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**IT/ILT: In absence of segmental information, company engaged in both software development services as well as product development would not be comparable to assessee-company engaged in provision of software development and support services to its A.E**

**IT/ILT: Company which failed to satisfy RPT filter could not be accepted as comparable to assessee-company engaged in provision of software development and support services to its A.E**

**IT/ILT: Company into product development and also providing high-end technical services in category of KPO services would not be comparable to assessee engaged in provision of software development and support services to its A.E**

**IT/ILT: Company engaged in product development and product design services would not be comparable to assessee engaged in provision of software development and support services to its A.E**

**IT/ILT: Company which had earned revenue from licensing of products/technology and in relevant previous year, there was an amalgamation / merger in company, said company could not have been taken as comparable to assessee engaged in provision of software development and support services to its A.E.**

**IT/ILT: A company could not have been excluded from comparable list merely due to different financial year ending as profitability/margin of company could be ascertained by extrapolating financial data available for period of nine month to subsequent three months**

**IT/ILT: In case of assessee-company engaged in provision of software development and support services to its A.E., a company also engaged in product development, where annual report of company did not provide enough segmental details to accurately arrive at profit margin of different segments, could not have been treated as comparable**

**IT/ILT: Where TPO in Transfer pricing order in case of assessee engaged in provision of software development and support services to its A.E. had excluded companies whose employee cost as a proportion to operating revenue was less than 25 per cent, company having employee cost of 3.96 per cent of operating revenue was to be excluded from list of comparables**

**IT/ILT: Matter to be remanded back to TPO/Assessing Officer to verify related party transaction of company and if it was found to be less than threshold limit of 25 per cent of sales, as claimed by assessee, this company could not have been rejected as a comparable**

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[2019] 102 taxmann.com 58 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'K'

**Infor Global Solutions India (P.) Ltd.****v.****Deputy Commissioner of Income Tax, Circle-8(2), Mumbai\***

SAKTIJIT DEY, JUDICIAL MEMBER  
AND MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER  
IT APPEAL NO. 520 (MUM.) OF 2012  
[ASSESSMENT YEAR 2007-08]  
DECEMBER 4, 2018

**I. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Assessee an Indian company was engaged in business of software development and distribution of software licenses to its AE - Whether a company engaged in both software development services as well as product development in which case no segmental information was available, could not be accepted as comparable - Held, yes [Para 8][In favour of assessee]**

**II. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Whether in case of assessee-company engaged in provision of software development and support services to its A.E., a company which failed to satisfy RPT filter could not be accepted as comparable - Held, yes [Para 11][In favour of assessee]**

**III. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Whether in case of assessee-company engaged in provision of software development and support services to its A.E., a company into product development and also providing high-end technical services in category of KPO services, could not be treated as comparable - Held, yes [Para 14][In favour of assessee]**

**IV. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Whether in case of assessee-company engaged in provision of software development and support services to its A.E., a company engaged in product development and product design services would not be comparable - Held, yes [Para 29][In favour of assessee]**

**V. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Assessee an Indian company was engaged in business of software development and distribution of software licenses to its AE - Whether a company which had earned revenue from licensing of products/technology which demonstrated that company was engaged in development of products also and further fact that in relevant previous year, there was an amalgamation/merger in company which might have impacted profitability, said company could not have been taken as comparable - Held, yes[Para 32][In favour of assessee]**

**VI. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Assessee an Indian company was engaged in business of software development and distribution of software licenses to its AE - Whether, a company could not have been excluded from comparable list merely due to different financial year ending as profitability/margin of company could be ascertained by**

extrapolating financial data available for period of nine month to subsequent three months - Held, yes [Para 41][In favour of revenue]

VII. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Whether in case of assessee-company engaged in provision of software development and support services to its A.E., a company also engaged in product development, where annual report of company did not provide enough segmental details to accurately arrive at profit margin of different segments could not have been treated as comparable - Held, yes [Para 41][Matter remanded]

VIII. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Whether wherefrom transfer pricing order passed by TPO in case of assessee-company engaged in provision of software development and support services to its A.E. , it was evident that by applying employee cost filter, TPO had excluded companies whose employee cost as a proportion to operating revenue was less than 25 per cent, company having employee cost of 3.96 per cent of operating revenue was to be excluded from list of comparables - Held, yes [Para 50][In favour of assessee]

IX. Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustration) - Assessment year 2007-08 - Assessee-company was engaged in provision of software development and support services to its A.E. - From transfer pricing order passed by TPO in case of assessee, it was found that TPO had excluded a company as a comparable on reasoning that related party transaction of company was 27.66 per cent on sales, thus, it exceeded threshold limit of 25 per cent - However, assessee contended that related party transaction of company as a percentage of sales worked out to 22.42 per cent - Whether aforesaid claim of assessee required consideration and if related party transaction of this company was less than 25 per cent of sales, as claimed by assessee, this company could not have been rejected as a comparable - Held, yes [Para 54][Matter remanded]

## CASE REVIEW - I

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*Telcordia Technologies India (P.) Ltd. v. Asstt. CIT* [[2012](#)] [22 taxmann.com 96/137 ITD 1 \(Mum.\)](#); *Sumtotal Systems India (P.) Ltd. v. Asstt. CIT* [[2014](#)] [46 taxmann.com 231/65 SOT 48 \(URO\) \(Hyd. - Trib.\)](#); *LSI Technologies India (P.) Ltd. v. ITO* [[2015](#)] [60 taxmann.com 405 \(Bang. - Trib.\)](#); *CAPCO IT Services India (P.) Ltd. v. ITO* [[2017](#)] [79 taxmann.com 214 \(Bang. - Trib.\)](#); *Global Logistic India (P.) Ltd. v. Asstt. CIT* [[2015](#)] [56 taxmann.com 159/69 SOT 57 \(URO\) \(Delhi - Trib.\)](#) and *Dialogic Networks (India) (P.) Ltd. v. Asstt. CIT* [[2018](#)] [97 taxmann.com 57 \(Mum. - Trib.\)](#) (para 8) followed.

## CASE REVIEW - II

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*Ness Innovative Business Services (P.) Ltd. v. Dy. CIT* [[2014](#)] [47 taxmann.com 377/151 ITD 190 \(Hyd. - Trib.\)](#); *Pr. CIT v. Barclays Technology Centre India (P.) Ltd.* [[2018](#)] [95 taxmann.com 170 \(Bom.\)](#); *Dialogic Networks (India) (P.) Ltd. v. Asstt. CIT* [[2018](#)] [97 taxmann.com 57 \(Mum. - Trib.\)](#) and *QAD India (P.) Ltd. v. Dy. CIT* [[2016](#)] [75 taxmann.com 280 \(Mum. - Trib.\)](#) (para 11) followed.

## CASE REVIEW - III

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*Asstt. CIT v. Tech Mahindra Ltd.* [[2018](#)] [91 taxmann.com 329 \(Mum. - Trib.\)](#); *LSI Technologies India (P.) Ltd. v. ITO* [[2015](#)] [60 taxmann.com 405 \(Bang. Trib.\)](#); *CAPCO IT Services India (P.) Ltd. v. ITO* [[2017](#)] [79 taxmann.com 214 \(Bang. Trib.\)](#); *Pr. CIT v. Barclays Technology Centre India (P.)*

*Ltd.* [\[2018\] 95 taxmann.com 170 \(Bom.\)](#); *Dialogic Networks (India) (P.) Ltd. v. Asstt. CIT* [\[2018\] 97 taxmann.com 57 \(Mum. - Trib.\)](#) and *Accenture Services (P.) Ltd. v. Asstt. CIT* [\[2018\] 96 taxmann.com 400 \(Mum. - Trib.\)](#) (para 14) followed.

## CASE REVIEW - IV

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*LSI Technologies India (P.) Ltd. v. ITO* [\[2015\] 60 taxmann.com 405 \(Bang. - Trib.\)](#); *Global Logic India (P.) Ltd. v. Asstt. CIT* [\[2015\] 56 taxmann.com 159/69 SOT 57 \(URO\) \(Delhi - Trib.\)](#); *Pr. CIT v. Saxo India (P.) Ltd.* [\[2016\] 74 taxmann.com 88/243 Taxman 411 \(Delhi\)](#) and *Dialogic Networks India (P.) Ltd. v. Asstt. CIT* [\[2018\] 97 taxmann.com 57 \(Mum. - Trib.\)](#) (para 29) followed.

## CASE REVIEW - V

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*Global Logic India (P.) Ltd. v. Asstt. CIT* [\[2015\] 56 taxmann.com 159/69 SOT 57 \(URO\) \(Delhi - Trib.\)](#) (para 32) followed.

## CASES REFERRED TO

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*Telcordia Technologies India (P.) Ltd. v. Asstt. CIT* [\[2012\] 22 taxmann.com 96/137 ITD 1 \(Mum.\)](#) (para 6), *Sumtotal Systems India (P.) Ltd. v. Asstt. CIT* [\[2014\] 46 taxmann.com 231/65 SOT 48 \(URO\) \(Hyd. - Trib.\)](#) (para 6), *LSI Technologies India (P.) Ltd. v. ITO* [\[2015\] 60 taxmann.com 405 \(Bang. - Trib.\)](#) (para 6), *CAPCO IT Services India (P.) Ltd. v. ITO* [\[2017\] 79 taxmann.com 214 \(Bang. - Trib.\)](#) (para 6), *Global Logic India (P.) Ltd. v. Asstt. CIT* [\[2015\] 56 taxmann.com 159/69 SOT 57 \(URO\) \(Delhi - Trib.\)](#) (para 6), *Dialogic Networks (India) (P.) Ltd. v. Asstt. CIT* [\[2018\] 97 taxmann.com 57 \(Mum. - Trib.\)](#) (para 6), *Ness Innovative Business Services (P.) Ltd. v. Dy. CIT* [\[2014\] 47 taxmann.com 377/151 ITD 190 \(Hyd. - Trib.\)](#) (para 9), *Pr. CIT v. Barclays Technology Centre India (P.) Ltd.* [\[2018\] 95 taxmann.com 170 \(Bom.\)](#) (para 9), *QAD India (P.) Ltd. v. Dy. CIT* [\[2016\] 75 taxmann.com 280 \(Mum. - Trib.\)](#) (para 9), *Asstt. CIT v. Tech Mahindra Ltd.* [\[2018\] 91 taxmann.com 329 \(Mum. - Trib.\)](#) (para 12), *Accenture Services (P.) Ltd. v. Asstt. CIT* [\[2018\] 96 taxmann.com 400 \(Mum. - Trib.\)](#) (para 12), *CIT v. PTC Software (I) (P.) Ltd.* [\[2016\] 75 taxmann.com 31 \(Bom.\)](#) (para 15), *Telelogic India (P.) Ltd. v. Dy. CIT* [\[2015\] 58 taxmann.com 364/69 SOT 135 \(Mum. - Trib.\)](#) (para 18), *Pr. CIT v. Saxo India (P.) Ltd.* [\[2016\] 74 taxmann.com 88/243 Taxman 411 \(Delhi\)](#) (para 27), *Pr. CIT v. S.T. Ericsson India (P.) Ltd.* [IT Appeal No.821/2017, dated 31-1-2018] (para 33) and *St-Ericsson India (P.) Ltd. v. Addl. CIT* [\[2017\] 79 taxmann.com 207 \(Delhi - Tib.\)](#) (para 33).

**Sunil Moti Lala** for the Appellant. **Jayant Kumar** for the Respondent.

## ORDER

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**Saktijit Dey, Judicial Member** :- The aforesaid appeal is directed against assessment order dated 23rd November 2010, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "the Act") for the assessment year 2007-08, in pursuance to the directions of the Dispute Resolution Panel-1 (DRP), Mumbai.

2. Altogether, the assessee has raised 15 grounds. Vide written submissions dated 5th September 2018 filed before us, the learned Authorised Representative has submitted, as regards the issue relating to transfer pricing adjustment, assessee wants only to contest selection / rejection of certain comparables and denial of benefit under proviso to section 92C(2) as raised in ground no.2, 3 and 4. Further, he submitted, besides the aforesaid grounds, the assessee wants to contest ground no.14, relating to corporate tax issue. In view of the aforesaid submissions of the learned Authorised Representative, we proceed to deal with the issue relating to selection / rejection of certain comparables disputed before us as well as the corporate tax issue as raised in ground no.14. At the outset, we propose to deal with the dispute relating to transfer pricing adjustment.

3. Brief facts are, the assessee an Indian company is engaged in the business of software development and distribution of software licenses. During the previous year the assessee entered

into international transactions with its Associated Enterprises (A.E) in the aforesaid two segments. Admittedly, the Transfer Pricing Officer accepted the arm's length price of the international transactions with the A.E. relating to software distribution and related services, reimbursement received for expenses incurred and reimbursement paid for expenses incurred by the A.E. However, as regards provision of software development and support services to the A.E. the Transfer Pricing Officer on verifying the transfer pricing study report found that the assessee has bench marked the aforesaid transaction with the A.E. by adopting Transactional Net Margin Method (TNMM) as the most appropriate method with operating profit / total cost (OP/TC) as the profit level indicator (PLI). By undertaking a search in the data bases the assessee has selected 12 companies as comparables having arithmetic mean of 13.94%. Since, the margin shown by the assessee @ 8.54% was within  $\pm 5\%$  range, the assessee claimed that the transaction with the A.E. is at arm's length. The Transfer Pricing Officer after verifying the transfer pricing study report, however, held that the bench marking done by the assessee is unreliable, hence, not acceptable. Out of the 12 comparables selected by the assessee, the Transfer Pricing Officer rejected nine comparables while accepting three. Having done so, the Transfer Pricing Officer undertook a search process independently and selected 24 new comparables. Thus, the Transfer Pricing Officer selected a final set of 27 comparables having arithmetic mean of 25.43%. By applying the arithmetic mean of the comparables selected, the Transfer Pricing Officer determined the arm's length price of the transaction with the A.E. at Rs. 60,95,58,624, as against the price charged by the assessee at Rs. 52,74,85,101. The resultant short fall in the price of Rs. 8,20,73,523, was treated as the transfer pricing adjustment to be made to the price charged. In pursuance to the order passed by the Transfer Pricing Officer, the Assessing Officer passed the draft assessment order adding the transfer pricing adjustment suggested by the Transfer Pricing Officer. Though, the assessee raised objections before the DRP contesting the transfer pricing adjustment on various grounds including selection / rejection of comparables, however, the DRP more or less rejected all the objections of the assessee. Being aggrieved with the directions of the DRP, the assessee is in appeal before us.

4. Since the major issue pertaining to transfer pricing adjustment as contested before us is with regard to selection / rejection of comparables, we will proceed to deal with the issue at the outset.

(i) *AVANI CIMCON TECHNOLOGIES LTD.*

5. The aforesaid company was selected by the Assessing Officer and retained by the DRP.

6. The learned Authorised Representative objecting to the selection of the aforesaid comparable submitted that the company is functionally different from the assessee since as per the information available in the website of the company, it is into software solution, software development and consulting and information technology services. He submitted that the company owns products like D- Xchange, Bizrule Exchange, CARMA, etc. In this context, he drew our attention to the relevant extract of the website as submitted in the paper book. The learned Authorised Representative submitted, no segmental break-up of software product and software development is available in the annual report of the assessee. He submitted, considering the aforesaid factual aspect, the Tribunal in a number of decisions pertaining to the very same assessment year has held this company not to be a comparable to a software development service provider. In this context, he relied upon the following decisions:—

- (i) *Telcordia Technologies India (P.) Ltd. v. Asstt. CIT* [[2012](#)] [22 taxmann.com 96/137 ITD 1 \(Mum.\)](#)
- (ii) *Sumtotal Systems India (P.) Ltd. v. Asstt. CIT* [[2014](#)] [46 taxmann.com 231/65 SOT 48 \(URO\)\(Hyd. - Trib.\)](#)
- (iii) *LSI Technologies India (P.) Ltd. v. ITO* [[2015](#)] [60 taxmann.com 405 \(Bang. - Trib.\)](#)
- (iv) *CAPCO IT Services India (P.) Ltd. v. ITO* [[2017](#)] [79 taxmann.com 214 \(Bang. - Trib.\)](#)
- (v) *Global Logic India (P.) Ltd. v. Asstt. CIT* [[2015](#)] [56 taxmann.com 159/69 SOT 57 \(URO\)](#)

[\(Delhi - Trib.\)](#); and

(vi) *Dialogic Networks (India) (P.) Ltd. v. Asstt. CIT [2018] 97 taxmann.com 57 (Mum. - Trib.)*.

7. The learned Departmental Representative relying upon the observations of the DRP and the Transfer Pricing Officer submitted that the assessee has never brought to the notice of the Departmental Authorities that the company is also developing product.

8. We have considered rival submissions and perused materials on record. As could be seen, the main contention of the assessee against selection of the aforesaid comparable is, it is engaged in both software development services as well as product development and segmental details are not available. As could be seen from the materials placed on record, comparability of this company with software development service providers has come up for consideration before different benches of the Tribunal for the very same assessment year. In case of *Telcordia Technologies India (P.) Ltd. (supra)*, the Co-ordinate Bench after taking note of the fact that segmental details of operating income of information technology services and sale of software products have not been provided in the annual report has rejected this company as a comparable. The same view has been expressed by the Tribunal in the other decisions cited by learned Authorised Representative. Since, the aforesaid decisions of the Tribunal pertain to the very same assessment year, respectfully following the consistent view expressed by the Tribunal with regard to the acceptability of the aforesaid comparable, we direct the Assessing Officer to exclude this company from the list of comparables.

(ii) *BODHTREE CONSULTING LTD.*

9. This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of this company, the learned Authorised Representative submitted that it is into varied activities like software solutions, end-to-end web solution, software consultancy, design and development of solutions. He submitted, no segmental information is available in the annual report of the company. He submitted, income from e-paper activity is included in the company's Profit & Loss account, however, expenses have been debited to the joint venture created in the name and style of Learn Smart India Pvt. Ltd. He submitted, the company has recorded an abnormal growth in turnover and profit of 91.63% and 546% respectively. For aforesaid reasons, the company cannot be treated as a comparable. In support of such contentions, he relied upon the following decisions:—

(i) *Ness Innovative Business Services (P.) Ltd. v. Dy. CIT [2014] 47 taxmann.com 377/151 ITD 190 (Hyd. - Trib.)*.

(ii) *Pr. CIT v. Barclays Technology Centre India (P.) Ltd. [2018] 95 taxmann.com 170 (Bom.)*.

(iii) *Dialogic Networks (India) (P.) Ltd. (supra)*

(iv) *QAD India (P.) Ltd. v. Dy. CIT [2016] 75 taxmann.com 280 (Mum. - Trib.)*.

10. The learned Departmental Representative relied upon the orders of the DRP and the Transfer Pricing Officer.

11. We have considered rival submissions and perused materials on record. As could be seen, in case of *Ness Innovative Business Services (P.) Ltd. (supra)*, the Tribunal having taken note of the fact that the related party transaction of the company during the relevant previous year exceeded the threshold limit of 25% has excluded this company as a comparable. Since, the aforesaid decision of the Tribunal pertains to the very same assessment year, we are of the view that the company cannot be treated as comparable as it fails the RPT filter. Even otherwise also, in various other decisions, as cited by the learned Authorised Representative, this company has been held as not comparable. Therefore, following the consistent view of the Tribunal in the decisions cited above, we direct the Assessing Officer to exclude this company from the list of comparables.

(iii) *e-ZEST SOLUTIONS LTD.*

**12.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of this company, the learned Authorised Representative submitted that the company deals both in software development as well as products and segmental details are not available. Further, he submitted, the company renders high end technical services which are in the nature of knowledge Process Outsourcing (KPO). Thus, he submitted, the company cannot be treated as comparable. In support of his contention, the learned Authorised Representative relied upon the following decisions:—

- (i) *Asstt. CIT v. Tech Mahindra Ltd.* [[2018](#)] [91 taxmann.com 329](#) (Mum. - Trib.);
- (ii) *LSI Technologies India (P.) Ltd.* (*supra*);
- (iii) *CAPCO IT Services India (P.) Ltd.* (*supra*);
- (iv) *Barclays Technology Centre India (P.) Ltd.* (*supra*);
- (v) *Dialogic Networks (India) (P.) Ltd.* (*supra*); and
- (vi) *Accenture Services (P.) Ltd. v. Asstt. CIT* [[2018](#)] [96 taxmann.com 400](#) (Mum. - Trib.).

**13.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**14.** We have considered rival submissions and perused materials on record. As could be seen from the material placed before us, comparability of this company came up for consideration before different benches of the Tribunal in respect of various assesseees. In these decisions the Tribunal has consistently held that this company, since, is into product development and also provides high end technical services in the category of KPO services, it cannot be treated as comparable. Thus, respectfully following the consistent view of the Tribunal in the decisions cited by the learned Authorised Representative, most of which are for the impugned assessment year, we hold that this company cannot be treated as comparable to the assessee.

(iv) *HELIOS AND MATHESON TECHNOLOGY LTD.*

**15.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of this company, the learned Authorised Representative submitted, it undertakes research and development of new services, design, frameworks and methodologies which is suggestive of the fact that the company is into development of products. Thus, he submitted that it cannot be treated as comparable to the assessee. In support of his contentions, he relied upon the following decisions:—

- (i) *CIT v. PTC Software (I) (P.) Ltd.* [[2016](#)] [75 taxmann.com 31](#) (Bom.);
- (ii) *LSI Technologies India (P.) Ltd.* (*supra*);
- (iii) *CAPCO IT Services India (P.) Ltd.* (*supra*); and
- (iv) *Global Logic India (P.) Ltd.* (*supra*);

**16.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**17.** We have considered rival submissions and perused materials on record. The primary ground on which the assessee objects to selection of this company is, it is involved in development of products. Notably, in case of *PTC Software (I) (P.) Ltd.* (*supra*), the Hon'ble Jurisdictional High Court upheld the decision of the Tribunal rejecting this company as a comparable on the ground that it is involved in development of software products. The same view has been expressed by the Tribunal in various other decisions as cited by the learned Authorised Representative. Since, the majority of the aforesaid decisions including the decision of the Hon'ble Jurisdictional High Court

pertain to the impugned assessment year, respectfully following the ratio laid down in these decisions, we exclude this company from the list of comparables.

(v) *KALS INFO SYSTEMS LTD.*

**18.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of this company, the learned Authorised Representative submitted that it is engaged in software development as well as products. He further submitted that segmental details relating to the aforesaid two segments are not available in the annual report. Drawing our attention to the financial statement of the company, the learned Authorised Representative submitted that 52.47% of the total current asset comprises of inventories which demonstrates that the company is into development of software products. In support of this contentions, he relied upon the following decisions:—

- (i) *PTC Software (I) (P.) Ltd. (supra)*—
- (ii) *Sumtotal Systems India (P.) Ltd. (supra)*;
- (iii) *LSI Technologies India (P.) Ltd. (supra)*;
- (iv) *CAPCO IT Services India (P.) Ltd. (supra)*;
- (v) *Global Logic India (P.) Ltd. (supra)*;
- (vi) *Barclays Technology Centre India (P.) Ltd. (supra)*;
- (vii) *Dialogic Networks (India) (P.) Ltd. (supra)*;
- (viii) *Accenture Services (P.) Ltd. (supra)*;
- (ix) *Telelogic India (P.) Ltd. v. Dy. CIT [2015] 58 taxmann.com 364/69 SOT 135 (Mum. - Trib.)*; and
- (x) *QAD India (P.) Ltd. (supra)*;

**19.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**20.** We have considered rival submissions and perused materials on record. The main plank on which the assessee has challenged selection of the aforesaid comparable is, it is engaged in development of software products. Notably, in case of *PTC Software (I) (P.) Ltd. (supra)*, the Hon'ble Jurisdictional High Court upheld the decision of the Tribunal in rejecting this company as a comparable to a software development service provider on the ground that it is engaged in the development of product. The other decisions cited by the learned Authorised Representative also express similar view. Since, most of the decisions cited by the learned Authorised Representative including the decision of the Hon'ble Jurisdictional High Court in *PTC Software (I) (P.) Ltd. (supra)* pertain to the impugned assessment year, respectfully following them, we exclude this company from the list of comparables.

(vi) *LUCID SOFTWARE LTD.*

**21.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of this company as comparable, the learned Authorised Representative submitted that the annual report of the company reveals that it has incurred product development expenses which demonstrate that the company is into product development activity and not software development. Thus, he submitted that the company cannot be treated as comparable. In support of this contentions, he relied upon the following decisions:—

- (i) *Tech Mahindra Ltd. (supra)*;

- (ii) *Telcordia Technologies India (P.) Ltd. (supra)*;
- (iii) *Sumtotal Systems India (P.) Ltd. (supra)*;
- (iv) *LSI Technologies India (P.) Ltd. (supra)*;
- (v) *CAPCO IT Services India (P.) Ltd. (supra)*; and
- (vi) *Global Logic India (P.) Ltd. (supra)*.

22. The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

23. We have considered rival submissions and perused materials on record. It is noted by us, in case of *Tech Mahindra Ltd. (supra)*, the Tribunal having found that this company is into software product development has rejected this company as a comparable. The same view has been expressed by the Co-ordinate Bench in case of *Telcordia Technologies India (P.) Ltd. (supra)* and various other decisions as cited by the learned Authorised Representative. Since the aforesaid decisions pertain to the very same assessment year, respectfully following them, we exclude this company as a comparable.

(vii) *MEGASOFT LTD.*

24. This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to selection of this company, the learned Authorised Representative submitted that revenue from software segment includes fees from license and product. He submitted, as no segmental information is available, the company cannot be treated as a comparable. In support of this contentions, he relied upon the following decisions:—

- (i) *Global Logic India (P.) Ltd. (supra)*; and
- (ii) *Telelogic India (P.) Ltd. (supra)*

25. The learned Departmental Representative submitted that segmental details of the company are very much available in the annual report and the Transfer Pricing Officer has applied the margin of software development segment. In this context, he drew our attention to Para-15 of the Transfer Pricing Officer's order. Further, he submitted that in case of *Sumtotal Systems India (P.) Ltd. (supra)* and *LSI Technologies India (P.) Ltd. (supra)* the Tribunal has directed the Assessing Officer / Transfer Pricing Officer to consider the profit margin of software development segment of the company. Thus, he submitted that this company cannot be rejected as comparable.

26. We have considered rival submissions and perused materials on record. The only ground on which the learned Authorised Representative seeks removal of this company is, it is also involved in software product development and segmental details are not available. However, on a perusal of the order passed by the Transfer Pricing Officer, it is seen that he has taken the profit margin of this company at 23.11% which appears to be relating to the software development segment. It is relevant to observe, in case of *Sumtotal Systems India (P.) Ltd. (supra)* and *LSI Technologies India (P.) Ltd. (supra)* the Tribunal has directed the Assessing Officer / Transfer Pricing Officer to consider the profit margin of software development segment for comparability purpose. Thus, if the segmental details of this company are available and the profit margin of the software development segment can be ascertained, in our view this company can be considered as a comparable. In view of the aforesaid, we direct the Assessing Officer / Transfer Pricing Officer to examine the issue and if from the financials of the company relating to the impugned assessment year, segmental details are available from which the profit margin of software development segment can be ascertained, this company can be considered as a comparable. However, before deciding the issue relating to inclusion of this company as a comparable, the assessee must be given reasonable opportunity of being heard.

(viii) *PERSISTENT SYSTEMS LTD.*

**27.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that this company earns income from both software services and product development and no segmental details are available in the annual report. Further, he submitted, the company is engaged in outsourced software product development. In this context, he drew our attention to certain documentary evidences placed in the paper book. Thus, he submitted that the company cannot be treated as comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

- (i) *LSI Technologies India (P.) Ltd. (supra)*;
- (ii) *Global Logic India (P.) Ltd. (supra)*;
- (iii) *Pr. CIT v. Saxo India (P.) Ltd.* [[2016\] 74 taxmann.com 88/243 Taxman 411 \(Delhi\)](#);
- (iv) *Dialogic Networks (India) (P.) Ltd. (supra)*.

**28.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

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

(xi) *SASKEN COMMUNICATION LTD.*

**30.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted, the software development service provided by the company includes income from licensing of product / technology. Thus, he submitted, the company is involved in development of product. Further, the learned Authorised Representative submitted that in the relevant previous year, there was an extra ordinary event relating to amalgamation / merger which must have impacted the profitability of the company. Thus, he submitted that the company cannot be selected as a comparable. In support of his contention, the learned Authorised Representative relied upon the following decisions:—

- (i) *Global Logic India (P.) Ltd. (supra)*; and
- (ii) *Saxo India (P.) Ltd. (supra)*.

**31.** The learned Departmental Representative submitted, the Transfer Pricing Officer has considered only segmental result, hence, contention of the assessee is not acceptable. As regards amalgamation / merger having taken place in the relevant previous year, the learned Departmental Representative submitted, neither the assessee has raised the issue before the Departmental Authorities nor it has demonstrated how the amalgamation / merger has impacted the profitability.

**32.** We have considered rival submissions and perused materials on record. The main reason for which the assessee seeks exclusion of the company is, it is involved in development of products and segmental details are not available. From the annual report of the company and other material placed before us, it is noticed that the company has earned revenue from licensing of products / technology which demonstrate that the company is engaged in development of products also. It is also a fact on record that in the relevant previous year, there is an amalgamation / merger in the

company which might have impacted the profitability. Considering the aforesaid aspect, the Co-ordinate Bench in *Global Logic India (P.) Ltd. (supra)*, which is for the very same assessment year, has excluded this company as a comparable. Thus, in view of the aforesaid factual position, we are of the opinion that it will not be safe to include this company as a comparable.

(x) *TATA ELXSI LTD.*

**33.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that the company is engaged in various activities such as software development and services, embedded product design services, industrial design and engineering, visual computing labs etc. Thus, he submitted, the company being functionally different cannot be treated as comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

- (i) *Telcordia Technologies India (P.) Ltd. (supra)*;
- (ii) *Sumtotal Systems India (P.) Ltd. (supra)*;
- (iii) *Ness Innovative Business Services (P.) Ltd. (supra)*;
- (iv) *LSI Technologies India (P.) Ltd. (supra)*;
- (v) *CAPCO IT Services India (P.) Ltd. (supra)*;
- (vi) *Global Logic India (P.) Ltd. (supra)*;
- (vii) *Dialogic Networks (India) (P.) Ltd. (supra)*;
- (viii) *Pr. CIT v. S.T. Ericsson India (P.) Ltd.* [IT Appeal No. 821/2017, dated 31-1-2018]; and
- (ix) *St-Ericsson India (P.) Ltd. v. Addl. CIT [2017] 79 taxmann.com 207 (Delhi - Tib.)*.

**34.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

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

(xi) *THIRDWARE SOLUTIONS LTD.*

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

- (i) *Tech Mahindra Ltd. (supra)*;
- (ii) *Ness Innovative Business Services (P.) Ltd. (supra)*;
- (iii) *LSI Technologies India (P.) Ltd. (supra)*;
- (iv) *S.T. Ericsson India (P.) Ltd. (supra)*;

(v) *St-Ericsson India (P.) Ltd. (supra)*;

(vi) *Dialogic Networks India (P.) Ltd. (supra)*; and

(vii) *Accenture Services (P.) Ltd. (supra)*;

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

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

(xii) *R SYSTEMS LTD.*

**39.** This company was selected both by the assessee and Transfer Pricing Officer. Though, the assessee objected this company before DRP, however assessee's objection was rejected. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that it has developed products like Indus Lending Solutions, Ecnet etc. He submitted, the annual report of the company does not provide segmental bifurcation. Further, he submitted, the financial year ending of the company is December 2008, whereas, assessee's financial year ends on March 2008. Therefore, this company cannot be treated as comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

(i) *CAPCO IT Services India (P.) Ltd. (supra)*.

**40.** The learned Departmental Representative submitted, the Transfer Pricing Officer has considered the profit margin of software development segment only. Further, he submitted, merely because the company has a different financial year it cannot be excluded as a comparable. He submitted, the data relating to nine month period can be extrapolated to other three month to ascertain the margin of the company.

**41.** We have considered rival submissions and perused materials on record. We are unable to accept the contention of the learned Authorised Representative that merely due to different financial year ending the company cannot be treated as comparable. We find substantial force in the argument of the learned Departmental Representative that the profitability / margin of the company can be ascertained by extrapolating the financial data available for the period of nine month to the subsequent three months. However, the assessee has also submitted that the company is involved in product development and no segmental information is available in the annual report. It appears from the order of the Transfer Pricing Officer that he has applied the profit margin of software development segment. However, in our view, the contention of the assessee that segmental details are not available requires to be verified by the Assessing Officer / Transfer Pricing Officer afresh. If the annual report of the company does not provide enough segmental details to accurately arrive at the profit margin of different segments, this company cannot be treated as comparable.

(xiii) *LGS GLOBAL LTD.*

**42.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that it undertakes application management services, application development, tool set development, product development and support activities. He submitted, since no segmental information is available in the annual report, this company cannot be treated as comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

(i) *Telcordia Technologies India (P.) Ltd. (supra)*.

**43.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**44.** We have considered rival submissions and perused materials on record. From the annual report of this company, it appears that the company was also selected by the assessee in its transfer pricing study report. It further appears that before the Transfer Pricing Officer also the assessee had accepted this company as comparable. However, considering the contention of the learned Authorised Representative that this company is also engaged in development of product and no segmental information is available in the annual report, we consider it appropriate to restore the issue relating to comparability of this company to the Assessing Officer / Transfer Pricing Officer for re-consideration after due opportunity of being heard to the assessee.

(xiv) *ACCEL TRANSMATIC LTD.*

**45.** Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that there is no description about software services segment in the annual report. He submitted that the company is also into of-shore development of embedded software, network system, imaging technologies and outsourced product development. He submitted that no segmental information with regard to different kind of services / product developed by the company is available in the annual report. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

(i) *Tech Mahindra Ltd. (supra)*;

(ii) *Sumtotal Systems India (P.) Ltd. (supra)*; and

(iii) *LSI Technologies India (P.) Ltd. (supra)*.

**46.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**47.** We have considered rival submissions and perused materials on record. As could be seen from the facts on record, this company was selected by the assessee itself as a comparable. The Transfer Pricing Officer also accepted it as a comparable. However, the assessee is now objecting to the selection of this company on the ground that it has product segment and no segmental details are available in the annual report. Since the Transfer Pricing Officer never had an occasion to consider this aspect as the assessee itself selected this company as a comparable, we are inclined to restore the issue relating to comparability of this company to the Assessing Officer/Transfer Pricing Officer for re-consideration after due opportunity of being heard to the assessee.

(xv) *ISHIR INFOTECH LTD.*

**48.** This company was selected by the Transfer Pricing Officer and retained by the DRP. Objecting to the selection of the aforesaid company as a comparable, the learned Authorised Representative submitted that the employee cost of the company works out to only 3.96% of the operating revenue which is less than 25% threshold limit applied by the Transfer Pricing Officer. Thus, he submitted that the company cannot be treated as a comparable. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

- (i) *Tech Mahindra Ltd. (supra)*;
- (ii) *Sumtotal Systems India (P.) Ltd. (supra)*;
- (iii) *LSI Technologies India (P.) Ltd. (supra)*; and
- (iv) *CAPCO IT Services India (P.) Ltd. (supra)*.

**49.** The learned Departmental Representative relied upon the order of the DRP and the Transfer Pricing Officer.

**50.** We have considered rival submissions and perused materials on record. From the transfer pricing order passed by the Transfer Pricing Officer, it is evident that by applying the employee cost filter, he has excluded companies whose employee cost as a proportion to operating revenue is less than 25%. It is the contention of the assessee that the employee cost of the company is 3.96% of the operating revenue. The aforesaid factual submission made by the learned Authorised Representative could not be controverted by the learned Departmental Representative. It is relevant to note, in case of *Tech Mahindra Ltd. (supra)*, this company has been rejected as a comparable as it was found to be outsourcing its work. In case of *Sumtotal Systems India (P.) Ltd. (supra)*, the Co-ordinate Bench taking note of the fact that the employee cost of the company is 3.96% of the operating revenue excluded it from the list of comparables. Similar view has been expressed in the other decisions cited by the learned Authorised Representative. In view of the aforesaid, we are inclined to exclude this company from the list of comparables.

(xvi) *PSI DATA SYSTEMS LTD.*

**51.** Though, this company was selected by the assessee, however, the Transfer Pricing Officer rejected the company as a comparable. The DRP also upheld the rejection of this company as comparable.

**52.** The learned Authorised Representative submitted, though the Transfer Pricing Officer has rejected the company on the reasoning that related party transaction of this company exceeds the threshold limit of 25%, however, this finding of the Transfer Pricing Officer is factually incorrect. He submitted, the related party transaction of the company works out to 22.42%. In this context, he drew our attention to Page no.162-163 of the paper book containing Profit & Loss account with Schedule forming part of the annual report of the company. Thus, he submitted that the company was excluded on a wrong footing.

**53.** The learned Departmental Representative submitted that the assessee's claim can be verified by the Transfer Pricing Officer.

**54.** We have considered rival submissions and perused materials on record. It is evident, the Transfer Pricing Officer has excluded this company as a comparable on the reasoning that the related party transaction of the company is 27.66% on sales. Thus, it exceeds the threshold limit of 25%. However, it is the contention of the assessee that related party transaction of the company as a percentage of sales works out to 22.42%. Hence, applying Transfer Pricing Officer's own filter it qualifies as a comparable. In our view, the aforesaid claim of the assessee requires consideration. If the related party transaction of this company is less than 25% of the sales, as claimed by the assessee, this company cannot be rejected as a comparable. The Assessing Officer / Transfer Pricing Officer must decide the issue after providing reasonable opportunity of being heard to the assessee.

**55.** In view of the aforesaid, the Assessing Officer / Transfer Pricing Officer is directed to determine the arm's length price of transaction with the A.E. relating to provision of software development services keeping in view our observations herein above. Adjustment, if any, on account of such determination of arm's length price should be made after allowing the benefit of  $\pm 5\%$  as provided under the proviso to section 92C(2) of the Act.

**56.** In ground no.14, the assessee has challenged addition of Rs. 8,23,860, on account of mismatch in receipt as shown by the assessee and as appearing in the TDS certificates.

**57.** The learned Authorised Representative submitted, though the DRP had directed the Assessing Officer to consider assessee's submissions on the issue, however, the Assessing Officer without considering the submissions of the assessee has again repeated the addition, as was made in the draft assessment order. Thus, he submitted, necessary direction may be issued to the Assessing Officer to consider the submissions and other details furnished by the assessee to reconcile the difference.

**58.** The learned Departmental Representative has no objection if the Assessing Officer is directed to verify assessee's claim.

**59.** Having considered rival submissions and perused material on record, we direct the Assessing Officer to decide the issue afresh after thoroughly examining the submissions and other details filed by the assessee to reconcile the difference in receipts. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

**60.** All other grounds raised by the assessee which are not specifically argued or dealt with in this order are deemed to be not pressed, hence, dismissed.

**61.** In the result, assessee's appeal is partly allowed.

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\*Partly in favour of assessee.