

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, PUNE

(Through virtual court)

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

ITA No. 1957/PUN/2019

Assessment Year: 2015-16

Knorr-Bremse Technology
Center India Pvt. Ltd.
S.No. 276, Hissa No. 1,
Village Mann, Hinjewadi Phase II,
Taluka Mulshi, Pune.

PAN AAFCK 0241B

Appellant

Vs.

Dy. CIT Cir. 14, Pune.

Respondent

Appellant by : Shri M.P. Lohia &
Shri Nikhil Tiwari

Respondent by : Shri Shivaji B. More

Date of Hearing : 11-02-2022

Date of Pronouncement : 16-02-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the directions of the Ld. Dispute Resolution Panel (DRP), Panel-3, Mumbai dated 03-09-2019 passed u/s.144C(5) of the Income Tax Act, 1961 (hereinafter referred to as „the Act“) for the assessment year 2015-16 as per the following grounds of appeal on record :

“Based on the facts and the circumstances of the case, Knorr-Bremse Technology Center India Private Limited (hereinafter referred to as 'the Appellant' or 'KB TCI') respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income- tax, Circle 14 ('the learned AO') under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') dated 4 October 2019 (received on 17 October 2019) in pursuance of the directions issued by Hon'ble Dispute Resolution Panel ('DRP') - 3, Mumbai under section 144C(5) of the Act, on the following grounds which are mutually exclusive and without prejudice to one another:

On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially the learned AO have:

I. Grounds pertaining to transfer pricing adjustment

- 1. General ground challenging the transfer pricing adjustment of INR 4,20,77,778 .**

Erred on facts and in circumstances of the case and in law in proposing adjustment of INR 4,20,77,778 to the value of certain international transactions entered by the Appellant by rejecting the analysis undertaken by the Appellant to determine the arm's length price and not considering the documentations maintained and filed.

2. Non-consideration of comparability analysis as documented in the transfer pricing study report

Erred on facts and in circumstances of the case by not considering the data provided in the transfer pricing study report for benchmarking analysis.

3.. Rejecting/modifying filters adopted by the Appellant for identifying comparable companies and inappropriately adopting new filters for the same:

Erred in rejecting/ modifying filters adopted by the Appellant in the TP documentation for identifying comparable companies and inappropriately adopting the following new/ modified filters for the same:

- *Rejection of companies having turnover less than INR 5.19 crores and more than INR 519.1 crores by applying turnover filter for selecting companies within 10 times higher or 10 times lower range as against selecting companies within the turnover of INR 1 crore to INR 200 crores as applied by the Appellant;*
- *Rejection of companies with less than 75% earnings from exports as against 25% earnings from export filter applied by the Appellant;*
- *Rejection of companies with different accounting year;*
- *Rejecting companies with forex spending greater than 75% of operating costs; and*
- *Rejection companies having employee cost less than 25% of the total costs*

4. Accepting companies having supernormal profit

Erred in law and in facts by accepting companies having supernormal profit as comparable to the Appellant

5. Inappropriate rejection of comparable companies identified in the TP documentation.

Erred in law and in facts by inappropriately rejecting certain comparable companies from the set of comparable companies identified by the Appellant in the TP Documentation with respect of international transaction pertaining to provision of software services-

*Akshay Software Technologies Limited; and
TVS Infotech Limited.*

6. Accepting certain additional companies as comparable to the Appellant on an ad hoc basis

Erred on facts and in circumstances of the case and in law by accepting certain additional companies as comparable to the Appellant in relation to international transactions pertaining to rendering of routine software support services

- *Thirdware Solutions Limited;*
- *Aspire Systems (India) Limited;*
- *Nihilent Technologies Private Limited;*
- *Harbinger Systems Private Limited;*
- *Infochips Limited;*
- *R.S Software (India) Limited;*
- *Rheal Software Private Limited;*
- *Cybercom Datamatics Information Solutions Limited;*
- *Ingenuity Gaming Private Limited;*
- *Inteq Software Private Limited;*
- *Pure Software Private Limited;*

- Infobeans Technologies Limited;
- Clogeny Technology Private Limited; and
- Great Software Laboratory Private Limited

7. Rejection of additional companies identified by KB TCI as comparable to the provision of software development services segment

Erred on facts and in circumstances of the case by rejecting additional companies identified by KB TCI as comparable to the provision of software development services segment:

- Sankhya Infotech Limited (Segmental); and
- Vrinchi Limited

8. Denial of adjustment for risk differences

Erred in denying adjustment on account of differences in the functional and risk profile of comparable companies vis-a-vis the Appellant.

II Other grounds of objections:

9. Transfer pricing adjustment as per rectified order not considered while computing assessed income

Erred in considering transfer pricing adjustment of Rs.4,20,77,778 as appearing in the draft assessment order instead of transfer pricing adjustment as per the rectified order of Rs 2,93,74,360.

10. Incorrect levy of interest under section 234A of the Act

Erred on the facts and in law by levying interest under section 234 A of the Act, despite of the original return of income filed within due date by the Appellant.

11. Initiating penalty proceedings under section 274 read with section 271(l)(c) of the Act on additions made to the total income

Erred on the facts and in circumstances of the case and in law in initiating penalty proceedings against the Appellant under section 274 read with section 271 (1)(c) of the Act for furnishing inaccurate particulars of its income on account of transfer pricing adjustment, without appreciating the fact that, the transfer pricing adjustment to the income of the Appellant is mainly on account of difference of opinion between the Appellant and the learned AO/ Transfer Pricing Officer.

12. Levy of interest under sections 234B, 234C of the Act on account of additions made to the total income

Erred on the facts and in law by levying interest under section 234B and section 234C of the Act.

The Appellant craves leave to add, alter, amend, amplify or modify any or all of the above grounds of appeal at or before the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the grounds of appeal and facts and circumstances of the case.”

2. At the very outset, the learned counsel for the assessee submitted that grounds No. 1 & 2 are general in nature. Hence no adjudication is required.

3. Grounds No. 4 and 5 are not pressed. Therefore, on hearing the submissions of the learned A.R., these grounds are **dismissed as not pressed.**

4. Ground No. 7 is also not pressed as submitted by the Id. A.R. That after recording his submissions, ground No. 7 is **dismissed as not pressed.**

5. Ld. A.R. submitted also that Ground No. 11 is premature while ground No. 12 is consequential.

6. The Id. Counsel further submitted that in this case, the main contention of the assessee is with regard to the dispute in the selection of comparable companies to the final list of comparables with that of the assessee. On this issue, grounds No. 3 and 6 of the grounds of appeal are to be taken together. That further in ground No. 6, the assessee has challenged inclusion of comparables companies in relation to the assessee and amongst them, the assessee only objected four comparable companies before us. The assessee wants exclusion of all these following comparable companies from its final set of comparables:

- (a) Thirdware Solutions Ltd.
- (b) E Infochips
- (c) R.S. Software (India) Ltd.
- (d) Infobeams Technologies Ltd.

The rest of the comparables are not pressed as submitted by the learned A.R., hence **are dismissed as not pressed.**

7. **Thirdware solutions Ltd.**

The learned T.P.O has discussed this issue at para 12 of his order wherein the assessee has stated that Thirdware Solutions Ltd. cannot be accepted as comparable to the assessee for financial year 2014-15 for the following reasons.

- (i) Thirdware is engaged in distinct activities such as enterprise applications and also derives revenue from sale of licences and subscriptions. Thus, it is functionally not comparable to the assessee.
- (ii) Non-availability of segmental information
- (iii) It fails the turnover filler applied by assessee.

Assessee's main contention was that the company Thirdware also deals in software products. The learned T.P.O. on the other hand on perusing the annual report placed on record came to the conclusion that this company is a software development service company, thus comparable to the assessee. The learned D.R.P. has dealt with this issue at para 8.2(i) of their findings and has categorically upheld the observations of the learned T.P.O. The learned counsel for the assessee at the time of hearing appraised us regarding the annual report of this company and demonstrated also through the P & L a/c that this company is functionally different from that of the assessee company. That further proper segmental information is also not available. The assessee has relied on the following judicial pronouncements in this regard.

- i) Synchron Technologies Pvt. Ltd. Vs. ACIT (ITA No. 1692/PUN/2018 for A.Y. 2014-15).
- ii) Symantec Software Pvt. Ltd. Vs. DCIT (ITA No. 1824/PUN/2018 for A.Y. 2014-15)
- iii) Infor (India) Pvt. Ltd. Vs. ACIT (ITA No. 1689/HYD/2019 for A.Y. 2015-16).

We also find that the Pune Bench of the Tribunal in ITA No.1692/PUN/2018 for A.Y. 2014-15 dated 22-01-2021 has observed as under:

“28. The assessee submitted that Thirdware Solutions Ltd. has derived its entire revenue from sale of products and this company has made purchases of stock and holds inventory which highlights that the company is engaged in purchase and sale of products and therefore, it is not functionally comparable with that of the assessee.

*29. The Ld. Counsel for the assessee has placed reliance on the decision of the Pune Bench of the Tribunal in the case of **Symantec Software India Private Limited Vs. DCIT (supra.)**, wherein on identical set of facts, Thirdware Solutions Limited was directed to be excluded from the final list of comparables with regard to its software development service segment. On this issue, the Pune Bench of the Tribunal has held as follows:*

“16. We have perused the case records and heard the rival contentions. We observe that Thirdware Solutions Limited is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from sale of user licenses. Further, the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. We find in the case of **M/s. EMC Software and Services India Pvt. Ltd. Vs. JCIT (supra.)**, the Co-ordinate Bench of the Tribunal, Bangalore exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“(iv) Thirdware Solutions Ltd. the company is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from sale of user licenses and purchase stock in trade during the year and has intangibles. Further the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. The above comparable was excluded in assessee's own case on functional dissimilarity in the Assessment Years 2005-06 and 2007-08 and learned Authorised Representative also relied on Lime Labs (India) Pvt. Ltd. Vs. ITO 101 Taxman.com 201 (Delhi Trib.) We found the co-ordinate Bench of the Tribunal in the case of LG Software India Pvt. Ltd. Vs. DCIT in IT(TP)A No.3122/Bang/2018 dt.28.05.2019 for the Assessment Year 2014-15 has excluded the comparable as observed at paras 8 & 8.1 at page 4 as under :

“8. We also notice that in A.Y 2008-09, the co-ordinate bench has excluded M/s. Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s. Thirdware Solutions Ltd. is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in A.Y 2008-09, we direct exclusion of M/s. Thirdware Solutions Ltd.”

The comparable Thirdware Solutions Ltd. has to be excluded as it is predominant in activity and segmental details are not available. Accordingly we direct the TPO/A.O to exclude this comparable from the list of comparables for determining the ALP.”

17. We further find the same view has been taken by the Co-ordinate Bench of the Tribunal, Pune in the case of **M/s. John**

Deere India Pvt. Ltd. Cybercity Vs. ACIT (supra.) wherein the Co-ordinate Bench of the Tribunal has exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“10. We have heard the rival submissions and gone through the relevant material on record. The Annual report of this company is available at page 415 onwards of the

paper book. Profit and loss account of this company shows `Sales' of Rs.67,56,06,505/-. Break-up of such sale has been given in Schedule 12, which records `Export from SEZ units' – Rs.47,58,40,447/-; `Export from STPI units' – Rs.11,20,90,633; `Revenue from subscription' – Rs.1,53,13,736/-; `Sale of licence' – Rs.1,51,38,618/-; and `Software Services' – Rs.5,72,23,072/-. This company has segments only on geographical basis and not on functional level. As such, there is no bifurcation of operating profit from Software Services and others including Sale of licence and Revenue from subscription etc. Even the first two major items of `Exports from SEZ units' and `Export from STPI units' do not show as to whether these were exports of Software products or Software Services. In the absence of the availability of any concrete information in respect of Software Services, we fail to comprehend as to how this company, also having software products in its portfolio, can be construed as comparable. The same is accordingly directed to be excluded.”

18. We also observed in the case of **M/s. ION Trading India Private Limited Vs. ITO (supra.)** wherein the Co-ordinate Bench of the Tribunal, Delhi has exclude Thirdware Solutions Limited from the list of comparable for determining the ALP by observing as follows:

“56. We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the functions of Thirdware are in contrast with the assessee which only provides software development in the finance domain as per the instruction of its AE. Also, Thirdware has incurred expenses towards import of software services, evidencing outsourcing of software services unlike the assessee. Since it is also engaged in outsourcing its activities as it has incurred expenses towards imports of software services, evidencing outsourcing of software services unlike the appellant company. Hence, it is functionally not comparable and cannot be treated as a comparable to assessee. We order accordingly.”

Respectfully, following the plethora of decisions of various Tribunals as referred hereinabove, Thirdware Solutions Limited cannot be treated as comparable company and the AO/TPO is directed to exclude **Thirdware Solutions Limited** from final list of comparable companies with regard to its software development service segment.”

30. Similarly also, in the case of **M/s. FIS Solutions (India) Private Limited Vs. DCIT, ITA No.1695/PUN/2018** for the assessment year 2014-15 which is the same assessment year as of the assessee in this case. The Pune Bench of the Tribunal has held that Thirdware Solutions Limited has to be excluded from the final list of comparables with respect to the assessee company. The Tribunal had decided this issue after considering its own decision in **Symantec Software India Private Limited Vs. DCIT (supra.)**. The relevant Para is extracted herein below:

“11. We observe again that our aforesaid finding pertains to the assessment year 2014-15 which is relevant assessment year

*under consideration before us at this present moment. It is therefore, natural that all parameters regarding this company would be same and respectfully, following our findings in **Symantec Software India Private Limited. Vs. DCIT (supra.)**, we direct the TPO/AO to exclude this company i.e. **Thirdware Solutions Limited** from the final list of comparables.”*

*The Ld. DR submitted that there is no change in facts and circumstances in respect to the assessee and also in respect to the comparable company i.e. **Thirdware Solutions Limited** in the present year also.*

*31. Considering the identical set of facts and circumstances, we respectfully follow our findings in the above mentioned cases and direct the TPO/AO to exclude this company i.e. **Thirdware Solutions Limited** from the final list of comparable in respect of the assessee. Thus, **Ground No.6 raised in appeal by the assessee is allowed.**”*

8. We are of the considered view that on identical set of facts and circumstances and on the same parity of reasoning, respectfully following our findings in the aforesaid decision, we direct the A.O/T.P.O to exclude this company i.e. **Thirdware Solutions Ltd.** from the final list of comparables. This part of the **ground raised in appeal by the assessee is allowed.**

9. **E-Infochips Ltd.**

The assessee objects that this company is functionally not comparable for the following reasons:

- i) E-Infochips is engaged in manufacturing and sale of products;
- ii) E-Infochips is engaged in a diversified portfolio and therefore, functionally not comparable to the assessee.
- iii) Service –wise segmental bifurcation is also not available to the annual report.

10. The T.P.O. has given his findings at para 5 of his order and has stated this company functionally comparable to the assessee while rejecting the arguments of the assessee as per record. The learned D.R.P. has given their findings at para (v) of the order, wherein they had upheld the findings of the T.P.O. The learned counsel for the assessee brought before our notice the annual report and the financial statements of E-Infochips and demonstrated how this company cannot be compared to that of the assessee.

11. The assessee has relied on the following case laws:-

1. ACIT Vs. M/s. NetHawk Networks India Pvt. Ltd. (ITA No. 117/PUN/2017 and ITA No. 2927/PUN/2016 for A.Y. 2011-12
2. John Deere India (P) Ltd. Vs. ACIT (ITA No. 2663/PUN/2016 and 2775/PUN/2016) for A.Y. 2011-12;
3. Redknee (India) Technologies Pvt. Ltd. Vs. DCIT (ITA No. 486/PUN/2016 for A.Y. 2011-12.

12. We also find that Pune Bench of the Tribunal in ITA No. 2663 and 2775/PN/2016 for A.Y. 2011-12 dated 29th January 2020 has dealt with the issue of exclusion of E-Infochips Ltd. and has observed as under:

13. *Heard both parties and perused the material available on record. The TPO had taken the comparability of e-infochip Ltd. on the ground that its revenue is more than 50% is from the provision of software and software consultancy services. The assessee contended it cannot be taken as comparable as there is functional differences and it is providing services in software products and applications and embedded systems. Further, it was contended no segmental data was available and it is engaged in the sale of software products. The TPO considering the income from software services and consultancy charges involving A.Ys. 2008-09 to 2010-11 and observed that the 70% of revenue in A.Y. 2010-11 is from software services which is more than the acceptance criteria of 50% and held the e-infochip Ltd. is a comparable company. The CIT(A) in its order at page 35 agreed with the contention of assessee that e-infochip Ltd. is engaged in many activities with the software development services, ITES and sells software products and hardware products and excluded e-infochip Ltd. from the set of final comparables. We find at page No 450 of the paper book wherein the financial statements as on 31-03-2011 is placed, particularly the profit and loss account at page No. 451 clearly shows the total income consisting of operating revenue and other income. We note that the expenditure incurred by the said company regarding consumption of materials changes inventory to an extent of Rs.2,65,92,550/- whereas in the manufacturing of other operative expenses is Rs.16,76,98,890/- which clearly shows that the said company is engaged in manufacturing company than software development which is the main activity of assessee. We find the director's report is placed on record from pages 459 to 518 wherein at page No. 495 of para 12 is it clearly stated that the e-infochip Ltd. is primary engaged in software development and ITES and products which is considered only reportable business segment. Therefore, it is clear that the comparable company as taken by the TPO in his study and its activity are not only software development but also includes ITES and its products. Therefore, in our opinion, when the functions of comparable company is different from the assessee who is engaged in software development cannot be a comparable company for benchmarking the ALP. Further, we find bifurcation of income of e-infochip Ltd. is at page No. 488 of the paper book wherein it is bifurcated revenue from software development and revenue from sale of products which support the argument of Id. AR that the activity and functions of e-infochip Ltd. is different from assessee's activities and its functions. Therefore, we hold that the E-infochip Ltd. cannot be a comparable company."*

13. That on the same issue in another decision of Pune Bench of the Tribunal in the case of Redknee (I) Technologies Pvt. Ltd. Vs. DCIT in ITA No. 486/PUN/2016 for A.Y. 2011-12 dated 29th June 2018 observed and held as follows:

“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 Arm’s 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 its Associated Enterprises (A.Es), who were located in United States. We find that TPO has included Infochips 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 Infochips 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 Infochips 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 its A.Es. We further find that in case of DCIT Vs. M/s. Philips India Limited (supra) and Ness Technologies (India) Private Limited (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 Arm’s 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 comparables, the margin of the assessee would fall within + 5% range vis-à-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 Limited from the list of comparables and thereafter compute the TP adjustment, if any, in the hands of assessee.”

Respectfully following the aforesaid judicial decisions on the same parity of reasoning, we direct the A.O/T.P.O to exclude E-Infochips Ltd. from the final list of comparables and thereafter compute the T.P adjustment, if any, in the hands of the assessee. **This part of the ground is also allowed.**

14. **R.S. Software (India) Ltd.** The main objections of the assessee regarding this company are; (i) M/s. R.S. Software (India) Ltd. is engaged in providing services pertaining to electronic payment and hence, it is functionally not comparable to the assessee; and (ii) it fails the turnover filter applied by the assessee.

15. The T.P.O. in his analysis came to the conclusion that this company is earning the entire revenue from sale of services and hence is a comparable company to that of the assessee. The learned D.R.P. has given their findings at para 6.1 of their order wherein they have upheld the conclusion arrived at by the T.P.O. That at the time of hearing, the learned counsel for the assessee took us through the annual report and financial statements of this company in support of his contention that R.S. Software (I) Ltd, is not functionally comparable to the assessee and also it fails the turnover filter applied by the assessee. The Id. A.R relied on the following judicial pronouncement and the relevant extract is as follows:-

- i) M/s. Avaya India Pvt. Ltd. Vs. Addl .CIT in ITA No. 7290/Del/2018 for A.Y. 2014-15 dated 24-9-2019. In this case, the Tribunal had observed and held as follows:

“12.1 The company was selected by the assessee in its transfer pricing study. The learned DRP retained the company in view of the fact that it was included by the DRP for assessment year 2012-13.

12.2 The learned counsel of the assessee submitted that company is engaged in on-site development of the software and cannot be compared with the assessee, which is an offside software developer. The Ld. counsel also referred to page No. 299 of the paper book and submitted the company was engaged in providing high-end technical services, including analytics services, testing services, dispute management, security management etc. He also submitted that company was engaged in significant R&D Activities in the areas of business intelligence, mobile payments, testing automation, cloud computing etc. According to the Ld. Counsel, the company being functionally dissimilar, cannot be compared with the ass

12.3 The Ld. DR, on the other hand, submitted that difference in business model cannot be a criterion for excluding the company from set of the comparables. He submitted that the company has been chosen as comparable in the assessment year 2012-13 also by the Ld. DRP.

12.4 We have heard rival submission of the parties. We find that in case of on-site development and off-site developments services are rendered in different geographical locations. In case of on-site development, the company charge higher revenue from the customers in view of the expenses incurred in foreign currency and higher input costs on human resources, whereas in case of off-site development all expenses on human resources are incurred domestically and thus revenue or fee charge from the customer would be generally less than what would be charged in case of on-site customers. This business model difference makes difference in FAR analysis. The company has been excluded in the case of Microsoft India (R&D) Private Limited in ITA No. 507/Dell/2017 as it was involved in R&D activities for software development services. In view of the decision of the Tribunal (supra), the company becomes functionally dissimilar to the assessee. Accordingly, keeping in view the difference of business model and functional dissimilarity, we direct the Ld. AO/TPO to exclude the company from the set of the comparables.”

That on the same parity of reasoning, following the aforesaid decision, we direct the A.O/TPO to exclude R.S. Software (I) Ltd. from the final set of comparables with regard to the assessee. **Accordingly, this part of the ground is also allowed.**

16. **Infobeans Technologies Ltd.**

That before the T.P.O the assessee has objected to the inclusion of this company for the following reasons:

- i) Infobeans has a diversified portfolio of high-end-services hence, it is functionally not comparable to the assessee. The assessee in this regard has also placed reliance on the annual report and the financial statements placed before us in the paper book and had tried to demonstrate and substantiate its contentions. The learned TPO has observed as follows:

- “1. As per revenue recognition, page 10 of AR Revenue includes rendering of services.
2. As per Note 18 of Annual Report for FY 2014-15 , Revenue from operations include : Sale of software which is 100% of revenue stream.
3. As per page 4, the Company is a service company, primarily rendering software services.
4. Further on page 10 of AR, it is described that InfoBeans operating at CMMI level 3, is a software services company specializing in business application development for web and mobile. Business

is primarily engaged in providing custom developed services to offshore clients.

Thus, considering the revenue stream and revenue recognition policy, company is held to be valid comparable.”

17. The learned D.R.P at para (xii) of its order has held as follows:

“Page 18 of the Annual Report shows that 100% of the revenue is from sale of software. Page 10/4 shows that the company is engaged in software development, specializing in application development for web and mobile. In fact, page 2 of the Annual Report referred by the assessee also shows that the company is in computer programming consultancy and related activities. In TNMM comparability on a broad level only needs to be considered as minor differences if any are taken care of while taking average margin at net level. Therefore the objection is dismissed.”

18. That on perusing the Annual Report of the company and the various financial statements placed before us, we agree with the findings of the TPO and the DRP and as evident in the annual report 100% of the revenue of this company is from sale of software. This company is engaged in software development, specializing in application development for web and mobile. Page 2 of the Annual Report shows that the company is engaged in computer programme consultancy and its related activities. Therefore, this company is comparable with that of the assessee. The TPO has rightly included this company as a comparable in the final list. **Therefore, this part of the ground of appeal of the assessee is dismissed.**

19. In view of the foregoing, we set aside the impugned order and remit the matter to the file of the A.O/TPO for re-deciding the transfer pricing adjustment in the light of our above discussion. **The aforesaid grounds are accordingly allowed for statistical purposes as indicated hereinabove.** At this stage, it is relevant to take note of ground No. 9 of the assessee’s appeal which deals with the rectified order passed by the TPO. The factual matrix of this issue is that the TPO took 20 companies as comparables in the final list of comparables and in the order passed u/s 92CA(3) of the Act, he computed the amount of final adjustment at Rs. 4,20,77,778/- by taking median at 20.17%, being, the average of the adjusted OP/OC of the comparable companies listed at serial numbers 10 and 11. Thereafter, the assessee moved a rectification

application. Pursuant to the order passed u/s 154 read with 92CA(3) on 20-5-2019,

2019, the TPO included another company, viz., M/s. Cigniti Technologies Ltd.

in the final set of comparable, taking total number of comparable companies at

21 with median at 11th data point as the arm's length margin of OP/OC at

17.45%. This rate was applied for computing the rectified transfer pricing

adjustment at Rs. 2,93,74,360/-. However, the A.O in the final order passed u/s

143(3) r.w.s. 144C(13) of the Act adopted the transfer pricing adjustment at Rs.

4,20,77,778/- instated of Rs. 2.93 crores determined under the rectified order.

In view of the fact that, we have excluded three companies from the list of

comparable in the above paras, the data set of the companies shall undergo

change and so shall be the median to be taken at arm's length price. We

therefore, direct the A.O./TPO to revise the data set of comparable companies

by giving effect to our above findings and then adopt the median OP/OC as

arm's length profit margin. **This will automatically take care of ground No. 9**

of the assessee's appeal, which, ergo, does not require any specific

consideration in the light of the revised data set to be drawn by the

A.O./TPO by giving effect to our directions hereinabove.

20. In Ground No. 8, the assessee has contended denial of adjustment for

risk differences in the functional and risk profile of comparable companies vis-à-

vis the assessee. However, before us, the assessee has failed to show any

evidences or to bring on record any documents/materials to justify that the

assessee is bearing more risk than the other comparable companies. We

therefore, do not agree with the contention of the assessee. **Ground No. 8 of**

assessee's appeal is dismissed.

21. Ground No. 10 is with regard to incorrect levy of interest u/s 234A of the

Act. That at the time of hearing, the learned counsel for the assessee fairly

submitted that this issue may be remanded to the file of the A.O/TPO for

verification and then re-adjudicate as per law. The learned D.R conceded to

the submissions of the assessee. Having heard the parties, in the interest of

justice, we remand this issue to the file of the A.O/T.P.O for re-adjudication as

per law while complying with the principles of natural justice. **Ground No.10 of the assessee's appeal is allowed for statistical purposes.**

22. **In the combined result, the appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced in the open Court on this 16th February 2022.

**Sd/-
(R.S.SYAL)
VICE PRESIDENT**

**sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER**

Pune; Dated : 16th February 2022 .
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CCIT Pune
4. The Dy. CIT (TP) 2(1) Pune.
5. The D.R. ITAT „B“ Bench
6. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

/// TRUE COPY ///

		Date	
1	Draft dictated on	11.02.2022	Sr.PS
2	Draft placed before author	15.02.2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS
6	Kept for pronouncement on		Sr.PS
7	Date of uploading of order		Sr.PS
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10	Date on which file goes to the A.R		
11	Date of dispatch of order		