

आयकर अपीलीय अधिकरण “सी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, PUNE

(Through Virtual Court)

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

आयकर अपील सं. / ITA No. 1692/PUN/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Synechron Technologies Private Limited
CEDAR Building, Ascendas International,
Tech Park Pune, Plot No.18,
Rajiv Gandhi Infotech Park,
Hinjewadi, Phase-III,
Pune-411 057.
PAN : AAICS2894R

.....अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax,
Circle-6, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri M.P. Lohia

Revenue by : Shri Sardar Singh Meena

सुनवाई की तारीख / Date of Hearing : 20.01.2021

घोषणा की तारीख / Date of Pronouncement : 22.01.2021

आदेश / 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 27.06.2018 passed u/s.144C(5) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) for the assessment year 2014-15 as per the following modified grounds of appeal on record :

“The Appellant would like to file the following grounds of appeal (along with modified specific ground no. 5 and 6) before the Hon'ble Bench:

A. Grounds pertaining to transfer pricing adjustment:

1. General ground challenging the transfer pricing adjustment of Rs.34,97,73,866.

Erred in making transfer pricing adjustment amounting to Rs.34,97,73,866 to the value of international transactions of the Appellant pertaining to provision of software development services to its Associated Enterprises (AEs) by rejecting the analysis undertaken in its transfer pricing documentation for determination of the arm's length price.

2. Inappropriate use of contemporaneous data and use of single year data

Erred on the facts and in circumstances of the case and in law by determining the arm's length margin using contemporaneous and single year data (AY 2014-15) which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

3. Inappropriate application/modification of certain qualitative and quantitative filters

Erred on the facts and in circumstances of the case and in law by introducing modifying certain additional filters to reject the comparable companies identified by the Appellant in its TP report.

4. Inappropriately considering gain/loss arising on account of foreign exchange fluctuation as non-operating in nature while computing the operating margins of the Appellant and comparables

Erred on the facts and in circumstances of the case and in law by treating gain/loss arising on account of foreign exchange fluctuation as non-operating in nature while computing the operating margins of the Appellant and comparables.

5. Inappropriate rejection of companies selected as comparable by the Appellant in the TP Report

Erred on facts and in circumstances of the case and in law by rejecting companies from the set of comparables identified by the Appellant in the TP report in respect of international transaction pertaining to provision of software development services.

- Cat Technologies Limited
- Evoke Technologies Private Limited
- Maveric Systems Limited

6. Inappropriately selecting companies which are not comparable to the Appellant

Erred on facts and in circumstances of the case and in law in inappropriately selecting additional companies which are not comparable to the Appellant.

- Persistent Systems Limited
- Thirdware Solution Limited

7. Inappropriately rejecting additional companies that can be considered as comparable to the Appellant

Erred on facts and in circumstances of the case and in law by rejecting certain additional companies identified as comparable by the Appellant in respect of international transaction pertaining to provision of software development services.

8. Inappropriately rejecting risk adjustment

Erred on the facts and in circumstances of the case and in law by comparing the full-fledged risk bearing entities with the Appellant's operations without making any risk adjustment for differences between the functional and risk profile of comparables vis-a-vis the Appellant.

9. Adjustment if any, should be restricted to the proportion of transactions with Associated Enterprises only

Erred on the facts and in circumstances of the case and in law by not restricting/proportionating the TP adjustment to international transactions with AEs only.

10. Benefit of +/- 3%, as applicable

Erred on facts and in circumstances of the case and in law by computing the arm's length price without granting the benefit of +/-3% under proviso to section 92C(2) of the Act, as applicable.

11. Incorrect computation of Income from business or profession and consequent tax demand

Erred on facts and in circumstances of the case and in law by incorrectly computing Income from business or profession and consequent tax demand in notice of demand accompanying final assessment order.

12. Erroneous levy of interest

Erred on facts and in circumstances of the case and in law by levying interest under sections 234A, 234B, 234C and 234D of the Act.

13. Penalty proceedings under section 271(1)(c) of the Act on additions made to the total income

Erred in initiating penalty proceeding under section 271(1)(c) of the Act without considering the fact that adjustment to the income of the Appellant is mainly on account of difference of opinion and interpretation of provisions between the Appellant and the learned AO/ Transfer Pricing Officer."

2. At the very outset, referring to the grounds of appeal, the Ld. Counsel for the assessee submitted that the assessee is not pressing Ground Nos. 2,

3, 7, 8 and 11. After recording the submissions of the Ld. Counsel, **these grounds are dismissed as “not pressed.”**

3. **Ground No.1** is general in nature, **Ground Nos. 10 & 12** are consequential and **Ground No.13** is premature. Hence, these grounds do not call for any adjudication.

4. The brief facts of the case are that the assessee is engaged in the business of software development services. During the year under consideration, the assessee has undertaken international transactions with its AEs as under:

Sr. No.	Nature of transactions	Amount	Method
1.	Provision of software development services	409,04,02,898	TNMM
2.	Recovery of expenses	1,78,90,314	At Actual
3.	Reimbursement of expenses	3,82,09,150	At Actual
	Total	414,65,02,362	

The Transfer Pricing Officer (TPO) found various faults in the TP study report filed by the assessee. It was found that the assessee has incorrectly used 3 years data in the case of the comparables for benchmarking analysis using TNMM in violation of Rule 10B(3). The TPO also used various filters as mentioned in Page 5 of his order. Thereafter, only four comparables namely persistent Systems Ltd, R.S. Software (India) Limited, Saskan Technologies Communication Ltd and Cigniti Technologies Ltd were selected out of the 21 comparables selected by the assessee as per TP study report. The TPO also

carried out further search and identified various other comparables including the four above. However, after considering the assessee's objection and application of filters only one more comparable i.e. Thirdware Solutions Ltd was added. The PLI i.e. working capital adjusted OP/OC margin of the comparables was computed at 25.52% compared to 16.17% in case of the assessee and an adjustment of Rs.34,97,73,866/- was made.

5. Coming to the effective **Ground No.4** which pertains to considering gain/loss arising on account of foreign exchange fluctuation as non-operating in nature while computing the operating margins of the assessee and comparables. It is the contention of the assessee that foreign exchange fluctuation gain/loss should be treated as operating income/expenses for the purpose of computing the operating margin of the assessee and the comparables.

6. The Ld. DRP and TPO have held that the foreign exchange fluctuation gain/loss should be treated as non operating income/expenses for the purpose of computation of Profit Level Indicator (PLI) of the tested party and the comparables. The Ld. DRP on this issue has held as follows:

“5.2 Findings :

This issue is discussed in Para 7.4 of the TPO's order. The TPO has considered foreign exchange gains/losses as non-operating revenue. In this regard, it is pertinent to point out that Foreign Exchange gain/loss occurs in the following two situations:

- i. Receipts/expenses are booked at the time of carrying out the transaction whereas the actual receipts/payments of foreign exchange occurs at a later point of time resulting in Foreign exchange gain/loss due to variation in the exchange rate from the date of transaction to that of date of actual receipt/payment.*
- ii. An exporter/ importer enters into forward contract for sale/purchase of foreign exchange to hedge itself from the fluctuation in exchange rates.*

In the first situation mentioned above, the foreign exchange gain/loss is solely attributable to the variation in exchange rate during the period from the date of carrying out the transaction to the date of actual receipt/payment and therefore the operations of the assessee have no direct bearing on such gain/loss. There is no direct/immediate nexus between the operations of the assessee and the foreign exchange gain/loss. The fluctuations in the rate of foreign exchange which result in such gain/loss are in turn caused by the macro-economic conditions in India and the other countries, RBI policies and its intervention in the foreign currency market, conditions prevailing in the world currency markets etc. Hence, the gain or loss due to foreign exchange rate fluctuations cannot be considered to be part of operating revenues or expenses in this situation.

In the second situation mentioned above, the amount of Foreign exchange gain/loss and the hedging cost/premium will vary depending upon the Risk management Policy adopted by the concerned enterprise which has entered in to the import/export transaction. Some enterprises may not hedge their foreign exchange positions while others may hedge their foreign exchange exposure either wholly or partly. The Risk management policy of each company is its internal matter and it has nothing to do with the operational transactions entered into by it with its AEs. An enterprise enters into contract with other enterprises to provide/procure services or goods on the basis of (i) cost of such services/goods, (ii) prevailing exchange rate and (iii) the profit margin expected by it. However, the actual profit margin at the end of the year may vary Substantially from the expected profit margin at the time of entering into the contract due to fluctuation in the exchange rate and its risk management policy, i.e., the extent to which its Foreign exchange transactions were hedged by it Therefore, the margins of two companies entering into 'similar transactions may vary Substantially depending upon the level of hedging of their Foreign exchange transactions though at the time of entering into transactions their estimated profit margin may have been same. Therefore, it would be unfair to compare their results i.e. profit margins, at the end of the year for determination of the Arm's Length Price unless the impact of the fluctuation in exchange rate is excluded from the computation of their margins i.e. by treating the same as non operating income/expenses.

Further, it is pertinent to point out that the basic transfer pricing principle requires computation of the ALP of the transferred goods/services on the date of sale or purchase since the comparability analysis is undertaken to examine whether the transfer price is at ALP at the time of the sale or purchase and not after it. However, when FE fluctuation gain/loss is included in the operating revenue/expense for the computation of PLI, the actual receipts/payments are substituted in place of the sale price or purchase price charge on the date of transfer and the PLI so computed would reflect the net margin prevalent at the time of realization/payment rather than the net margin at the time of sale or purchase. Hence, the treatment of FE gain/loss as operating for the purpose of computing the PLI of the tested party and the comparables causes distortions in the comparability analysis.

Further, when the FE gain/loss is included in the operating revenue/expenses, part of the gain/loss would pertain to the transactions of sales /purchases made during the earlier year in respect of which the actual receipts/payments took place during the instant year. The net margin so computed therefore does not reflect the correct net margin arising from the sale/purchase transactions that have

taken place during the year for carrying out a reliable comparability analysis.

The inclusion of FE gain/loss in the operating revenue would result in distortion of net margins of the tested party and the comparable companies making the comparability analysis unreliable, which is illustrated by way of the following situations:

(i) In a case where two enterprises sell the same product on the same date at the same net margin but realize the sale proceeds on different dates, their PLI computed by including the FE gain/loss in the operating revenue would be different due to the difference in the quantum of the gains/loss arising from the difference in the exchange rate on the said dates of realization.

(ii) Where the two enterprises have exported the same product on the same date at the same net margin to different countries with different currencies, their PLI computed by including the FE gain/loss in the operating revenue would be different due to the difference in the extent of fluctuation in the exchange rates of the two currencies from the date of sale to the date of realization of the sale proceeds.

Further, it is relevant to note that Rule 10TA of IT Rules forming part of safe harbour rules dealing with the definition of Operating revenue and Operating expense prescribe the exclusion of the income/loss arising on account of foreign currency fluctuations from the operating revenue/expense. Though the assessee has not opted for safe harbour rules and the said rules are not applicable to the assessee for the purpose of acceptance of the transfer price if it has resulted in an operating margin which is not less than the rate prescribed therein, the scope and meaning attached to the expressions 'Operating revenue' and 'Operating expense' as per these rules can be considered to provide guidance for the interpretation of these expressions in the case of the assessee also as the meaning of these expressions would remain the same irrespective of whether an enterprise has opted for safe harbour rules or not.

Having regard to the reasons cited above, we are of the view that the FE fluctuation gain/loss is required to be treated as non operating and excluded from the computation of the PLI of the tested party and the comparables for facilitating a reliable comparability analysis.

This issue of treatment of Foreign exchange loss/gain as operating or non-operating for the purpose of computing the PLI of the assessee and the comparables has been a subject matter of various decisions of Hon'ble Tribunals. The assessee has relied on many decisions wherein various benches of the hon'ble ITAT have held that the foreign exchange fluctuation gain/loss should be treated as Operating income/cost. However, we find that in the case of M/s. DHL Express (India) (P) Ltd., [2011] 11 taxmann.com 40 the hon'ble ITAT Mumbai laid down the principle that the foreign exchange gain/loss has nothing to do with the main operations of the assessee and therefore the same represents a non-operating income/loss which needs to be excluded for the purpose of benchmarking the international transaction. Thus, we find that there is no judicial consensus on the issue of the treatment of gain/loss arising from foreign exchange rate fluctuation in respect of transactions carried out during the course of business. There is no decision of the Hon'ble Supreme court so far on this issue. As regards decision cited by the assessee, however, no evidence is brought on

record that this decision is accepted by the Department on merit. As the decision is pending before the higher forums for adjudication and has not reached a finality and considering the decision of Jurisdictional ITAT on the matter as discussed above and considering the need for keeping the issue alive until such time the matter reaches a finality in the light of the Change in law doing away with the right of the department to appeal against the order of the DRP, we rely on the above cited decisions of the Hon'ble ITAT Mumbai, apart from the detailed reasons cited in the preceding paragraphs, to hold that the foreign exchange fluctuation gain/loss should be treated as non-operating income/expense for the purpose of computation of PLI of the tested party and the comparables. The assessee's ground in this regard is accordingly rejected."

7. Taking forward the contention of the assessee that the foreign exchange gain/loss has to be treated as operating in nature, the Ld. Counsel for the assessee submitted that there are various decisions of the Tribunal and the Hon'ble High Courts, where this issue has been decided in favour of the assessee. Referring one of such decision enclosed at Page 700 of legal compilation of the paper book, the Ld. Counsel for the assessee has placed reliance on the decision of the Pune Bench of the Tribunal in the case of **M/s. Extentia Information Technology Pvt. Ltd. Vs. DCIT, in ITA No.2331/PUN/2017 dated 04.03.2020**, vide Para 21 to 24 on the said issue it has been held as follows:

"21. First of all, we take up the assessee's objection regarding treatment of foreign exchange (forex) gain/loss given by the authorities as an item of non-operating nature in the computation of the ALP of the assessee as well as comparables. The ld. AR contended that the forex gain of the assessee ought to have been considered as operating revenue. We find merit in the contention about the inclusion of foreign exchange gain/loss in the operating revenue/costs of the assessee as well as that of the comparables, but only in respect of transactions in the revenue field and not the capital field. The Special Bench of the Tribunal in ACIT Vs Prakash I. Shah (2008) 115 ITD 167 (Mum)(SB) has held that the gain due to fluctuations in the foreign exchange rate emanating from exports is its integral part and cannot be differentiated from the export proceeds simply on the ground that the foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in currency of the country where such goods are sold and subsequently when the amount is realized in that foreign currency and then converted into Indian rupees, the entire amount is relatable to the exports. In fact, it is only the translation of invoice value from the foreign currency to the Indian rupees. The Special bench held that the exchange rate gain or loss cannot have a different character from the transaction to which it pertains. The Bench found

fallacy in the submission made on behalf of the Revenue that the exchange rate difference should be detached from the exports and be considered as an independent transaction. Eventually, the Special Bench held that such exchange rate fluctuation gain/loss arising from exports cannot be viewed differently from sale proceeds. What is true for exports is also true for other items of expenses/income of revenue nature.

22. In the context of transfer pricing, the Bangalore Bench of the Tribunal in SAP Labs India Pvt. Ltd. Vs ACIT (2011) 44 SOT 156 (Bangalore) has held that foreign exchange fluctuation gain is part of operating profit of the company and should be included in the operating revenue. Similar view has been taken in several ITA No.2331/PUN/2017 M/s. Extentia Information Technology Pvt. Ltd. 20 decisions including Trilogy E Business Software India (P) Ltd. Vs DCIT (2011) 47 SOT 45 (URO) (Bangalore).

23. The reliance of the ld. DR on Safe Harbour rules to contend that foreign exchange gain or loss be taken as non-operating, is not sustainable. There is no doubt that in such rules, forex gain/loss has been treated as non-operating. However it is relevant to note that such rules are not applicable to the assessment year under consideration. The Hon'ble Delhi High Court in Pr. CIT VS. Cashedge India Pvt. Ltd., vide its judgment dated 4.5.2016 in ITA 279/2016, has held that : 'So far as the question of fluctuation of foreign exchange was concerned, the ITAT ruled that the relevant provision, i.e. 'Safe Harbour Rules' had not been notified for the concerned assessment year and were, therefore, inapplicable'. Thus the Hon'ble High Court did not disturb the operating nature of forex gain/loss as held by the tribunal.

24. We note from the Notes forming part of the Accounts of the assessee for the year under consideration that one of the transactions involving fluctuation in foreign currency is in the capital field, which is, 'Purchase of capital goods worth Rs.13,85,590/-.' Forex gain/loss in respect of such a transaction cannot be considered as a part of operating expense/income. The ld. AR candidly admitted that the TPO considered forex gain/loss as non-operating not only for the assessee but also for the comparables. In view of the foregoing discussion, we are of the considered opinion that the amount of foreign exchange gain/loss arising out of revenue transactions is required to be considered as an item of operating revenue/cost, both for the assessee as well as the comparables. We hold accordingly."

8. The Ld. Counsel for the assessee further pointed out the decision of the Hon'ble Delhi High Court in the case of **Pr. Commissioner of Income Tax Vs. Ameriprise India Pvt. Ltd., in ITA No.206/2016**, wherein the substantial question of law raised before the Hon'ble High Court was as follows:

"3. The question sought to be urged by the Revenue is whether the ITAT was correct in directing the foreign exchange gain/loss to be considered as an item of operating revenue/cost?"

The Hon'ble High Court on this substantial question of law has held and observed as follows:

“4. The ITAT has in the impugned order noted the fact that the foreign exchange gain earned by the Assessee is in relation to the trading items emanating from the international transactions. Since the foreign exchange loss directly resulted from trading items, it could not be considered as a non-operating loss. Further, it is noted by the Dispute Resolution Panel that the service agreement between the Associated Enterprise (AE) and the Assessee stated that for the specified products and services provided by the Assessee, it “shall raise invoices on Ameriprise USA on the basis of a cost plus pricing methodology.” The ITAT was therefore right in holding that the AO was not justified in considering the foreign exchange loss as a non-operating cost.”

9. Further, the Ld. Counsel for the assessee has also placed reliance on the decision of the Delhi Bench of the Tribunal in the case of **Ameriprise India (P) Ltd. Vs. Assistant Commissioner of Income Tax, New Delhi (2015) 62 taxmann.com237 (Delhi- Trib)**, wherein the Delhi Bench of the Tribunal on the same issue has held as follows:

“16.1 The second issue taken up before us is against treating foreign exchange differences as non-operating as against the assessee's treatment of operating cost. On pertinent query, it was stated by the Ld. AR that the foreign exchange loss relates to its transactions from operations by which the Revenue has been earned and offered for taxation.

16.2 We find merit in the contention raised on behalf of the assessee about the inclusion of foreign exchange gain/loss in the operating revenue/costs of the assessee as well as that of the comparables. When we advert to the nature of such foreign exchange gain earned by the assessee, it has also been admitted by the ld. DR that the same is in relation to the trading items emanating from the international transactions. When the foreign exchange loss directly results from the trading items, we fail to appreciate as to how such foreign exchange fluctuation loss can be considered as non-operating.

16.3 The Special Bench of the Tribunal in Asstt. CIT v. Prakash I. Shah [2008] 115 ITD 167 (Mum) has held that the gain due to fluctuations in the foreign exchange rate emanating from export is its integral part and cannot be differentiated from the export proceeds simply on the ground that the foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in currency of the country where such goods are sold and subsequently when the amount is realized in that foreign currency and then converted into Indian rupees, the entire amount is relatable to the exports. In fact, it is only the translation of invoice value from the foreign currency to the Indian rupees. The Special bench held

that the exchange rate gain or loss cannot have a different character from the transaction to which it pertains. The Bench found fallacy in the submission made on behalf of the Revenue that the exchange rate difference should be detached from the exports and be considered as an independent transaction. Eventually, the Special Bench held that such exchange rate fluctuation gain/loss arising from exports cannot be viewed differently from sale proceeds.

16.4 In the context of transfer pricing, the Bangalore Bench of the Tribunal in SAP Labs India (P) Ltd. v. Asstt. CIT [2011] 44 SOT 156/[2010] 8 taxmann.com 207 has held that foreign exchange fluctuation gain is part of operating profit of the company and should be included in the operating revenue. Similar view has been taken in Trilogy E Business Software India (P) Ltd. v. Dy. CIT[2011] 12 taxmann.com 464/47 SOT 45 (URO)(Bangalore). The Mumbai Bench of the Tribunal in S. Narendra v. Addl. CIT [2013]. 32. taxmann.com 196/57 SOT 32 has also laid down to this extent. In view of the foregoing discussion, we are of the considered opinion that the amount of foreign exchange gain/loss arising out of revenue transactions is required to be considered as an item of operating revenue/cost, both of the assessee as well as comparables. We, therefore, hold that the AO was not justified in considering forex loss as non-operating cost as against the assessee's claim of operating cost."

That therefore going by the aforesaid plethora of judicial pronouncements, this issue is answered in favour of the assessee and the TPO/AO is directed to determine the ALP of the international transactions afresh after considering forex gain/loss as operating in nature. Thus, **Ground No.4 raised in appeal by the assessee is allowed.**

10. In **Ground No.5**, the assessee is aggrieved with the rejection of certain companies from the set of comparables identified by the assessee in the TP report in respect of international transaction pertaining to provision of software development services. In this regard, the Ld. Counsel for the assessee submitted that they want inclusion of three companies in the final set of comparables which are (A) **Cat Technologies Limited** (B) **Evoke Technologies Private Limited** and (C) **Maveric Systems Limited**.

(A) Cat Technologies Limited :

11. The Ld. Counsel for the assessee submitted that the TPO has rejected this company due to persistent loss making company. Further, it is contented that Cat Technologies Limited, it would be persistent loss making company, if the forex is taken as non-operating in nature. However, if forex is taken as operating in nature, Cat Technologies Limited will not be considered as persistent loss making company. The Ld. Counsel for the assessee relied on the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India Pvt. Ltd. wherein it was held that comparable cannot be excluded only because it is incurring losses.

12. The Ld. Counsel further referring to Page 347 of the factual paper book wherein profit and loss account of the Cat Technologies Limited as on 31.03.2012 has been placed and therein, under head "other income" there is foreign exchange realization profit is at Rs.10,037,962/-. Further, at Page 350 which is notes relating to profit and loss account as on 31.03.2012 of Cat Technologies Limited, it is specifically mentioned that there are no capital and other commitments as on the date of balance sheet.

13. We find the Hon'ble Bombay High Court in the case of **CIT Vs. Welspun Zucchi Textiles Ltd., (2017) 77 taxmann.com.137 (Bombay)** wherein Their Lordship while analyzing Rule 10B(2) of the Income Tax Rules itself sets out that for the purpose of determining the ALP, the comparison between an international transaction and an uncontrolled transaction would be judged with reference to the aspects specified therein. That further, analyzing the said Rule, Their Lordship held that the aforesaid Rule does not require

exclusion of a company from comparability analysis only because it had suffered loss in a particular year.

14. The Revenue must bring on record that certain company is consistent loss making company in order to record its exclusion from the final set of comparables. In this case of the company i.e. Cat Technologies Limited, we have already examined that as per the statement of accounts placed on record as on 31.03.2012, it has earned foreign exchange realization profit.

15. We observe similarly, the Mumbai Bench of the Tribunal in the case of **Goldman Sachs (India) Securities (P) Ltd. Vs. ACIT (OSD) in ITA No.7724/Mum/2011** vide Para 19 of the said order it was observe that *“the Company Capital Trust was taken as comparable by the assessee but it was rejected by the TPO because for the two out of the last three years taken into consideration, the company had a loss. The Tribunal further observed that “there was no difference of business of this company with that of the assessee and that in such circumstances, if a company has suffered loss in a particular year that cannot disqualify it as a legitimate comparable.”*

16. That further, going by the submissions of the Ld. Counsel for the assessee that Cat Technologies Limited is persistent loss making company only, if forex is taken as non-operating in nature. However, in the foregoing paragraphs while deciding Ground No.4 in this appeal, we have already arrived at the findings that forex has to be taken as operating in nature. In such scenario, the Ld. Counsel did submit that Cat Technologies Limited will not be considered as persistent operating loss making company. Taking the totality of facts and circumstances, **we direct the TPO/AO to include this**

company i.e. Cat Technologies Limited in the final set of comparables with that of the assessee.

(B) Evoke Technologies Pvt. Ltd.

17. The next company which the assessee wants to include in the final set of comparables is **Evoke Technologies Pvt. Ltd.** The Ld. Counsel for the assessee submitted that the revenue from exports is more than 99% and the details of FY 2013-14 are available in the annual report for FY 2014-15 which is available in public domain and therefore, consider this company to be as comparable.

18. The Ld. DRP with regard to this company i.e. Evoke Technologies Pvt. Ltd. has held and observed as follows :

“iv) Evoke Technologies Pvt. Ltd.

This entity was rejected by the TPO by applying export filter. The TPO has discussed this issue in para 7.5(iv) of his order. It is contended that the Annual Report for F.Y. 2013-14 is not available and further the export revenue is less than 75% of the total revenue, as per segmental chart reproduced by the TPO. The assessee contends that the Annual Report of F.Y. 2014-15 was available from where necessary details were culled out relevant to current year and further that the TPO used the geographic segments. We have considered the argument. It is admitted fact the annual report of F.Y 2013-14 is not available in public domain. The assessee has in his submission reproduced the accounts of F.Y 2014-15 which shows the corresponding figure for F.Y 2013-14 and also the segmental reporting done. We find from there that the total revenue for current financial year from both the charts is shown at Rs 4546.59 lacs. Out of the total revenue, the segmental revenue chart shows the revenue from USA as 924.87 lacs and from India at 3621.72 lacs. Thus it is clear that the export is much less than 75%. Therefore in absence of any further clarity on this issue and in absence of annual report for F.Y 2013-14, assessee's objection cannot be accepted.”

19. Having heard both the sides and gone through the material on record, it is seen that it was the assessee who included this company in the list of comparables. As such, the primary burden of proving comparability was on it.

It is just elementary that comparability can be established with reference to various factors. Apart from filters, it is essential to consider the nature of business of the company and other qualitative information, such as, related party transactions, mergers and acquisition etc. if any and the detailed composition and manner of revenue recognition, which predominantly help in deciding the comparability. Such qualitative information can be obtained only from the Annual Report of the company for the relevant year. Simply relying on the quantitative figures for the year under consideration with reference to the Annual Report of the company for the succeeding year does not in any manner assist in deducing the qualitative information and the resultant comparability. It is a matter of record and admitted position that the assessee did not furnish Annual Report of the Company before the Authorities below which could have assisted them in ascertaining the comparability of this company with that of the assessee. The same position is continuing before the Tribunal as well. Since the assessee failed to prove the comparability with reference to the Annual Report of this company, we are satisfied that the Authorities below were justified in excluding this company in the final list of comparables. Thus, the impugned order is upheld on this score.

(C) Maveric Systems Ltd :

20. The next company which the assessee wants to include in the final set of comparables is Maveric Systems Ltd. The Ld. Counsel for the assessee submitted that during the FY 2013-14, Maveric had obtained permission for relocation of its SEZ unit. The relocation of business cannot be considered as peculiar circumstances as it is normal for an organization and does not change business functions or circumstances to a large extent. That also the compensation amount is reported as exceptional item in profit and loss account and is not considered for the purpose of calculating TNMM.

Accordingly, impact, if any, in relation to this event is already excluded while calculating operating margins of Maveric.

21. The Ld. DRP with regard to this company i.e. Maveric Systems Ltd. has held and observed as follows:

“v) Maveric Systems Ltd.

The TPO has discussed this issue in para 7.5(vi) of his order. It is noticed that this company has relocated its SEZ unit during the year under consideration and has received compensation for the relocation. The compensation has been shown as an exceptional item of income by the assessee and was excluded from the operating income. The assessee contends that though there was compensation received due to the exceptional condition, but the same was not shown as operating income for the TNMM analysis. However, the TPO contends that the total income in this year is reduced to Rs.6.52 Cr. after excluding the exceptional income of Rs.4.96 Cr., but its turnover has increased by more than 10%, thereby adversely impacting its profitability. The assessee contends that the relocation was from one SEZ unit to another SEZ unit and, therefore, there was no impact on the tax benefit availed. As regards impact on profit, it contends that the same may be due to increase in allowances paid to the employees and legal and professional charges. The assessee contends that the employees' salary and allowances has increased to Rs.47.91 Cr. in AY. 2014-15, compared to Rs.41.06 Cr. in AY.2013-14. Similarly, legal and professional charges have increased to Rs.8.32 Cr. in AY.2014-15, compared to Rs.6.76 Cr. in AY.2013-14. No reasons have, however, been brought on record as to under what circumstances there was an increase in such expenses and it is only submitted that the lower profit in this year may be attributed to the facts mentioned above. Since the assessee has failed to properly justify that the increase in such expenses is not due to the relocation factor, therefore, this objection cannot be accepted.”

22. Having heard the rival submissions and gone through the relevant material on record, it is observed that the TPO ordered exclusion of this company from the final list of comparables on the ground that it had ‘peculiar economic circumstances’ during the year under consideration in the sense of relocation of its SEZ unit and further, compensation received for this purpose was excluded by the assessee from the computation of the operating income of this company. As against that, we find from Note No.14 to the Annual accounts of this company that it obtained permission for relocation of its SEZ unit from L&T, Arun Excello, IT SEZ Vallanchery Village,

Guduvenchery to Sector specific IT/ITES SEZ of DLF Info City Developer vide communication dated from 25.02.2013. It has been specifically mentioned that “*Unit was physically moved during June 2014*”. The assessment year under consideration is 2014-15 with the corresponding F.Y. 2013-14. Since the unit got physically moved during June 2014 i.e. in the succeeding financial year, the factor of relocation of its SEZ unit cannot be considered as extraordinary event for the year. However, it is also an admitted position that this company received compensation of Rs.4,96,31,866/- on account of such relocation which was shown as income during the year in the P & L account under “Exceptional item”, but was not considered as operating revenue. Since this income on account of relocation relates to the very fact of relocation, the income on account of such relocation also needs to be considered as item of operating revenue. Though the assessee was contesting before the Authorities below that the income of Rs.4.96 Crore should not be taken as operating revenue, but, it was fairly conceded by the Ld. AR before the Tribunal that this income can be included in the operating revenue of this company for the purpose of determining its PLI. We, therefore, direct to include this company in the final list of comparables. Further, we clarify that in computing the PLI of this company, income of Rs.4.96 Crore should also be taken as a part of operating revenue.

23. With regard to **Ground No.6**, the assessee has contended that the Revenue Authorities has inappropriately selected additional companies which are not comparable with that of the assessee and those companies are (D) **Persistent Systems Limited** and (E) **Thirdware Solution Limited**.

(D) Persistent Systems Limited :

24. The TPO has observed that this company was selected by the assessee itself in its TP study report as comparable company. However, in response to show cause notice, the assessee has objected for the selection of this company on the ground that on review of notes to accounts of the financial statements of the Persistent Systems Limited for the FY 2013-14, it was noticed that the company was engaged in diversified activities and earning revenue from sale of software products, services and technology innovation covering full life cycle of product to its customers. That also, break of segmental information was not available.

25. The Ld. Counsel for the assessee placed reliance on the decision of the Pune Bench of the Tribunal in the case of **Symantec Software India Private Limited Vs. DCIT, in ITA No.1824/PUN/2018** for assessment year 2014-15 dated 17.02.2020, wherein the facts were identical to the case of the assessee and in this case also, Persistent Systems Limited was sought to be excluded as comparables to the software development service segment of the assessee. That in the above referred case, it was submitted by the assessee that Persistent Systems Limited has been rejected by the Revenue Authorities as functionally non comparable to software development service provider in past years before various Forums. It was also submitted that Persistent Systems Limited has derived revenue from licensing of software products, products engineering and royalty but however, breakup of the same in revenue from software services is not available. The Tribunal while deciding this issue has placed reliance on the decision of the Hon'ble Delhi High Court in the case of Pr. CIT Vs. Saxo India Pvt. Ltd., ITA No.682/2016 and held as follows:

“11. We have perused the case records and heard the rival contentions. We observe that the company i.e. Persistent Systems Limited is functionally different as it is engaged in rendering IT services and in the development of software products without there being support segmental information. During the year the company made acquisitions. We observe that the Hon’ble Delhi High Court in the case of **Pr. CIT Vs. Saxo India Pvt. Ltd. ITA No.682/2016** has held as follows:

“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 in 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.”

12. We further find in the case of **EMC Software and Services India Private Limited Vs. JCIT (ITA No.3375/Bang/2018)**, the Co-ordinate Bench of the Tribunal, Bangalore has directed the Assessing Officer to exclude the Persistent Systems Limited from the final list of comparable for determination of ALP by observing as follows:

“(iii) Persistent Systems Ltd. : The company is functionally different as it is engaged in rendering IT services and in the development of software products without there being support segmental information and engaged in IP led solutions and undertakes significant R & D activities, owns IP. During the year the company made acquisitions. The company has made significant investment in IP and their solutions and has a dedicated team for Research and IP development. The learned Authorised Representative relied on decision of Tribunal in the case of CGI Information & Management Systems Pvt. Ltd. Vs. ACIT 94 Taxman.com 97 and PCIT Vs. Saxo India Pvt. Ltd. 74 taxmann.com 88 (Delhi). We relied on the decision of CGI Information Systems & Management Consultants Pvt. Ltd.(supra) at paras 28 to 30 as under :

28. The learned counsel for the Assessee submitted before us that the comparability of the 3 companies out of the aforesaid 4 companies which the Assessee seeks to exclude from the list of comparable companies chosen by the TPO viz., Infosys Ltd., Larsen & Toubro Infotech Ltd. and Persistent Systems Ltd., were considered by the ITAT Delhi Bench in the case of *Agilis Information Technologies India (P.) Ltd. v. Asstt. CIT* [2018] 89 taxmann.com 440 (Delhi - Trib.) for the same AY 2012-13. In this regard it was submitted that the functional profile of the Assessee is same as that of the Assessee in the case of *Agilis Information Technologies India (P.) Ltd. (supra)*, is identical inasmuch as the said company was also involved in providing SWD services to its AE and the TPO had chosen 16 comparable companies out of which 6 companies chosen by the TPO in the case of the Assessee for the purpose of comparability were the same. His submission was that the decision rendered by the Tribunal in the case of *Agilis Information Technologies India (P.) Ltd. (supra)* would be equally applicable to the Assessee in the present case also. The learned DR. submitted that the DRP in its directions has merely accepted with the reasoning of the IPO and therefore the issue of exclusion of these companies should be directed to be examined afresh by the DRP.

29. We have considered the rival submissions. In the case of *Agilis Information Technologies India (P.) Ltd. (supra)*, this Tribunal considered the comparability of the 3 companies which the Assessee seeks to exclude from the final list of comparable companies chosen by the TPO. The functional profile of the Assessee and that of the Assessee in the case of *Agilis Information Technologies India (P.) Ltd. (supra)*, is identical inasmuch as the said company was also involved in providing SWD services to its AE and the TPO had chosen some comparable companies which were also chosen by the TPO in the case of the Assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the Assessee seeks to exclude as follows:

- (a) Infosys Ltd., was excluded from the list of comparable companies by following the decision of the Hon'ble Delhi High Court in the case of *CIT v. Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26 (Delhi). The discussion is contained in paragraphs 4.5 to 4.7 of the Tribunal's order. The Tribunal accepted that Infosys Ltd. is a giant risk taking company and engaged in development and sale of software products and also owns intangible assets and therefore not comparable with a software development service provider such as the Assessee in that case.
- (b) Larsent & Tourbro Infotech Ltd., was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of ITAT in the case of *Saxo India (P.) Ltd. v. Asstt. CIT* [2016] 67 taxmann.com 155 (Delhi - Trib.). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L & T Infotech Ltd., was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the revenue against the tribunal's order was dismissed by the Hon'ble Delhi High Court in ITA No.682/2016.
- (c) Persistent Systems Ltd., was excluded from the list of comparable companies on the ground that this company was a software product company and segmental information on SWD services was not available. The Tribunal in coming to the above conclusion referred to the decision rendered by ITAT Delhi Bench in the case of *Cash Edge India (P.) Ltd. v. ITO* ITA No.64/Del/2015 order dated 23.9.2015 and the decision of Hon'ble Delhi High Court in the case of *Saxo India Pvt. Ltd. (supra)*. The findings in this regard are contained in Paragraphs 4.14 to 4.16 of its order.

30. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins. In this regard we are also of the view that the plea of the learned DR for a remand of the issue to the DRP on the ground that the DRP has not given any reasons in its directions cannot be accepted. The DRP has endorsed the view of the TPO in its directions and therefore the reasons given by the TPO should be regarded as the conclusions of the DRP.

We rely on judicial decisions and facts in respect of comparable Persistent Systems Ltd. and direct the Assessing Officer to exclude from the final list of comparable for determination of ALP.”

13. The Co-ordinate Bench of the Tribunal, Cochin in the case of **US Technology International Private Limited Vs. ACIT in ITA No.592/Coch/2018** has held as follows:

“10. Persistent Systems Ltd. The TPO obtained information u/s. 133(6) based on which it was concluded that the comparable is predominantly engaged in the business of rendering software development to various customers world wide. The TPO observed that the company is engaged in developing products which have been outsourced by clients and the company does not own IP to these products and the product development is nothing but software development services. With respect to the intangibles of the comparable company, it was found that overseas subsidiary companies have acquired certain IP products and that the comparable is predominantly engaged in the software development services. Further, the intangibles with the comparable are in the nature of software license acquired for use in the operation of the company and they are not the software products generating revenue. The disclosure in the annual report regarding the acquisition of the products relate to the group as a whole and not to the stand alone as entity whose financials are compared. The R&D expenditure of the comparable relates to cross improvements and not to innovate on new products or earning additional revenue. Hence, the R&D is not affecting the margin of the company. The TPO had applied related party filter of greater than 25% and clearly this company passed the filters. Hence, the TPO rejected the contentions of the assessee and held the company as comparable. The DRP held that the company is functionally similar to the assessee.

10.1 Against this, the assessee is in appeal before us. The Ld. AR submitted that it was not functionally comparable as it was engaged in significant product development. The Ld. AR relied on the order of the ITAT, Chennai in the case of Symantec Software & Services India (P) Ltd. vs. DCIT 79 taxmann. com (Chennai-Trib.) wherein it was held as follows:

“10. We heard the rival submissions, perused the material on record. We found that the company is engaged in product development and cannot be comparable to the software development services and has income from license fee. The Revenue Recognition Policy in notes of accounts and segmental information is available in respect of infrastructure and systems, telecom and wireless life sciences and Health care. Further, it renders services in cost plus to its Associate Enterprise and sail with partnership and alliances, intellectual property led solutions and end-to end solutions, strategic acquisitions and financial year 2010-11 is an exceptional year of operation of Persistent Systems. We find support from the decision of 3DPLM Software Solutions Ltd. (supra) at para 17 Page 13 of the paper book as under:

“17. Persistent Systems Ltd.

17.1.1 This company was selected by the TPO as a comparable. The assessee objected to the inclusion of this company as a comparable for the reason that this company being engaged in software product designing and analytic services, it is functionally different and further that segmental results are not available. The TPO rejected the assessee’s objections on the ground that as per the Annual Report for the company for Financial Year 2007-08, it is mainly a software development company and as per the

details furnished in reply to the notice u/s. 133(6) of the Act, software development constitutes 90% of its revenue. In this view of the matter, the Assessing Officer included this company, i.e., Persistent Systems Ltd. in the list of comparables as it qualified the functionality criterion.

17.1.2 Before us, the assessee objected to the inclusion of this company as a comparable submitting that this company is functionally different and also that there are several other factors on which this company cannot be taken as a comparable. In this regard, the Id. Authorised Representative submitted that:

i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.

ii) Page 60 of the Annual Report of the company for F.Y. 2007-08 indicates that this company is predominantly engaged in 'Outsourced Software Product Development Service' for independent software vendors and enterprises.

iii) Website extracts indicate that the company is in the business of product design services.

iv) The ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) while discussing the comparability of another company namely Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available. The learned Authorised Representative prays that in view of the above, the company, i.e. Persistent Systems Ltd. be omitted from the list of comparables.

17.2 Per contra, the learned Departmental Representative support the action of the TPO in including this company in the list of comparables.

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

We rely on the above facts and Tribunal decision and we direct the TPO to exclude Persistent Systems Ltd. from the list of comparable companies".

10.2 Further, the Ld. AR relied on the order of the ITAT, Delhi in the case of M/s. Alcatel-Lucent India Ltd. vs. Addl. CIT in ITA No.6979/Del/2017 dated 09/05/2019 wherein it was held as under:

"We are of the view that a company engaged in development of the software products cannot be compared with the assessee who is engaged in contract software development services. Accordingly, we direct the Ld.A.O./TPO to exclude the company from the final set of the comparables.

10.3 Further, the Ld. AR relied on the on the order of the ITAT, Bangalore in the case of GXS India Technology Centre vs. ITO in ITA No. IT(TP)A No. 1444/Bang/2012 dated 31/07/2015 wherein it was held as follows:

“13.2 We have considered the rival submissions as well as the relevant material on record. As pointed out by the learned AR of the assessee that the functional comparability of the company has been examined by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions (Supra) in para 17.3 as under:

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

13.3 It is clear from the finding of this Tribunal that this company is engaged in the product developing and product design services which is similar with the software development services provided by the assessee.

Accordingly, following the decision of the co-ordinate bench of this Tribunal (supra) we direct the TPO/A.O. to exclude this company from the list of comparables.”

10.4 The Ld. AR relied on the order of the ITAT, Bangalore in the case of MetricStream Infotech (India) Pvt. Ltd. vs. DCIT in IT(TP)A Nos. 1418 & 2735/Bang/2017 dated 27/02/2019 which we have discussed in earlier para.

10.5 We have heard the rival submissions and perused the material on record. In view of the above orders of the ITAT cited in para 10.1 to 10.4 of this order, we direct the AO/TPO to exclude this company from the list of comparables on the same reason given by the co-ordinate Bench of Bangalore.”

14. In view of the matter and following the decisions of the Hon'ble Delhi High Court as well as various Tribunals, Persistent Systems Limited cannot be treated as comparable company and the AO/TPO is directed to exclude **Persistent Systems Limited** from final list of comparable companies with regard to its software development service segment.”

26. The Ld. Counsel for the assessee before us demonstrated from Page 563, 613, 622, 651 and 665 of the factual paper book referring to Director's report, financial statements of account, submitted that Persistent Systems Limited is not functionally comparable company with that of the assessee and

therefore, the same cannot be treated as a comparable company. That further, there is no support segmental information of product or services available on record.

27. The Ld. DR could not place on record any evidences or material to demonstrate that the factual observation in respect of the Persistent Systems Limited as observed by the Pune Bench of the Tribunal (supra.) and the facts of the present case are different. The Ld. DR also could not refute the findings of the Pune Bench of the Tribunal (supra) vis-à-vis the facts of the present case. We observe from the materials available on record that this company is functionally not comparable with that of the assessee company and more so because, segment wise information regarding product or services are not available in respect of this company. Therefore, **we direct the AO/TPO to exclude Persistent Systems Limited from the final list of comparable companies with regard to its software development service segment.**

(E) Thirdware Solutions Limited :

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.**

32. With regard to **Ground No.9**, the assessee contented that the TP adjustment has to be done restricting to the proportion of transaction with Associated Enterprises only.

33. We find that the Hon'ble Jurisdictional High Court in the case of **CIT vs. Firestone International (P.) Ltd., 378 ITR 558** has held that TP adjustment needs to be restricted to the transaction with associated enterprises only. The ALP can be considered on value of international transaction alone and not on the entire turnover of the assessee. This judgment of Hon'ble Bombay High Court (supra) has attained finality by the

Hon'ble Supreme Court in the same case vide SLP(C)CC No.22512/2015 dated 05.01.2016.

The Hon'ble Delhi High Court in the case of **CIT Vs. Keihin Panalfa Ltd. ITA No.11 of 2015** has held that TP adjustment have to be restricted only to the transaction with Associated Enterprises.

The Hon'ble Bombay High Court in the case of **CIT Vs. Hindustan Unilever Ltd, ITA No.1873 of 2013** has observed that Transfer Pricing adjustment has to be done only in respect of international transaction with Associated Enterprises.

The Pune Bench of the Tribunal in the case of **DCIT Vs. Magna Steyr India P. Ltd.** had occasion to refer the decision of the Hon'ble Bombay High Court in the case of **CIT Vs. Thyssen Krupp Industries India Pvt. Ltd., 381 ITR 413** wherein it has been held the transfer pricing adjustment, if any, has to be made vis-à-vis associated enterprises transaction and not on entity level. Accordingly, Pune Bench of the Tribunal directed AO/TPO to re-compute the ALP of international transactions of the assessee with its associated enterprises on the basis of the transactions with associated enterprises only.

34. Respectfully following the above referred judicial pronouncements, we direct the AO/TPO to determine the TP adjustment, if any, to be restricted to the international transactions of the assessee with its Associated Enterprises only. Thus, **Ground No.9 raised in appeal by the assessee is allowed.**

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

Order pronounced on 22nd day of January, 2021.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 22nd January, 2021.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, “सी” बेंच,
पुणे / DR, ITAT, “C” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	20.01.2021	Sr.PS/PS
2	Draft placed before author	21.01.2021	Sr.PS/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/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		