

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B" , BANGALORE**

**Before Shri N.V.Vasudevan, Vice-President
&
Shri Chandra Poojari, Accountant Member**

IT(TP)A No.692/Bang/2017 : Asst.Year 2012-2013
IT(TP)A No.2861/Bang/2017 : Asst.Year 2013-2014

M/s.NXP India Pvt.Ltd. (Successor of NXP Semiconductors India P.Ltd.) Information Technology Park Nagawara Village Kasaba Hobli Bengaluru – 560 045 PAN : AADCP9454H.	Vs.	The Dy.Commissioner of Income-tax, Circle 5(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Vikram Vijayaraghavan, Advocate
Respondent by : Sri.Muzaffar Hussain, CIT-DR

Date of Hearing : 25.02.2020	Date of Pronouncement : 27.04.2020
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ORDER

Per Chandra Poojari, AM :

These appeals filed by the assessee are directed against two separate orders of the CIT(A), dated 30.01.2017 and 24.10.2017 for the assessment years 2012-2013 and 2013-2014, respectively.

First, we shall take up IT(TP)A No.692/Bang/2017 for assessment year 2012-2013 for adjudication.

IT(TP)A No.692/Bang/2017 : Asst. Year 2012-2013 :

2. The assessee has raised the following grounds:-

“Based on the facts and circumstances of the case and

In law, NXP India Private Limited (Successor of NXP Semiconductors India Private Limited) (hereinafter referred to as "Appellant") respectfully craves leave to prefer an appeal against the order passed by Deputy Commissioner of Income Tax, Circle-5(1)(1) ("Assessing Officer" or "AO"), dated 30 January 2017 for A Y 2012-13, under section 143(3) read with section 144C of the Income Tax Act, 1961 ("the Act") pursuant to the directions issued by the Honourable Dispute Resolution Panel ("Hon'ble DRP"), Bangalore dated 01 December 2016 under section 144C(5) of the Act ("the impugned order"), inter-alia on the following grounds:

That on the facts and circumstances of the case and in law:

General Grounds

- 1. The impugned order and directions of the Hon'ble DRP are based on incorrect appreciation of facts and wrong interpretation of law and therefore, are bad in law;*
- 2. The learned AO / Transfer Pricing Officer ("TPO") has erred in assessing the total income at INR 324,935,945 as against the returned income of INR 244,543,220 computed by the Appellant in its return of income for A Y 2012-13;*
- 3. The learned AO has erred in law and in fact, in determining a sum of INR 40,638,140 as the balance tax demand payable by the Appellant;*

Transfer Pricing grounds

- 4. The Hon'ble DRP has erred in, law and facts, by upholding the stand of learned AO/TPO of not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("the Rules"), and conducting a fresh economic analysis for the*

determination of the ALP in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;

5. The learned AO / TPO erred in making an addition of INR 70,609,072 to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the provision of software development ("SWD") services transaction entered by the Appellant with its associated enterprise;

6. The learned TPO/AO has erred, in law and in facts, by determining the arm's length margin! price using only Financial Year ("FY") 2011-12 data which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements and the Hon'ble DRP has erred in upholding the said stand of the learned TPO/AO;

7. The learned AO/ TPO has erred in law and facts by rejecting certain comparable companies considered by the Appellant in the comparability analysis by applying different quantitative and qualitative filters:

(a) by rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months);

(b) by rejecting certain comparable companies identified by the Appellant using export earnings greater than 75% of the sales as a comparability criterion;

(c) by rejecting certain comparable companies identified by the Appellant using employee cost greater than 25% of the total revenues as a comparability criterion;

8. *The Hon'ble DRP has erred in, law and facts, by holding that the functions of the Appellant are highly complex and complicated in nature;*

9. *The learned AO/TPO has erred in law and in facts by accepting/ rejecting certain companies based on unreasonable comparability criteria.*

10. *The learned AO/TPO erred in law and in facts by erroneously computing the margins of certain comparable companies.*

11. *The learned AO / TPO have erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparables.*

Corporate Tax Grounds

12. *The learned AO has erred in law and in facts, in disallowing the stock compensation expense amounting to INR 6,523,426 on the basis that, tax has not been deducted at source on the amount of perquisite taxable in the hands of the employees, without appreciating the fact that as per the provisions of Section 17 of the Act, perquisite taxation would arise only at the time of exercise of the option.*

13. *The learned AO has erred in law, in disallowing the payment made towards purchase of software amounting to INR 134,700 due to non-deduction of taxes at source, without appreciating the fact that this expenditure does not pertain to the current assessment year.*

14. *The learned AO has erred in inadvertently increasing the income by adding depreciation amounting to INR 3,125,527 instead of reducing the same while computing the income.*

Other Grounds

15. *The learned AO has erred in levying interest of INR 13,759,456 under section 234B and INR 797,664 under section 234C of the Act.*

16. *The Hon'ble DRP erred in upholding the action of the learned AO in levying interest under section 234D of the Act;*

17. *The learned AO has erred in initiating penalty proceedings under section 271 (1)(c) of the Act.*

All the above grounds may be considered independent and without prejudice of each other.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to decide on the appeal in accordance with the law.

3. The assessee has raised additional grounds twice, i.e. on 16.01.2018 and on 05.03.2018, which read as follows:-

ADDITIONAL GROUND dated 16.01.2018

In addition to the grounds of objections raised in Form 36A before the Hon'ble Tribunal and the additional grounds filed earlier, after ground number 15, the Petitioner hereby wishes to introduce ground numbers 18-20 as under:

18. *"The learned AO / TPO and DRP erred in accepting Genesys International Corporation Limited and Infosys Limited as comparable companies applying unreasonable comparability criteria."*

19. *"Larsen & Toubro Infotech Ltd. and Persistent*

Systems Limited were chosen as comparables in transfer pricing study, however upon availability of more details in public domain, these companies are found to be not comparable and should be excluded from the finals set of comparables."

20."The learned AO / TPO and DRP erred in rejecting HeNos & Matheson Information Technology Limited, R Systems International Limited, Caliber Point Business Solutions Limited, Cigniti Technologies Limited, Evoke Technologies Private Limited, Maveric systems Limited and Thinksoft Global Services Limited as comparable company."

The Petitioner submits that the above additional grounds are being raised by way of abundant caution. The additional grounds raise issues which are fundamental to the appeal and the non-admission and non-adjudication of the same would result in an incomplete appreciation and adjudication of the matter. The Petitioner submits that the failure to raise these grounds at an earlier stage is neither wilful nor wanton but due to the reasons stated above.

No prejudice would be caused to the Respondent by reason of the above additional ground being admitted and adjudicated and accordingly the balance of convenience is in favour of such an order being passed by this Hon'ble Tribunal. The Petitioner states and submits that the issues raised in the additional ground above arise out of the order of the lower authorities. Reliance is based on the decisions of the Hon'ble Supreme Court in the case of Jute Corporation of India vs. C.I.T. (187 ITR 688) and National Thermal Power Corporation vs. C.I.T. (229 ITR 383) as well as the full Bench of the Bombay High Court in the case of Ahmadabad Electricity Co. Ltd. (199 ITR 351).

In the above circumstances the Petitioner prays that this Hon'ble Tribunal may kindly be pleased to;

- (i) admit and adjudicate the above additional ground,
- (ii) pass any other order that may be required in the circumstances of the case and render justice.

ADDITIONAL GROUND dated 05.03.2018

In addition to the grounds of objections raised in Form 36A before the Hon'ble Tribunal (after ground number 15) and the additional grounds filed earlier, after ground number 20, the Petitioner hereby wishes to introduce ground number 21 as under:

21. "Sasken Communications Technologies Limited were chosen as comparable in transfer pricing study, however upon availability of more details in public domain, this company is found to be not comparable and should be excluded from the finals set of comparables."

The Petitioner submits that the above additional ground is being raised by way of abundant caution. The additional grounds raise issues which are fundamental to the appeal and the non-admission and non-adjudication of the same would result in an incomplete appreciation and adjudication of the matter. The Petitioner submits that the failure to raise these grounds at an earlier stage is neither wilful nor wanton but due to the reasons stated above.

No prejudice would be caused to the Respondent by reason of the above additional ground being admitted and adjudicated and accordingly the balance of convenience is in favour of such an order being passed by this Hon'ble Tribunal. The Petitioner states and submits that the issues raised in the additional ground above arise out of the order of the lower authorities. Reliance is based on the decisions of the Hon'ble Supreme Court in the case of Jute Corporation of India vs. C.I.T. (187 ITR 688) and National Thermal

Power Corporation vs. C.I.T. (229 ITR 383) as well as the full Bench of the Bombay High Court in the case of Ahmadabad Electricity Co. Ltd. (199 ITR 351).

In the above circumstances the Petitioner prays that this Hon'ble Tribunal may kindly be pleased to;

(i) admit and adjudicate the above additional ground,

(ii) pass any other order that may be required in the circumstances of the case and render justice.

Transfer Pricing grounds :

4. However, at the time of hearing before us, the assessee has only pressed exclusion of following comparables from the list of comparables considered by the Transfer Pricing Officer (TPO):-

- (i) Persistent Systems Limited
- (ii) Larsen & Toubro Infotech Limited
- (iii) Infosys Limited
- (iv) Genesys International Corporation Limited
- (v) Sasken Communication Technologies Limited

4.1 Hence, we limit our adjudication with regard to the exclusion of the above five comparables.

5. The facts relating to the transfer pricing issue are that the assessee-company is engaged in the activities in India, which includes design and sales agent support services NXP's design competence centre in Bangalore offers user solutions for

vibrant medis technologies and focuses on automotive, identification and software businesses.

The segmental (SWD segment) financials as given in the TP study is as under:-

Particulars	Amount (SWD Segment)
Operating income	885470219
Operating Expenses	820219617
Operating profit	65250602
OP/OC	7.96%
OP/OR	7.37%

The international transactions (as mentioned in the 92 CE report) is as under:-

Particulars	Amount
Software development services	885470219
Sales agent support services	102116858
Receipt of services	54,176895
Fixed assets received free of charges	8176309
Reimbursement of costs	4942058
Total	1054882331

5.1 For the above determination of Arms Length Price (ALP), the assessee selected 25 comparables, however, the TPO limited the comparables to the extent of 10 out of which 4 selected by the assessee were retained by the TPO. The 10 comparables selected by the TPO were as follow:-

- (i) Datamatics Global Services Limited
- (ii) Genesys International Corporation Limited
- (iii) ICRA Techno Analytics Limited
- (iv) Infosys Limited
- (v) Larsen & Toubro Infotech Limited
- (vi) Mindtree Limited (Segmental)
- (vii) Persistent Systems Limited
- (viii) R.S.Software (India) Limited
- (ix) Sasken Communication Technologies Limited
- (x) Spry Resources India Private Limited.

5.2 The TPO made transfer pricing adjustment of Rs.8,36,07,533. However, the Dispute Resolution Panel (DRP) excluded ICRI Techno Analytics Limited and confirmed 9 comparables out of the above 10 comparables. Accordingly, he sustained TP adjustment to the tune of Rs.7,06,09,072.

5.3 Now the assessee has challenged for the exclusion of the following five comparables:-

- (i) Persysent Systems Limited
- (ii) Larsen & Toubro Infotech Limited
- (iii) Infosys Limited
- (iv) Genesys International Corporation Limited
- (v) Sasken Communication Technologies Limited.

PERSYSTENT SYSTEMS LIMITED

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

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

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

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

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

OPD and outsourced IT services: the difference.

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

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

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

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

LARSEN & TOUBRO INFOTECH LIMITED

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

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

INFOSYS LIMITED

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

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

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

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

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

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

“11.0 Infosys Technologies Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENESYS INTERNATIONAL CORPORATION LIMITED

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

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

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

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

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

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

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

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

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

SASKEN COMMUNICATION TECHNOLOGIES LIMITED

10. The learned AR submitted that this company is engaged in the development of software products as it has inventories. It has research and development expenditure, high brand value and intangibles. Therefore, this company is functionally not comparable to the case of the assessee. The learned AR also referred to the financial statement kept on record at paper book page nos.3011, 3818 and 3043. It is also submitted that no segmental break up is available in its financial statement. He relied on the order of the Delhi Bench of the Tribunal in the

case of *Saxo India Pvt. Ltd. v. ACIT [ITA No.6148/Del/2015 – order dated 05.02.2016]* for assessment year 2011-2012, wherein the Tribunal held as under:-

“vi) *Sasken Communications Technologies Ltd.*

15.1. The TPO included this company in the set of comparables despite the assessee’s objection that it was functionally different and also had Product portfolio.

15.2. After considering the rival submissions, we find from page 58 of the TPO’s order that he has recognized sale of software products to the tune of Rs.37 crore and odd. Though the break-up of revenue from software services and software products is available, but, the break-up of operating costs and net operating revenues from these two 29 segments have not been given. It is further observed that the TPO has taken entity level figures for the purposes of making comparison. Since such entity level figures contain revenue from both software services and software products, as against the assessee only providing software services, we are disinclined to treat this company as comparable. The assessee’s contention is accepted on this issue.”

10.1 On the other hand, the learned Departmental Representative pleaded that the issue may be remitted to the Assessing Officer for fresh consideration.

10.2 We have heard the rival submissions and perused the material on record. We find that this issue was considered by the Bangalore Bench of the Tribunal in the case of *Applied Materials India Pvt. Ltd. v. ACIT [IT(TP)A No.17/Bang/2016 – order dated 21.09.2016]*, wherein the Tribunal held as under:-

“9.3.3 We have considered the rival submissions as well as the relevant material on record. The co-

ordinate bench of this Tribunal in the case of DCIT v. Electronics for Imaging India Pvt. Ltd. (supra) has considered the comparability of this company in para 27 to 29 as under:

“(5) Sasken Communication Technologies Ltd.

27. The assessee raised objection that this company has revenue from software services, software products and other services. The DRP has come to the conclusion that this company earned revenue from 3 segments. However, no segmental information is available. Accordingly, the DRP directed the AO to exclude this company from the comparables.

28. We have heard the ld.DR as well as ld.AR and considered the relevant material on record. The DRP has reproduced the break-up of revenue in the impugned order as under:-

	Rupees in lakh.	
	Year ended on 31 st March, 2010	Year ended on 31 st March, 2010
Software services	37,736.22	40,531.20
Software products	2,041.00	6,146.4
Other services	372.77	1,297.05
Total revenues	40,150.89	47,974.68

29. Thus, there is no dispute that this company earns revenue from 3 segments. However, the segmental operating margins are not available. Therefore, in the absence of segmental relevant data and particularly operating margins, this composite data cannot be considered as comparable with the assessee for software development services segment. Accordingly, we do not find any error or illegality in the findings of the DRP.”

We further note that the DRP has not adjudicated the objections of the assessee whereas for the Assessment Year 2010-11, the DRP rejected this company as comparable. Accordingly, we set aside

this issue to record of the AO / TPO to verify the relevant facts and compare with the facts recorded by the Tribunal in the case of DCIT v. Electronics for Imaging India Pvt. Ltd. (supra) for the Assessment Year 2010-11 and then decide the issue after giving an opportunity of hearing to the assessee.”

10.3 In view of the above order of the Tribunal, we are inclined to remit the issue to the file of the TPO with the similar directions as given by the coordinate Bench of the Tribunal in the case of *Applied Materials India Pvt. Ltd.(supra)*.

Corporate Tax Grounds & Other Grounds :

11. At the time of hearing before us, the learned AR has not pressed ground Nos.13 and 14 relating to Corporate Tax and ground Nos.15, 16 and 17 relating to Other Grounds. Accordingly, these grounds are dismissed as not pressed.

12. Ground No.12 raised by the assessee, relating to Corporate Tax issue is that the AO has erred in law and in facts, in disallowing the stock compensation expense amounting to INR 6,523,426 on the basis that, tax has not been deducted at source on the amount of perquisite taxable in the hands of the employees, without appreciating the fact that as per the provisions of Section 17 of the Act, perquisite taxation would arise only at the time of exercise of the option.

13. Briefly stated the facts of this issue are that the argument of the assessee before the DRP is that the stock-based compensation plans were introduced by the ultimate holding company NXP Semiconductors N.V. in 2007 wherein certain

employees of NXP India have been granted options and restricted stock units under these plans. In line with the Guidance Note on 'Accounting for employee share based payments' issued by the ICAI, the Company measures and discloses the stock compensation cost relating to employee stock options using the fair value method. The compensation cost is amortised over the vesting period of the options. Accordingly, the Company has recorded compensation cost for all grants made to its employees by the ultimate holding Company using the fair value based method of accounting. The provision for compensation cost recognized for the year ended 31st March, 2012 is Rs.65,23,426. The said provision, being incurred during the normal course of the business, has been considered as an allowable expenditure for the purpose of computation of income. The assessee further argued that during the F.Y. 2014-2015, the assessee has reversed the said provision for compensation cost which has been offered to tax in F.Y.2014-15 (in the return of income) since the provision created earlier was claimed by the company. The assessee has also relied on the Special Bench decision of the ITAT Bangalore Benches in the case of Biocon.

14. The DRP was of the view that there are four stages in the grant of the ESPO, viz., (i) Granting of option, (ii) Vesting of option, (iii) Exercise of option, and (iv) Selling shares. Normally, the ESOP is designed in such a way that there is a gap of one or more years between each of the first three stages. The decision relied upon by the assessee in the case of Biocon also

holds that the expenditure is allowable at the time of vesting. Since this is position as per the Biocon decision, then the same becomes taxable in the hands of the employees. What has not been brought before and therefore not considered by the Special Bench in this case is that when the same amount becomes taxable in the hands of the employee. The assessee is claiming that the provisions for ESOP expenses are ascertained liability. However, it is contended that the taxability arises in the hands of the employees on the date of exercise. The TDS on perquisite amount arising out of the vesting transaction must have been deducted by the assessee. However, from the records it is not clear when the TDS is made. According to the DRP, the gap between the date of vesting and the date of exercise is the period for which there is a tax loss to the revenue. Each transaction has two sides, One is expenditure side and the other is income side. In the hands of the company it is an expense and in the hands of the employee it is income. The second question arises is whether the income is taxable. In the hands of the employee the taxability cannot be seen on a different basis. Thus, the same transaction becomes allowable expenditure in the hands of the assessee but does not become income in the hands of the employee. This situation is not permissible as per law. If the liability in the hands of the assessee is ascertained then the perquisite/salary in the hands of the employee also becomes ascertained because it is the same transaction which is triggering both, and the salary / perquisite is taxable on the due basis as per the section 15 of the I.T.Act. The DRP summarized that the decision in the case

of Biocon holds that the expenditure is allowable at the time of vesting. Therefore, by corollary the income becomes taxable at the time of vesting itself. Therefore, two situations arise.

- (a) First, the assessee has not considered the 'perquisite amount at the time of vesting' as salary income of the employee and has not deducted tax on the same. In such a situation the expenditure is to be disallowed by the AO u/s 40(a)(ia) of the Act.
- (b) Second, the assessee has considered 'perquisite amount at the time of vesting' as salary income of the employee and has deducted tax on the same. In such a situation, the expenditure is to be allowed by the AO.

15. Aggrieved, the assessee is in appeal before us.

16. We have heard the rival submissions and perused the material on record. We find that similar issue came up for consideration before the Hon'ble Supreme Court in the case of *CIT v. Infosys Technologies Limited* [(2008) 297 ITR 167 (SC)], wherein it was held as under:-

"There is also no merit in the contention advanced on behalf of the Department that s.17(2)(iiia) inserted by Finance Act, 1999 w.e.f. 1st April, 2000 was clarificatory and, therefore, retrospective in nature. Unless a benefit / receipt is made taxable, it cannot be regarded as "income". This is an important principle of taxation under the 1961 Act. Applying the above principle to the insertion of cl.(iiia) in s.17(2) one finds that for the first time w.e.f. 1st April, 2000 the word "cost" stood explained to mean the amount actually

paid for acquiring specified securities and where no money had been paid, the cost was required to be taken as nil. The mechanism introduced for the first time under the Finance Act, 1999 by which “cost” was explained in the manner stated above was not there prior to 1st April, 2000. The new mechanism stood introduced w.e.f. 1st April, 2000 only. With the above definition of the word “cost” introduced vide cl. (iiia), the value of option became ascertainable. There is nothing in the Memorandum to the Finance Act, 1999 to say that this new mechanism would operate retrospectively. Further, a mechanism which explains “cost” in the manner indicated above cannot be read retrospectively unless the legislature expressly says so. It was not capable of being implemented retrospectively. Till 1st April, 2000, in the absence of the definition of the word “cost”, value of the option was not ascertainable. Clause (iiia) is not clarificatory. Moreover, the meaning of the words “specified securities” in sub-cl. (iiia) was defined or explained for the first time vide Finance Act, 1999 w.e.f. 1st April, 2000. Moreover, the words allotted or transferred in cl. (iiia) has been subsequently deleted w.e.f. 1st April, 2001. For the aforesaid reasons, the cl. (iiia) cannot be read as retrospective. – CIT v. B.C.Srinivasa Setty (1981) 21 CTR (SC) 138 : (1981) 128 ITR 294 (SC) relied on.

Even assuming that there was “benefit”, every benefit received by the person is not taxable as income. Unless the benefit is made taxable, it cannot be regarded as income. During the relevant assessment years, there was no provision in law which made such benefit taxable as income. Further, as stated, the benefit was prospective. Unless a benefit is in the nature of income or specifically included by the legislature as part of income, the same is not taxable. In this case, the shares could not be obtained by the employees till the lock-in period was over. On facts, in the absence of legislative mandate a potential benefit could not be

considered as “income” of the employee(s) chargeable under the head “salaries”. The stock was non-transferable and the stock exchange was also accordingly notified. This is where the weightage ought to have been given by the AO to an important factor, namely, lock-in period. This has not been done. It is important to bear in mind that if the shares allotted to the employee had no realizable sale value on the day when he exercised his option then there was no cash inflow to the employee. It was not possible for the employee to know the future value of the shares allotted to him on the day he exercises his option. Even the cost of acquisition as “nil” came to be introduced in the 1961 Act by the Finance Act, 1999 only w.e.f. 1st April, 2000. In fact, the later deletion of cl. (iiia) is an indicator of the ineffective charge. For the aforesaid reasons, the Department had erred in treating Rs.165 crores as a perquisite value for the asst. yrs. 1997-98, 1998-99, 1999-2000. During those years, the fifth anniversary had not taken place and, therefore, it was not possible for the assessee company to estimate the value of the perquisite during that period. It was not open to the Department to ignore the lock-in period. Therefore, the Department had erred in treating the respondent herein as an assessee in default for not deducting the TDS at 30 per cent as stated in the order of assessment. Estimation of TDS under s. 192 in the absence of clear provisions on valuation of “perquisite” in this case would not justify the Department in treating the respondent as assessee in default. Therefore, the AO and the CIT(A) had erred in treating the respondent as defaulter for not deducting TDS under s. 192. Consequently, ss.201(1) and 201(1A) were also not applicable to the facts of this case – CIT v. Infosys Technologies Ltd. (2007) 207 CTR (Kar) 620 affirmed.”

16.1 However, they have not pressed any opinion on the law prevailing after 1st April, 2000. Being so, the above ratio laid down by the Hon’ble Supreme Court cannot be applied for the

assessment year 2011-2012. There was an amendment to section 17(2)(iiia) with effect from 01.04.2000, however, the same was deleted by the Finance Act, 2000 with effect from 01.04.2001. Being so, the judgment of the Hon'ble Supreme Court in the case of *Infosys Technologies Limited (supra)* is squarely applicable to the facts of the case. Accordingly, we hold that the element of shares to employees under ESOP could not be treated as perquisite as there was no benefit and value of benefit, if any, was unascertainable at the time when the options were exercised. Accordingly, we allow this ground raised by the assessee.

17. In the result, the appeal filed by the assessee in IT(TP)A No.692/Bang/2017 is partly allowed for statistical purposes.

Now, we shall take up IT(TP)A No.2861/Bang/2017 for assessment year 2013-2014 for adjudication.

IT(TP)A No.2861/Bang/2017 : Asst. Year 2013-2014 :

18. The assessee has raised following grounds:-

Based on the facts and circumstances of the case and in law, NXP India Private Limited (hereinafter referred to as "Appellant") respectfully craves leave to prefer an appeal against the order passed by Assistant Commissioner of Income Tax, Circle-5(1)(1) ("Assessing Officer" or "AO"), dated 24 October 2017 for AY 2013-14 ("the impugned order"), under section 143(3) read with section 144C of the Income Tax Act, 1961 ("the Act") pursuant to the directions issued by the Honourable Dispute Resolution Panel ("Hon'ble DRP"), Bangalore dated 22 September 2017 under section 144C(5) of the Act, inter-alia on the following grounds:

That on the facts and circumstances of the case and in law:

General Grounds

- 1.The impugned order and directions of the Hon'ble DRP are based on incorrect appreciation of facts and wrong interpretation of law and therefore, are bad in law;*
- 2.The learned AO I Transfer Pricing Officer ("TPO") has erred in assessing the total income at INR 329,987,557 as against the returned income of INR 241,671,830 computed by the Appellant in its return of income for AY 2013-14;*
- 3.The learned AO has erred in law and in fact, in determining a sum 01 INR 29,337,140 as the balance tax demand payable by the Appellant;*

Transfer Pricing grounds

4.Rejecting the transfer pricing study undertaken by the Appellant and making an adjustment by conducting a fresh economic analysis for the software development transaction

4.1 The learned DRP/AO/TPO erred in making an addition of INR 74,695,457 to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the provision of software development services transaction entered by the Appellant with its associated enterprise;

4.2 The learned DRP/AO/TPO has erred in law and facts by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules") and conducting a fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;

5.1 The learned DRP/AO/TPO has erred in law and facts by determining the arm's length marginal price using only FY 2012-13 data which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements;

5.2 The learned DRP/AO/TPO erred, in law and in facts, by accepting/rejecting companies based on unreasonable comparability criteria:

a)The learned DRP/AO/TPO erred, by accepting certain additional comparable companies by conducting a fresh independent search during TP assessment proceedings which are functionally dissimilar;

- *Tech Mahindra Ltd (Segmental)*

b)The learned DRP/AO/TPO erred, by accepting certain additional comparable companies by conducting a fresh independent search during TP assessment proceedings which are functionally dissimilar;

- *CG VAK Software & Exports Limited*
- *Larsen & Toubro Infotech Ltd.*
- *Persistent Systems Limited (Seg)*

Although these companies were chosen as comparables in transfer pricing study, upon consideration of more details, these companies are found to be not comparable and should be excluded from the finals set of com parables.

c)The learned AOI TPO and DRP has erred in law and facts by rejecting certain com parables considered by the Appellant in the comparability analysis by applying different quantitative and qualitative filters:

d)by rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months); this resulted in deletion of:

- *Caliber Point Business Solutions Limited*
- *Helios & Matheson Information Technology Limited*
- *Maveric Systems Limited*
- *R Systems International Limited (Segmental)*

e)by rejecting the following comparables identified by the Appellant using export sales turnover greater than 75% of sales as a comparability criterion:

- *Goldstone Technologies Limited*

by rejecting the following comparable identified by the Appellant using non availability of financial data for financial year 2012-13 as a comparability criterion:

- *Caliber Point Business Solutions Limited*
- *Maveric Systems Limited*

f)by rejecting certain comparable companies, on the ground that

there were extraordinary circumstances;

- *Spry Resources India Private Limited*
- *Hellos & Matheson Information Technology Limited*

g) by rejecting certain comparable companies selected by the Appellant in its TP documentation on the ground that they are functionally dissimilar;

- *Akshay Software Technologies Limited*
- *Cat Technologies Limited*
- *Cigniti Technologies Limited*
- *Lucid Software Limited*
- *Sasken Communication Technologies Limited*

5.3 The learned DRP/AO/TPO has erred in law and facts by erroneously computing the margins of the comparable companies for the Appellant's international transaction of provision of software development services:

- *CG VAK Software & Exports Limited*
- *ICRA Techno Analytics Limited*
- *Persistent Systems Limited*
- *Larsen and Toubro Infotech Limited*
- *Mindtree limited (Segmental)*

5.4 The learned DRP/AO/TPO erred, in law and in facts, by obtaining information u/s 133(6) of the Act, which was not available in public domain and relying on the same for comparability purposes;

- *Tech Mahindra Ltd (Segmental)*

5.5 The learned DRP/AO/TPO erred, in law and in facts, by incorrectly computing the working capital adjustment of certain comparable companies.

5.6 The learned DRP/AO/TPO erred, in law and in facts, by not making suitable adjustments on account of differences in the risk profile of the Appellant vis-a-vis the comparables, while conducting comparability analysis;

Corporate Tax Grounds

6. The learned AO has erred in facts disallowing the stock compensation expense amounting to Rs 16,512,330 under Section 37 of the Act without appreciating the fact that, the same has been suo moto disallowed by the assessee in the

computation of income for the current AY.

The learned AO erred in facts, by increasing the total income by INR 2,892,060 being the consequential depreciation allowed to the Appellant, instead of reducing the same

Other Grounds

8.The learned AO has erred in levying interest of INR 10,404,900 under section 234B and INR 14,226 under section 234C of the Act.

9.The learned AO has erred in initiating penalty proceedings under section 271 (1)(c) of the Act.

All the above grounds may be considered independent and without prejudice of each other.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to decide on the appeal in accordance with the law.”

18.1 However, at the time of hearing before us, the assessee has pressed for the exclusion of following five comparables:-

- (i) Larsen & Toubro Infotech Limited
- (ii) Persistent Systems Limited.
- (iii) C.G.VAK Software & Exports Limited
- (iv) ICRA Techno Analytics Limited
- (v) Tech Mahindra Limited.

18.2 The learned AR also pressed the inclusion of the following seven comparables:-

- (i) Caliber Point Business Solutions Limited
- (ii) Helios & Matheson Information Technology Limited

- (iii) R Systems International Limited
- (iv) Akshay Software Technologies Limited
- (v) Cat Technologies Limited
- (vi) Cignity Technologies Limited
- (vii) Lucid Software Limited.

19. The facts of the case are that the assessee in the earlier assessment years engaged in the following activities:-

Strategic Management Functions:

NXP Netherlands plays a significant role in determining the business strategy of the group (including NXP India). NXP Netherlands is responsible for all top management functions of corporate strategy, treasury, legal and regulatory affairs and designing the policy with respect to its group operations (including NXP India)

No strategic functions are performed by NXP India. NXP India primarily performs the tactical managerial functions regarding day to day management of business.

Corporate services:

With respect to human resources, financial management, routine administration etc. NXP India is responsible for arranging the necessary resources. It is responsible for managing its own cash flows, accounts payable, accounts receivables, employee management, management information system, and training and hiring employees.

Though NXP India drafts its policies within the broad framework of NXP Group, it receives nil or little support from its overseas entities in terms of implantation of those policies.

Marketing/Business Development:

NXP Netherlands formulates the overall marketing strategy and is responsible for marketing the products/services offered by NXP Netherlands. As NXP Netherlands is the front end contact for the customers, it undertakes lead generation, marketing and sales activity for the products/services provide to the customers. It is responsible for maintaining and developing relationship with its customers and is therefore responsible for expanding the business. NXP India does not undertake any marketing/business development activity.

Functions in respect of Sales agent Support Services:

- Marketing Strategy
- Developing marketing and sales collaterals
- Advertising and sales promotion
- Assistance in identifying customers in India
- Pricing decision
- Contracting with customers and invoicing

ANALYSIS OF FINANCIAL RESULTS:

Financial results for the F.Y.2012-13 as per the Profit & Loss Account:-

Particulars	Amount (Rs.)
Income	
Revenue from operations	
Income from research design & application development services	1004090591
Income from indenting activity	95537256
	1099627847
Other Income	160257816
Total Revenue	1259885663
Expenses	
Employee benefits	600786517
Finance cost on finance leases	1802982
Depreciation & Amortisation	23774473
Other operating expenses	404939049
Total Expenses	1031303021
Profit before Tax	228582642

The reconciled financials of the Tax payer for the A.Y.2013-2014 as per Profit and Loss Account are as under:-

Particulars	Amount (Rs.)
Total Income	1259885663
Less : Other income	160257816
Add : Foreign exchange gain, net	6017675
Operating income	1105645522
Expenses	1031303021
Less : Finance cost	1802982
Operating Expenses	1029500039
Operating Profit	76145483
OP/OC	7.40%
OP/OR	6.89%

The segmental financial as given in the Transfer Pricing study is as under:-

Particulars	Software development services (A)	Order gathering services (B)	Unallocated (C)	Total = (A+B+C)	As per P&L (FY 2012-13)
Income					
Income from service	1004090591	95537256	--	1099627847	1099627847

Foreign exchange fluctuations	6017675	--	--	6017675	6017675
Other operating income	371878	--	--	371878	371878
Non-operating income	--	---	153868263	153868263	153868263
Operating Revenue	1010480144	95537256	153868263	1259885663	1259885663
Expenditure					
Employee costs	558991583	41794934	--	600786517	600786517
Operating and other expenses	328904402	10048722	65985925	404939049	404939049
Depreciation and amortization	23110659	663814	--	23774473	23774473
Non-operating expenses	--	--	1802982	1802982	1802982
Operating cost	911006644	52507470	67788907	1031303021	1031303021
Operating Profit	99473500	43029786	86079356	228582642	228582642
Operating profit / Operating cost	10.92%	81.95%			

The segmental break up as computed by the TPO is as under:-

Particulars	Software development services (A)	Order gathering services (B)
Income from services	1004090591	95537256
Add : Foreign exchange fluctuations	6017675	--
Operating Income	1010108266	95537256
Expenses	911006644	562507470
Operating Expenses	911006644	52507470
Operating Profit	99101622	43029786
OP/OC	10.88%	81.95%
OP/OR	9.81%	45.04.%

20. While making the transfer pricing adjustment, the assessee selected 25 comparables. However, the A.O. considered only 4 out of it and limited the comparables to the extent of 7 and computed the margin at 19.08% by considering following comparables:-

- (i) C G VAK Software & Exports Limited
- (ii) Larsen & Toubro Infotech Limited
- (iii) Mindtree Limited
- (iv) Persistent Systems Limited
- (v) R S Software (India) Limited
- (vi) ICRA Techno Analytics Limited
- (vii) Tech Mahindra Limited.

20.1 Thus, the TPO made transfer pricing adjustment to the tune of Rs.7,46,95,457 without making any adjustment on account of risk. The assessment went for the direction of the Dispute Resolution Panel (DRP), who concurred with the view taken by the TPO on selection of the comparables and also concurred with the view with regard to working capital adjustment and risk adjustment. Therefore, the assessee is before us.

21. The learned AR pleaded for the exclusion of the following comparables:-

- (i) Larsen & Toubro Infotech Limited
- (ii) Persistent Systems Limited.
- (iii) C.G.VAK Software & Exports Limited
- (iv) ICRA Techno Analytics Limited

(v) Tech Mahindra Limited.

I. LARSEN & TOUBRO INFOTECH LIMITED

22. The learned AR relied on the order of the co-ordinate Bench in the case of M/s.Metric Steam Infotech (India) Pvt. Ltd. v. DCIT in IT(TP)A No.1418 & 2735/Bang/2017 for the assessment year 2013-2014, order dated 27.02.2019, wherein the Tribunal held as under:-

“11. As far as L&T Infotech Ltd. and Persistent Systems Ltd. are concerned, our attention was drawn to the decision of ITAT Hyderabad Bench in the case of M/s. EPAM Systems (I) P. Ltd. v. ACIT, ITA No.2122/Hyd/2017 for AY 2013-14, order dated 20.11.2017. Vide para 12 of the decision, the Tribunal took the view that Persistent Systems Ltd. was into software products and software solutions and no segmental details were available and therefore the profit margin in the software development services segment could not be compared with the assessee’s profit margin. As far as L&T Infotech Ltd. is concerned, the Tribunal vide para 17 of the aforesaid order came to a similar conclusion to hold that L&T Infotech should not be regarded as a comparable company. In the light of judicial precedents which remain uncontroverted, we are of the view that the aforesaid two comparable companies should be excluded from the list of comparable companies.”

22.1 It was also brought to our notice that in earlier year, Larsen & Toubro Infotech Limited has incurred expenditure on “cost of brought out items for resale at Rs.27,10,89,274 for which he drew our attention to the financial statement of Larsen & Toubro Infotech Limited placed at paper book page No.1081, which is absent in the case of present assessee. He also submitted that it has huge intangible assets and brand value in software at Rs.143,61,95,196 and it has intangible

asset in the form of business rights to the tune of Rs.153,42,45,196 as shown in the Fixed Assets as on 31.03.2013 placed at paper book page No.1078. Being so, in our opinion, it cannot be compared with the assessee's case. Accordingly, we direct the TPO to exclude the same from the list of comparables.

II. PERSISTENT SYSTEMS LIMITED

23. As discussed in earlier year, Persistent Systems Limited is engaged in product engineering services, platforms and solutions, IP and related business, which is functionally different from assessee's case and it has earned revenue from R & D activities. Persistent Systems Limited also owns intellectual properties. Further, segmental data is not available as seen from the Notes forming part of financial statements under the head "Revenue from operations (net)", placed at paper book page No.1260 and it has net income from sale of software services as discussed in earlier year. It is also to be noted that Persistent Systems Limited is considered as a comparable by various orders of the Tribunal in the following case of NXP Semiconductor Private Limited [IT(TP)A No.1634/Bang/2014 for assessment year 2009-2010. Vide order dated 22.07.2015, the Tribunal observed as under:-

"13.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision cited. We find that a co-ordinate bench of this Tribunal in the assessee's own case (supra) for Assessment Year 2008-09 has held that this company being engaged in product

development and product design and analysis service is functionally different from a pure software service provider and therefore excluded it from the list of comparables for software development services; holding as under at para 17.3 of its order:-

“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.”

13.4.2 Following the decision of the co-ordinate bench of this Tribunal in the assessee's own case (supra) for Assessment Year 2008-09, we direct the TPO to exclude this company from the list of comparables as it is functionally different (viz. being engaged in product development and product design services) from the assessee in the case on hand which is rendering software development services. It is ordered accordingly.”

23.1 Therefore, Persistent Systems Limited cannot be compared with the assessee's case. Accordingly, we direct the TPO to exclude the said company from the list of comparables, with the similar directions given in the above order of the Tribunal (supra).

III. C G VAX SOFTWARE & EXPORTS LIMITED

24. The learned AR submitted that this company should be excluded for the reason that C G VAX Software & Exports Limited is engaged in software development and sale of

products which involves high degree of R & D expenditure and to demonstrate the same, he drew our attention to the paper book page Nos.1018 and 1034 and submitted that the nature of the business of software development involves inbuilt, constant Research and Development as a part of its process of manufacturing (development). The company is developing applications engines, re-usable codes and libraries as a part of its R & D activities. Further, it has intangible assets as shown in the financial statement as on 31.03.2013 at Rs.3,03,83,536 and it is also engaged in outsource product development, as is evident from the attached notes forming part of the accounts. The learned AR also submitted that C G VAK Software & Exports Limited was not considered as a comparable in the case of M/s.EPAM Systems India Private Limited (ITA No.2122/Hyd/2017 for assessment year 2013-2014). Vide order dated 20.11.2018, the Tribunal held as under:-

“16. Having regard to the rival contentions and the material on record, we find that the assessee has raised its objections before 10 the TPO but he held that it is functionally similar. We have gone through the annual reports of CGVAK Software & Exports Ltd and find that the said company is having revenue from both software services and BPO services but there is no segmental data with regard to each of these transactions. Therefore, as held by the Coordinate Bench of the Tribunal in a number of cases (cited supra), we hold that this company cannot be taken as a comparable to the assessee-company. Accordingly, we direct the TPO to exclude this company from the final list of comparables.”

24.1 Similarly, in the case of M/s.ION Trading India Private Limited v. ITO (ITA No.1035/Del/2015 for the assessment

year 2010-2011). The Tribunal vide its order dated 07.12.2015, held as under:-

“21. We have considered the submission of the ld. counsel for the assessee and have considered the argument of the ld. DR that the assessee is not producing any product, however, we find that CGVak Software and Exports Limited is not only into computer software but it is a product manufacturer too. Since assessee is not into product manufacturing and the segmental details cannot be bifurcated from the financial details, we find that the assessee and the CG-Vak Software and Exports Limited are not comparables. Therefore, we are inclined to uphold the orders of the authorities below in rejecting this company as a comparable. We direct accordingly.”

24.2 In our opinion, there is force in the argument of the learned AR. M/s.C G VAX Software & Exports Limited is not only engaged in the business of computer software development, but also engaged in product manufacturing process, whereas the present assessee is not in product manufacture activity. M/s. C G VAX Software & Exports Ltd. owns huge intangible assets and also engaged in outsourced product development. In view of the foregoing reasons, we hold that the said company cannot be considered for inclusion in the list of comparables. We, therefore, direct the TPO to exclude the said company from the list of comparables.

IV. ICRA TECHNO ANALYTICS LIMITED

25. The learned AR submitted that ICRA Techno Analytics Limited is functionally different from that of the assessee. The learned AR drew our attention to paper book page Nos.1317 and 1318 to show that its revenue from services is at

Rs.1807.37 lakh for the period 01.04.2012 to 31.03.2013 and there was no sale of software. According to the learned AR, ICRA Techno Analytics Limited is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing. It was also submitted that since the revenue as shown in the consolidated manner and no segmental break up was made available in its annual accounts, the consolidated amount of Rs.1807.37 lakh was disclosed in its financial statement as on account of service revenue. The learned AR also drew our attention to the financial statement placed at paper book page No.1322.

25.1 The learned Departmental Representative, on the other hand, submitted that this was raised by way of additional ground. The learned DR submitted that this comparable was not objected by the assessee before the lower authorities, but only challenged the computation of margin of this comparable, and therefore, it may be remitted back to recompute the margin.

26. We have heard the rival submissions and perused the material on record. In our opinion, as rightly pointed out by the learned DR, the assessee has not objected for considering ICRA Techno Analytics Limited as a comparable before us and the only challenge was with regard to computation margin of the comparable. In view of this, we are inclined to remit the matter

to the files of TPO to compute the correct margin of this comparable company. Accordingly, we remit the matter to the TPO with the above directions.

V. TECH MAHINDRA LIMITED

27. The contention of the assessee is that in case of Tech Mahindra Limited the TPO has obtained information about its comparability u/s 133(6) of the I.T.Act, which was not available in public domain, and relied on the same as comparable. According to the learned AR, the intangible and inventory is very high and Tech Mahindra Limited is functionally different from that of the assessee. The learned AR further submitted that Tech Mahindra Limited provides variety of services like business support systems, operations support systems, mobility solutions, network design and engineering, infrastructure managed services, remote infrastructure management etc. and are diversified in nature and are high end services which are significantly different from routine software development.

27.1 The learned Departmental Representative, on the other hand, submitted that there is no specific finding by the DRP on this issue, hence, this should go back to the TPO for reconsideration.

27.2 We have heard the rival submissions and perused the material on record. We find that, at the time of transfer pricing study, the data of Tech Mahindra Limited were not available to

the public domain. Now these details are available with the assessee. These details were not made available either before the TPO or before the DRP. In view of the variation between the activity of the assessee and Tech Mahindra Limited, we remit the issue to the files of the TPO for reconsideration. It is ordered accordingly.

28. The learned AR pleaded for the inclusion of the following seven comparables:-

- (i) Caliber Point Business Solutions Limited
- (ii) Helios & Matheson Information Technology Limited
- (iii) R Systems International Limited
- (iv) Akshay Software Technologies Limited
- (v) Cat Technologies Limited
- (vi) Cignity Technologies Limited
- (vii) Lucid Software Limited.

I. CALIBER POINT BUSINESS SOLUTIONS LIMITED

29. The assessee selected this as a comparable in his transfer pricing study, which was required by TPO for the reason that no data were available in public domain, however, there is no dispute that this company is engaged in software development services. Now the annual report of the company is available in public domain and more so, the assessee has already produced the financial data in the Prowess data before the TPO, which is evident from assessee's paper book page No.490. Even this company could be considered as a comparable if it has different financial year as held by the co-ordinate Bench in the case of RR Donnelley India Outsources Pvt. Ltd. [ITA No.678/Mds/

2015 – order dated 18.08.2016, for assessment year 2010-2011]. Being so, we direct the TPO to consider this company as a comparable company to the assessee's case while determining the transfer pricing adjustment.

II. HELIOS & MATHESON INFORMATION TECHNOLOGY LIMITED

30. The TPO rejected this company for the reason that the financial report by submitted by the assessee is for the year ending on 31st September, which is different when compared to that of the assessee's case. There is no dispute that this company is engaged in business of software development services. This company is considered to be comparable though it has different financial year, as held in the following cases:-

- (i) RR Donnelley India Outsources Pvt. Ltd. [ITA No.678/Mds/2015]
- (ii) Mckinsey Knowledge Centre India Private Limited [ITA No.217/Del/2014]
- (iii) Techbooks Electronics Services v. Pr.CIT [ITA No.343/Del/2017]

30.1 Being so, in our opinion, an extrapolated data can be considered so as to determine the data for the relevant financial year 2012-2013. Accordingly, we remit this issue to the file of the TPO for fresh consideration.

III. R.SYSTEMS INTERNATIONAL LIMITED

31. This company has been rejected by the TPO on the reason that this company has different year ending as compared to that of the assessee company. As discussed in earlier paragraph, there is no dispute that R.Systems International Limited is functionally comparable to the assessee. Being so, as held in earlier paragraph, we direct the TPO to consider this company as a comparable.

IV. AKSHAY SOFTWARE TECHNOLOGIES LIMITED

32. It was rejected by the TPO for the reason that the function of this company appears to be more in the nature of support services and I.T. enabled services. However, this company is engaged in providing professional services, implementation, support and maintenance of ERP products and other services. These are nothing but software development services, as is evident from Notes forming part of the financial statement, which is placed at paper book page No.1825. Further, the revenue from software services accounts for 99.45% of the total revenue of the company as evident from the financial statement placed on record at paper book page No.1831. Being so, we direct the TPO to consider this company as comparable to the assessee's case while selecting the comparables.

V. CAT TECHNOLOGIES LIMITED

33. This company was rejected by the TPO for the reason that it is engaged in quality consultancy services in system analysis, system design and other related services. According to the TPO,

it was functionally different from the assessee, and rejected the said company from the comparables. As seen from the Notes relating to statement of profit and loss account as on 31.03.2013, along with sales and services as under:-

Particulars	As on 31.03.2013 (Rs.)
Sales & Services	
EXPORT	
Consultancy Fees Receipts	14,630,808
Medical Transcription Receipts	4,342,700
Software Development Receipts	55,221,160
DOMESTIC	
Course Fees	178,350
Local Software Development Receipts	109,730
Total	74,482,748

33.1 As seen from the above, the company is engaged in software development services as per its annual report. Further, the revenue from the software development services is more than 93.93% of the total revenue. Being so, this company should be included in the list of comparables. Accordingly, we direct the TPO to include Cat Technologies Limited in the list of comparables.

VI. CIGNITI TECHNOLOGIES LIMITED

34.This company was rejected by the TPO for the reason that this company was engaged in software testing service. This

company is also into computer programming, consultancy and related activities. According to the TPO, it was functionally different from assessee-company. As seen from the revenue from operations, which is as follows:-

Particulars	Year ending 31.03.2013
Revenue from operations	
Sale of Services	
Domestic	4,632,731
Export	231,042,089
Total Revenue from Operations	235,674,820

34.1 In our opinion, software testing is a part of software development life cycle and being so, this company should be considered as a comparable. Accordingly, we direct the TPO to include Cigniti Technologies Limited as a comparable to the assessee-company, while selecting the comparables.

VII. LUCID SOFTWARE LIMITED

35. This company was rejected by the TPO for the reason that there was no data available and the accounting year of Lucid Software Limited is different from that of the assessee. This company primarily engaged in software development services, as 95.44% of the total revenue is derived from rendering software services, which is evident from the Notes forming part of account, which is placed at page 2334 of the paper book filed by the assessee. The same is extracted below:-

Note 2.14**Revenue from Operations****Revenue from Operations consists of the following:**

Particulars	For the Year ended 31.03.2013 (Amount in Rs.)	For the year ended 31.03.2012 (Amount in Rs.)
Income from software services Exports	24,240,202	29,807,707
Income from Software Products Sold	1,150,000	6,709,892
Total	25,390,202	36,517,599

35.1 As discussed in earlier paragraph, this company is considered to be comparable though it has different financial year as held in the case of RR Donnelley India Outsources Pvt. Ltd. [ITA No.678/Mds/2015]. Accordingly, we direct the TPO to include Lucid Software Limited as a comparable company in the list of comparables.

CORPORATE TAX

36. This ground is similar to that of the ground raised in IT(TP)A No.692/Bang/2017 for the assessment year 2012-2013. For the reasons stated hereinabove in paragraph 16 and 16.1 of this order, and also respectfully following the judgment of the Hon'ble Supreme Court in the case of *CIT v. Infosys Technologies Limited [(2008) 297 ITR 167 (SC)]*, we allow this ground.

37. Ground Nos. 7, 8 and 9 are not pressed by the assessee. Hence, they are dismissed as not pressed.

38. In the result, both the appeals are partly allowed for statistical purposes.

Order pronounced on this 27th day of April, 2020.

Sd/-
(N.V.Vasudevan)
VICE-PRESIDENT

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Bangalore ; Dated : 27th April, 2020.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The DRP-2, Bengaluru.
4. The CIT (TP)-2, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore