders of revenue authorities.

4.4. After considering the submissions of both the parties and keeping in tune with the consistent view of different benches of the Tribunal in respect of the aforesaid company, we direct the AO/TPO to exclude the aforesaid company from the list of comparables".

37. The learned DR, on the other hand, supported the orders of the authorities below.

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

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

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

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

"TCS e-SERVE LIMITED 11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs.46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs.1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2. We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y.2009-10 while considering the comparability of the assessee with Infosys BPO Ltd., has taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies P. Ltd., (2013) 219 Taxman 26 (Del.), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs.15.79 crores as against the turnover of Rs.1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS e-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs.50 crores as against the turnover of TCS e-Serve Limited of Rs.1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No.6 is partly allowed.

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

9. As far as M/s. E-clerx Services Ltd., is concerned, the Co-ordinate Bench of ITAT in the case of M/s Hyundai Motors India Engineering P.

ltd in ITA Nos. 1743/Hyd/2014 (AY.2010-11) & ITA No. 1917/Hyd/2014 (AY.2010-11) dt. 13-11-2015, has decided the issue as under:

"16. As regards M/s. Eclerx Services Ltd., is concerned, we find that this company was also directed to be excluded by following the decision of ITAT in assessee's own case for the A.Y. 2009-2010 on the ground that it is a KPO. The Ld. Counsel for the assessee has drawn our attention to the annual report of the said company to demonstrate that the facts and circumstances and the nature of the activities carried on by the said company in the A.Y. 2010-11 are also same.

17. Ld. D.R. has not been able to rebut this factual aspects of the said company with any evidence to the contrary. The only ground relied on by the Revenue is that in the case of Agilent Technologies International P. Ltd., the ITAT, Delhi Bench has upheld selection of M/s. Eclerx Services Ltd. A copy of the said order is filed before us. Assessee's contentions therein that the KPO services are distinct from BPO services and are not comparable, has been rejected by the Tribunal. However, since a uniform and consistent stand has to be taken in the case of the same assessee on similar facts and circumstances, we, respectfully following the decision of the Coordinate Bench in assessee's own case, do not see any reason to interfere with the order of the DRP. Ground No.2 is accordingly rejected".

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

39. Respectfully following the same, we direct the exclusion of Infosys BPO Ltd as well as E-Clerx Services from the final list of comparables in respect of ITeS.

40. As regards Ground No.5, the assessee is seeking inclusion of only two companies i.e. Informed Technologies Ltd and Ace BPO Services (P) Ltd. As regards Informed Technologies Ltd, the TPO did not accept this company as a comparable on the ground that this company has high non-current investment of Rs.6.05 crores and further that it is a KPO. According to the assessee, it is also not a KPO but is an ITeS company and that its total Revenue is from the Call Centre Services only. He therefore, prayed that this company may be included in the list of comparables.

41. Similarly, as regards Ace BPO Services Ltd, the contentions of the assessee are that this company is functionally comparable and that it satisfies all the filters of the TPO and also that there are no related party transactions or the (RPT) of this company are negligible. It is also submitted that the financials of this company are very much available in the public domain and therefore, the findings of the TPO that the financial of the company are not available is not correct. He relied upon the decision of the Tribunal in the case Infor (India) (P) Ltd wherein the Tribunal directed the AO/TPO to adopt this company as a comparable and prayed for a similar direction in the case of the assessee also.

42. The learned DR relied upon the orders of the authorities below.

43. Having regard to the fact that the assessee has brought out that these two companies satisfies the filters adopted by the TPO and that the findings of the TPO with regard to the distinguishing factors are not correct, we deem it fit and proper to set aside the issue to the file of the AO/TPO with a direction to re-examine the above facts/contentions of the assessee and if they are found to be correct, the said Companies be adopted in the final list of comparables.

44 In the result, Ground No.5 is partly allowed for statistical purposes.

45. As regards Ground No.6 with regard to the correct margin of the comparable companies, we find that the assessee is seeking correct computation of margins of E-Infochips Ltd, Thirdware Solutions Ltd, Persistent Systems Ltd and Tata Elxsi Ltd with regard to software development services and Infosys BPO Ltd and Microland with regard to ITeS services are concerned. We therefore, remit the issue to the file of the AO/TPO for computation of the correct margins of these companies.

46. Ground Nos. 7 & 8 were not pressed by the assessee and therefore, these grounds are rejected.

47. As regards Ground No.9 with regard to the working capital adjustment, it is the case of the assessee that the provision of bad and doubtful debts should be considered as operating expenses while computing the PLI. He submitted that the transactions can be considered as a comparable only after making adjustments to eliminate the differences that are likely to affect the cost and profit margin on controlled and uncontrolled transactions. In support of this contention, he placed reliance upon the I.T. Rules 1(10)B(i)(e) of the I.T. Rules. He further submitted that the assessee being a Capitive Service Provider, working capital adjustment should be allowed to the assessee as per OECD guidelines. We find that the TPO has not granted working capital adjustment for both SDS and ITeS transactions by holding that the assessee has failed to substantiate that WCA has an impact on the profit of the assessee vis-à-vis comparable companies. Even before us, the assessee has not shown how the working capital adjustment is required in the case of the assessee

as comparable to the compared companies. Therefore, we do not see any reason to direct the AO/TPO to grant working capital adjustment to the assessee. Thus, ground No.9 is accordingly rejected.

48. As regards Ground No.10 with regard to interest on outstanding receivables, it is the case of the assessee that the interest on receivables is not an international transaction as notional interest cannot be brought to tax. Further, he also submitted that after making working capital adjustment, a separate adjustment of receivables cannot be made. He further submitted that without prejudice to the above arguments, since the receivables are in foreign currency, the rate of interest should be at LIBOR + and not SBIPLR rate as applied by the TPO.

49. Having regard to the rival contentions and the material on record, we find that the A.Y before us is 2014-15 and hence, the interest on receivables is an international transaction as it is subsequent to the amendment to section 92B of the I.T. Act. However, we are inclined to accept the alternate argument of the assessee that since the receivables are in foreign currency, the rate of interest to be applied is at LIBOR + and nor SBIPLR rate. AO/TPO is directed accordingly.

50 In the result, ground of appeal No.10 is treated as partly allowed.

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

Order pronounced in the Open Court on 18th December, 2020.

Sd/-	Sd/-
(D.S.SUNDER SINGH) **ACCOUNTANT MEMBER**	**(P. MADHAVI DEVI)** **JUDICIAL MEMBER**

Hyderabad, dated 18th December, 2020.
Vinodan/sps
Copy to:

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3 DRP-1, Kendriya Sadan, 4th Floor, C Wingh Bengaluru 560034
4 Director of Income tax, (Intl. Taxation), Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order