

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

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

आयकर अपील सं. / ITA No.1824/PUN/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Symantec Software India Private Limited.
EON Free Zone, 5th Floor, Wing 1,
Cluster B, Plot 1, Survey 77, MIDC,
Knowledge Park, Kharadi,
Pune-411 004.
PAN : AAACV6015F

.....अपीलार्थी / Appellant

बनाम / V/s.

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

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nageshwar Rao
Revenue by : Shri T. Vijaya Bhaskar Reddy, CIT

सुनवाई की तारीख / Date of Hearing : 23.01.2020

घोषणा की तारीख / Date of Pronouncement : 17.02.2020

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the directions of the Ld. Dispute Resolution Panel (DRP) dated 30.07.2018 for the assessment year 2014-15 as per the grounds of appeal on record.

2. Though the assessee has raised multiple grounds of appeal, however, contention of the Ld. AR at the time of hearing is that if three comparables i.e. (i) **Persistent System Limited** (ii) **Thirdware Solutions Limited** and (iii) **MPS Limited** are excluded from the final list of comparables, the rest of the grounds raised in appeal by the assessee becomes academic in nature.

3. The assessee has also filed an application praying for admission of additional ground based on the decision of the Hon'ble Supreme Court of India in the case of **NTPC Vs. CIT reported in 229 ITR 383 (SC)** where the ITAT is empowered to admit such additional ground. The Ld. AR of the assessee submitted that the additional ground does not require any fresh verification of facts since the issue involved therein is purely a question of law and the same reads as under:

Additional ground: *13.1 On the facts and circumstances of the case and in law, the Appellant prays that the liability for education cess of income tax paid for the year ought to be allowed as a deduction while computing the total income."*

4. The Ld. DR did not raise any objection with regard to admission of additional ground for adjudication.

5. Having heard the submissions of both the parties herein, we find the additional grounds raised by assessee are legal in nature, hence, the same is admitted in line with the decision of Hon'ble Supreme court of India in the case of **NTPC Ltd. Vs. CIT (supra.)**

Adjudication of additional ground

6. At the time of hearing, the Ld. AR of the assessee submitted that the issue of “*deduction of liability of education cess*” is squarely covered by the following decisions of the Pune Bench of the Tribunal:

(i) *DCIT Vs. Bajaj Allianz General Insurance Company Limited, ITA Nos.1111 & 1112/PUN/2017*

(ii) *Atlas Copco (India) Limited Vs. ACIT, ITA No.736/PUN/2011.*

7. Having heard the submissions of the parties herein, we find this issue has already been adjudicated by the Pune Bench of the Tribunal in the case of **DCIT Vs. Bajaj Allianz General Insurance Company Limited (supra.)**, in favour of the assessee wherein the Tribunal on the issue has held as follows:

“12. Referring to **Ground No.4**, the Ld. Counsel submitted that this ground relates to the **allowability of deduction in respect of the educational cess paid** by the assessee. The Ld. Counsel further submitted that this issue is covered in nature by virtue of the decision of the Hon’ble High Court of Judicature for Rajasthan Bench at Jaipur in the case of *Chambal Fertilisers and Chemicals Ltd. Vs. JCIT, Range -2, Kota*.

13. On hearing both the parties on this issue, we find that this issue is covered one by the decision of the Hon’ble High Court of Judicature for Rajasthan Bench at Jaipur in the case of *Chambal Fertilisers and Chemicals Ltd. Vs. JCIT, Range -2, Kota* wherein substantial question of law No.3 is relevant in this regard (Para 3) and the same was adjudicated by the Hon’ble High Court at Para 12 of the judgment. The Hon’ble High Court on this issue held the said question No.3 is answered in favour of the assessee. For the sake of completeness, the said Paragraph is extracted as under:

“12. We have heard consel for the parties.

On the third issue in appeal no.52/2018, in view of the circular of CBDT where word “Cess” is deleted, in our considered opinion, the tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the **Cess is not tax** in that view of the matter, we are of the considered opinion that

the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee.”

*From the above, it is evident that education Cess, which is not disallowable item, on its payment, the cess is an allowable expenditure as per provision of section 40(a)(ii) of the Act. Considering the settled nature of the issue as per the ratio laid down in the above referred case by the Hon’ble High Court of Judicature for Rajasthan Bench at Jaipur, **ground of Cross objection No.4 is allowed.”***

Respectfully, following the decision of the Co-ordinate Bench of the Tribunal, Pune in the above referred case, we allow this additional ground in favour of the assessee. Thus, **additional ground raised in appeal by the assessee is allowed.**

Adjudication of the grounds in appeal memo

8. The brief facts involve in this case are that the assessee company was incorporated on 12.09.1995 as a subsidiary of Symantec Operating Corporation USA. The ultimate parent company is Symantec Corporation, USA. The assessee has two units registered with Software Technology Park of India (STPI), Pune viz. Unit A and Unit B. The assessee company is engaged in the business of Software Development, Consultancy Services, and Technical Support Services. The assessee electronically filed its revised return of income for assessment year 2014-15 on 22.01.2016 declaring total income of Rs.1,28,03,08,180/-. During the assessment year 2014-15, the assessee company has undertaken the following international transactions:

<i>Nature of transaction</i>	<i>Nature of services</i>	<i>Amount (Rs.)</i>	<i>Method Adopted</i>
<i>Symantec Corporation, USA</i>	<i>Software Development</i>	<i>83,038.34</i>	<i>TNMM</i>

	<i>services</i>		
<i>Symantec Corporation, USA</i>	<i>Technical Support service</i>	<i>13,241.90</i>	<i>TNMM</i>
<i>Symantec Corporation, USA</i>	<i>Reimbursement of expenses to AEs</i>	<i>5,401.76</i>	<i>-</i>
<i>Symantec Ltd. Ireland</i>	<i>Reimbursement of expenses to AEs</i>	<i>226.73</i>	<i>-</i>
<i>Symantec Corporation, USA</i>	<i>Recovery of expenses from AEs</i>	<i>1,567.40</i>	<i>-</i>
Total		1,03,476.13	

The assessee has selected TNMM as the most appropriate method with the Profit Level Indicator (PLI) of operating profit/operating cost (OP/OC) for benchmarking its international transactions. In respect of the software development services segment and technical support services segment, the assessee worked out 3 years weighted average PLI of the comparable companies of 10.56% for software development services segment in its transfer pricing study report against PLI of 12.86% of its own. Since the weighted average PLI of comparable companies is less than its own PLI in case of software development services, it was contended that its international transactions of software development services are at the arm's length. With respect to the segment of international transaction of technical support services also, the assessee used TNMM by using PLI of OP/OC. The assessee worked out its PLI at 12.99% as against the 3 year weighted average PLI of comparable companies at 10.29% in its transfer pricing study report. Since the weighted average PLI of comparable companies is less than its own PLI in case of technical support services, it was contended that its international transactions of technical support services are at the arm's length. On the

basis of this exercise, the assessee argued that its international transactions were at the arm's length.

EXCLUSION OF COMPANIES AS COMPARABLES TO SOFTWARE DEVELOPMENT SERVICE SEGMENT

(A) Persistent Systems Limited:-

9. The Ld. AR of the assessee submitted that Persistent Systems Limited is engaged in the OPD which is non comparable to software development of the assessee. Persistent Systems is engaged in sale of software products; services and technology innovation covering full life cycle of product. Persistent Systems has been rejected as non comparable to software development services by various Hon'ble High Court and ITAT in various judicial precedents. The TPO observed that the assessee has relied upon the annual report for FY 2009-10 to support its contention that the OPD (Outsourced Software Product Development) business operations carried out by Persistent Systems are different from the IT/Software Development Services. It may be mentioned that the above company is included in the list of functionally comparable entities finalized by the assessee himself for the assessment year 2013-14 and was considered functionally comparable by the assessee in A.Y.2009-10, 2010-11 and 2011-12 as well. The TPO further observed that the assessee has given no reason as to how without there being any change in the functions of the Persistent Systems Limited over the years, the entity is considered functionally incomparable. The assessee also has not demonstrated as to how Persistent Systems Limited should be excluded because of F.Y. 2012-13 being an exceptional year of operation and has

impacted upon the profitability of the company. Accordingly, the TPO concluded his findings by providing final set of comparables in Software Development Service segment of the Persistent Systems Limited as under:

	<i>Name of the Company</i>	<i>Turnover</i>	<i>FY 2013-14 OP/OC %</i>	<i>Working capital adjusted margin as per SCN (%)</i>
1.	<i>R.S. Software (India) Ltd.</i>	<i>351.88</i>	<i>24.24</i>	<i>23.69</i>
2.	<i>Sasken Communication Technologies Ltd.</i>	<i>350.83</i>	<i>6.63</i>	<i>7.75</i>
3.	<i>Exilant Technologies Pvt. Ltd.</i>	<i>298.10</i>	<i>10.41</i>	<i>11.31</i>
4.	<i>Larson & Tourbro Infotech Ltd.</i>	<i>4643.94</i>	<i>22.28</i>	<i>21.14</i>
5.	<i>Mindtree Ltd.</i>	<i>3031.60</i>	<i>21.17</i>	<i>19.31</i>
6	<i>Persistent Systems Ltd.</i>	<i>1184.11</i>	<i>35.10</i>	<i>33.06</i>
7.	<i>Thridware Solutions Ltd.</i>	<i>206.76</i>	<i>50.45</i>	<i>49.06</i>
	<i>Arithmetic Mean</i>		<i>22.46</i>	<i>23.61</i>

As the PLI of the comparable using single year data and after allowing working capital adjustment claim, is arrived at 23.61%(OC/OP), whereas the PLI margin earned by the assessee in software development service segment is 14.34% (OC/OP). Since PLI margin of the assessee falls beyond the limit of +/- 3% u/s.92C(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), the TPO proposed adjustment over operating income of Rs.6731.28 Lakhs.

9.1. The Ld. AR of the assessee further submitted that the assessee has been continuously contesting for rejection of Persistent Systems as

functionally non comparable to software development service provider in past years before various forums. The Annual report of Persistent Systems for FY 2013-14 clearly states that Persistent Systems is a leader in the outsourced software development(OPD) which is non comparable to software development segment of the assessee. The Ld. AR of the assessee further submitted that Persistent has derived revenue from licensing of software products, product engineering and royalty and breakup of the same in revenue from software services is not available in its annual report for F.Y.2012-13. Before the Ld. DRP, Ld. AR placed reliance on the various decisions showing that Persistent Systems has specifically been rejected as non comparable to software development service provider. However, the Ld. DRP upheld the findings of the TPO by observing as follows:

“Findings : This entity qualifies for the turnover filter applied by the TPO. Employee cost of 62% of total cost shows that it is a software services provider. In case of Persistent Systems Limited, the assessee has referred to its Annual Report and has stated that acquisition of US Company has contributed to the assessee company’s growth. In this connection, it may be mentioned that the acquisition of the US company, if at all, will affect the growth of US company and at most would affect consolidated financials of the company but not stand alone financials of the India Company which is being compared with the assessee company. Therefore, we do not agree with the assessee’s arguments that acquisition of US company by Persistent will make it incomparable with the assessee company.

The TPO has correctly noted that entire revenue as per details is from software services only. Perusal of the Annual Report of the company shows that company is in to software development. Its turnover is also comparable with the assessee company’s turnover. Therefore, we confirm the decision of the TPO to accept Persistent Systems Ltd. and Larsen & Toubro Infotech Ltd. as comparable.”

10. The Ld. AR of the assessee also submitted that on account of functionally not comparable, Persistent Systems Limited should be excluded from the list of comparable companies. The issue of non-comparable of

Persistent Systems Limited is squarely covered by the decisions of Hon'ble High Courts and Tribunals. With regard to inappropriate acceptance of Persistent Systems Limited as functionally comparable, the Ld. AR of the assessee placed strong reliance on the following decisions:

(i) EMC Software and Services India Private Limited Vs. JCIT- Hon'ble ITAT, Bangalore (ITA No.3375/Bang/2018)

(ii) Pr. CIT Vs. Saxo India Private Limited- Hon'ble Delhi High Court, ITA No. 682/2016.

(iii) US Technology International Private Limited Vs. ACIT, ITAT, Cochin , ITA No.592/Coch/2018

(iv) Cash Edge India Private Limited Vs. DCIT-ITAT, Delhi

(v) Global Logic India Private Limited Vs. DCIT, ITAT, Delhi ITA No.122/Del/2013.

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. Assst. 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 ld. 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.

(B) Thirdware Solutions Limited :

15. The Ld. AR of the assessee submitted that Thirdware Solutions Limited has generated its entire revenue from sale of software products and hence, is not functionally comparable to the software development service segment of the assessee. Thirdware Solutions Limited is engaged in providing high end comprehensive application implementation and application management support service in enterprise application space and implementation of high and ERP solutions for various companies which is a distinct activity from software development and it has been rejected as comparable to software development service provider by various ITAT in various judicial pronouncement. With regard to the TPO's comments that the assessee itself has considered Thirdware Solutions Limited functionally comparable in its own set while carrying out its benchmarking analysis for AY. 2013-14, the Ld. AR of the assessee submitted, the TPO himself has stated in the TP order that companies having revenue from software products more than 25% cannot be said to be engaged in software development services and hence, Thirdware Solutions Limited ought to be rejected. Thirdware Solutions Limited is engaged in non comparable activities like consultancy services and the breakup of the same is not available in its annual report for FY 2012-13. The Ld. AR further submitted that the Ld. DRP has erred in holding that Thirdware Solutions Limited is engaged in diversified business activities but it is seen that they are not reported in the financial year. Perusal of the foot note to the P & L Account shows that 99% of the revenue is from software services.

15.1 The Ld. AR of the assessee also submitted that on account of functionally not comparable, Thirdware Solutions Limited should be excluded from the list of comparable companies. The issue of non-comparable of Thirdware Solutions Limited is squarely covered by the decisions of Hon'ble High Courts and Tribunals. With regard to inappropriate acceptance of Thirdware Solutions Limited as functionally comparable, the Ld. AR of the assessee placed strong reliance on the following decisions:

(i) M/s. Emerson Electric Company (India) Private Limited Vs. ACIT, ITA No.6098/Mum/2018 and ITA No.531/Mum/2018

(ii) M/s. John Deere India Pvt. Ltd. Cybercity Vs. ACIT in ITA No.518/PUN/2015

(iii) M/s. ION Trading India Private Limited Vs. ITO, ITA No.1035/Del/2015

(iv) Sun Life India Service Centre Pvt. Ltd. Vs. DCIT, ITA No.1489/Del/2014

(v) M/s. EMC Software and Services India Pvt. Ltd. Vs. JCIT, ITA No.3375/Bang/2018.

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.

EXCLUSION OF MPS LIMITED AS COMPARABLE TO TECHNICAL SUPPORT SERVICE SEGMENT

(C) MPS LIMITED :

19. The Ld. AR of the assessee submitted that MPS Limited is engaged in carrying out content development activity which is in the nature of KPO service and therefore, is functionally non comparable to the technical support service segment of the assessee. With regard to the TPO's comments, the company is engaged in data digitization and considered as functionally similar to the assessee, the Ld. AR of the assessee submitted that MPS Limited is inter alia engaged in high end activity i.e. type-setting, data digitization, content and product development for learners which is in the nature of 'knowledge processing outsourcing services. The Ld. AR of the assessee further stated that the revenue recognition note states that the company is deriving revenue from website design and development and website hosting which is not similar to ITes. MPS Limited undertakes R & D activities unlike the assessee which substantiate that MPS Limited undertakes high end activity which is akin to IT services and not ITes. The Ld. AR further submitted that there is no break up available regarding the same and ought to be removed as a comparable company and therefore, the DRP had wrongly approved the action of the TPO in including MPS Limited in the list of comparables.

19.1 The Ld. AR of the assessee also submitted that on account of functionally not comparable, MPS Limited should be excluded from the list of comparable companies. The issue of non-comparable of MPS Limited is squarely covered by the decisions the Tribunals. With regard to inappropriate

acceptance of MPS Limited as functionally comparable to its technical support services segment, the Ld. AR of the assessee placed strong reliance on the following decisions:

(i) *Emerson Electric Company (India) Private Limited Vs. ACIT in ITA No.6098/Mum/2018 & ITA No.531/Mum/2018*

(ii) *United Health Group Information Services Pvt. Ltd. Vs. ACIT in ITA No. 6312/Del/2012*

(iii) *iQor India Services Private Limited Vs. ITO, in ITA No.6034/Del/2012*

(iv) *GE India Business Services Pvt. Ltd. Vs. ACIT, ITA No.6008/Del/2012.*

20. We have perused the case records and heard the rival contentions. We find from the annual report of MPS Limited is engaged in high end activity i.e. type-setting, data digitization, content and product development for learners which is in the nature of 'knowledge processing outsourcing services. From the various functions performed by MPS Limited, we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITes which is in the name of the assessee in ITes segment. In this regard, we find in the case of **Emerson Electric Company (India) Private Limited Vs. ACIT (supra.)** wherein the Co-ordinate Bench of the Tribunal, Mumbai held the MPS Limited as functionally not comparable by observing as follows:

"9.3. From the perusal of the annual report for the year ended 31/03/2014 of the said comparable, we find from page 707 of the paper book that the said comparable had incurred outsourcing cost of Rs.1078.76 Crores which is included under the head "miscellaneous expenses" which goes to prove that it has got a different business model. From the various functions performed by MPS Ltd., we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITeS which is the case of the assessee in ITeS segment. In this regard, we find that the reliance placed by the ld.AR on the Co-ordinate Bench decision of Bangalore Tribunal in the case of M/s. Google (India) Pvt. Ltd., vs. DCIT in ITA

No.1368/Bang/2010 for A.Y.2006-07 dated 19/10/2012 is well founded wherein it was held asunder:-

16. As far as (4) Apex Knowledge Solutions Pvt. Ltd., is concerned, we find that the assessee had taken objections before the TPO that it is functionally different, as it provides services such as E-publishing knowledge based services etc. But TPO has rejected the objection on the ground the assessee has not considered the verticals or functional lines during the search process conducted by it and, therefore, it is not proper to make any objection on this basis now. We are not able to agree with the finding of the TPO as confirmed by the DRP on this issue. Merely because, the assessee itself has not considered the said filter while making its TP study; it cannot be said that it cannot raise such an objection before the TPO. It is the TPO who has adopted this company as comparable. On such adoption, the assessee has every right to raise the objections as regards the functional differences between the assessee and comparable. It is the bounden duty of the TPO to consider the said objections in accordance with law. As brought out by the assessee, the assessee is in the IT enabled services, whereas the said company Apex Knowledge Salutation Pvt. Ltd., is in the business of E-publishing which cannot be said to be in the same line of business. The functional differences are likely to affect the profit marking capacity of both the companies. In view of the same, we are of the opinion that this company is also to be excluded from the list of comparables.

9.3. In view of the above, we hold that the comparable chosen by the ld. TPO, M/s. MPS Ltd., is functionally not comparable with that of the assessee and accordingly, we direct the ld. TPO to exclude the same from the list of comparables.”

21. We further observe in the case of **United Health Group Information Services Pvt. Ltd. Vs. ACIT (supra.)** wherein with regard to Vishal Informatics which is engaged in e-publishing business like the company in the instant case i.e. MPS Limited, on same issue, the Co-ordinate Bench of the Tribunal, Delhi has held as follows:

“Vishal Informatics

12.1. The TPO included this company in the list of comparables by noticing that it was engaged in providing BPO services. The assessee failed to convince him and the DRP that it was incomparable.

12.2. Having heard the rival submissions and perused the relevant material on record, we find from the Annual report of this company that it is mainly engaged in e-publishing business. It has more than 10,000 classic books to its credit which are also converted into large font titles for visually challenged. Apart from e-publishing, this company is also

engaged in Documents scanning & Indexing. It can be seen from the financial results of this company that both the segments viz., e-publishing and Documents scanning etc. have been combined and there are no separate financial results in respect of Documents scanning work, which may be comparable with the assessee to some extent. As the assessee is not engaged in any e-publishing business and the financials given by this company are on consolidated basis, we direct to exclude this company from the list of comparables. The assessee succeeds.”

22. We further observe that the Ld. DRP held MPS Limited as BPO Company and is engaged in ITes only. In this regard, the Pune Bench of the Tribunal in the case of **Macom Technology Solutions (India) Private Limited Vs. DCIT in ITA No.2393/PUN/2017** for A.Y.2013-14 vide its order dated 08.08.2019 discussed the definitions as provided under Rule 10TA of Part-II DB wherein the definition of Information Technology Enabled Services are provided the business process outsourcing is defined under clause (e) which provides mainly with assistance or use of Information Technology which as back office operations, call centre, data processing or insurance claim processing. Further, the definition of KPO is provided under clause (g) of Rule 10TA to mean certain business process outsourcing services (BPO) services provided mainly with the assistance or use of information technology requiring application of knowledge and advanced analytical and technical skills such as geographic information system, human resource services, business analytical services, financial services or engineering and design services, therefore, the Tribunal held being a KPO, it cannot be compared with that of company which is into business of BPO. The revenue recognition note states that the company is deriving revenue from website design and development and website hosing which is not similar to ITes. Further, MPS Limited underwent type-setting, data digitization, content and product

development for learner which as per Safe Harbour Rules issued by Central Board of Direct Taxes qualifies to be in the nature of KPO.

In view of the above, respectfully following the decisions of the Tribunal as mentioned hereinabove, we are of the considered view, high end activities of the MPS Limited is akin to IT services and not ITes. The activities of the MPS Limited i.e. typesetting, data digitization, content development and product development are in the nature of “Knowledge Processing Outsourcing Services (KPOs) and not BPO. Accordingly, MPS Limited cannot be treated as comparable company and the AO/TPO is directed to exclude **MPS Limited** from final list of comparable companies with regard to its technical support service segment.

23. Since we have directed the AO/TPO to exclude three comparables i.e. (i) **Persistent System Limited** (ii) **Thirdware Solutions Limited** and (iii) **MPS Limited** from the final list of comparables, the rest of the grounds raised in appeal by the assessee becomes academic in nature.

24. In the result, **appeal of the assessee is allowed.**

Order pronounced on 17th day of February, 2020.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 17th February, 2020.

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.

// True Copy //

आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	23.01.2020	Sr.PS/PS
2	Draft placed before author	17.02.2020	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		