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**[2021] 126 taxmann.com 309 (Hyderabad - Trib.) [19-10-2020]**

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**TRANSFER PRICING :** Companies having huge turnover cannot be compared with assessee having turnover of merely 46.69 crores

**TRANSFER PRICING :** When Co-ordinate bench of Tribunal in similar instant for previous assessment years held that companies should be excluded from final list of comparables as segmental details of selected companies are not available and companies are functionally different then, following same companies should be excluded from final list of comparable

**TRANSFER PRICING :** When margin declared by selected company was abnormally high and TPO or DRP did not go into reasons for such huge margins and requested for inclusion of said company which cannot be accepted without having complete information thus, contention of TPO and DRP to include selected company as comparable cannot be accepted and company should be excluded from final list of comparables

**TRANSFER PRICING :** When assessee requested for exclusion of comparable on basis of abnormally high margin and same was considered in favour of assessee then following same rule selected company who was persistent loss making company and assessee's request for inclusion of same as comparable company cannot be accepted as both are abnormal figures

**TRANSFER PRICING :** After amendment of law inserting Explanation to section 92B interest on trade receivables also became international transaction and ALP adjustment is required to be made in respect of same where credit period of 90 days or industry average in respect of deviation, interest should be considered for ALP adjustment



**[2021] 126 taxmann.com 309 (Hyderabad - Trib.)**

**IN THE ITAT HYDERABAD BENCH**

**Infor (India) (P.) Ltd.**

**v.**

**ACIT\***

SMT. P. MADHAVI DEVI, JUDICIAL MEMBER  
AND D.S. SUNDER SINGH, ACCOUNTANT MEMBER  
IT APPEAL NO.1689 (HYD.) OF 2019  
STAY APPLICATION NO. 98 (HYD.) OF 2020  
[ASSESSMENT YEAR 2015-16]  
OCTOBER 19, 2020

**I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Turnover filter) - Assessment year 2015-16 - Whether companies having huge turnover cannot be compared with assessee having turnover of merely 46.69 crores - Held, yes [Para 6.2.1] [In favour of assessee]**

**II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Segmental result) - Assessment year 2015-16 - Whether where co-ordinate bench of Tribunal in similar instant for previous assessment years held that companies should be excluded from final list of comparables as segmental details of selected companies are not available and companies are functionally different then, following same companies should be excluded from final list of comparable - Held, yes [Para 6.3.2] [In favour of assessee]**

**III. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Profit margin/profit level indicator) - Assessment year 2015-16 - Whether where margin declared by selected company was abnormally high and TPO or DRP did not go into reasons for such huge margins and requested for inclusion of said company which cannot be accepted without having complete information thus, contention of TPO and DRP to include selected company as comparable cannot be accepted and company should be excluded from final list of comparables - Held, yes [Para 6.4.1] [In favour of assessee]**

**IV. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Loss making company) - Assessment year 2015-16 - Whether where assessee requested for exclusion of comparable on basis of abnormally high margin and same was considered in favour of assessee then following same rule selected company who was persistent loss making company and assessee's request for inclusion of same as comparable company cannot be accepted as both are abnormal figures - Held, yes [Para 7.3.1] [In favour of revenue]**

**V. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Adjustments - Interest) - Assessment year 2015-16 - Assessing Officer/TPO/DRP made adjustment on account of interest on receivables - However, during appeal assessee claimed that as he adopted TNMM as MAM, no**

separate adjustment was required in respect of interest on receivables and TNMM method itself takes care of all such adjustments and credit period of 150 days need to be allowed in assessee's case as industry average was 150 days as against average period allowed by Assessing Officer for 30 days - Further claimed that Assessing Officer/TPO/DRP has taken SBI deposit rate for working interest on receivables and as activities are export activities, assessee requested for LIBOR rate - Whether after amendment of law inserting Explanation to section 92B interest on trade receivables also became international transaction and ALP adjustment is required to be made in respect of same where credit period of 90 days or industry average in respect of deviation, interest should be considered for ALP adjustment - Held, yes - Whether interest should be charged at rates of short term deposits of SBI as decided by Tribunal in its earlier year orders - Held, yes [Para 9.2.2] [Partly in favour of assessee]

## CASE REVIEW-I & V

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*Infor (India) (P.) Ltd. v. Dy. CIT* [2019] 109 taxmann.com 435 (Hyd. - Trib.) (para 6.2.1) *followed*.

## CASES REFERRED TO

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*Infor (India) (P.) Ltd. v. Dy. CIT* [2019] 109 taxmann.com 435 (Hyd. - Trib.) (para 6.2) and *Apoorva Systems (P.) Ltd. v. Dy. CIT* [IT Appeal No. 1921 (PUN.) of 2014, dated 25-1-2017] (para 6.3.1).

**Sunil M. Lala**, AR *for the Appellant*. **Srinivas Reddy**, DR *for the Respondent*.

## ORDER

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**D.S. Sunder Singh, Accountant Member.** - This appeal filed by the assessee is directed against the order of Deputy Commissioner of Income Tax, Hyderabad, dated 31-10-2018 passed u/s 143(3) r.w.s 144C of the Income-tax Act for the Assessment Year 2015-16 and stay application is filed by the assessee. Since the main appeal is taken up for hearing, the stay application filed by the assessee is dismissed *in limine*.

The assessee filed appeal raising the following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Ld. Transfer Pricing Officer i.e the Deputy Commissioner of Income-tax - Circle - 2(1), Hyderabad (hereinafter referred to as the Ld. TPO') and the Ld. AO under the directions issued by Hon'ble DRP, erred in making an addition to the Appellant's total income of INR 4,60,53,538 (based on the provisions of Chapter X of the Income-Tax Act, ('the Act') and the said additions being wholly unjustified are liable to be deleted.
2. On the facts and in the circumstances of the case and in law, the Ld. TPO erred and the Hon 'ble DRP further erred in upholding/confirming the action of the Ld. TPO in incorrectly including/selecting the following companies as comparables, without appreciating that the said companies were functionally dissimilar to the Appellant, which ought to have been

excluded for the following reasons which are independent of and without prejudice to one another *i.e.* the said companies were engaged in product development, do not have required segmental Information, have huge turnover, presence of brand and intangibles, have incurred huge R & D Expenditure, have significant Onsite Expenses, hold significant inventory, have abnormal profits, have insufficient information in public domain, have significant Related Party Transactions, peculiar economic circumstances, and earn fluctuating margins:

- (i) Infosys Limited
- (ii) Larsen & Toubro Infotech Limited
- (iii) Mindtree Limited
- (iv) Tata Elxsi Limited (Seg)
- (v) Persistent Systems Limited
- (vi) Thirdware Solution Limited
- (vii) Cybage Software Private Limited
- (viii) Aspire Systems (India) Private Limited
- (ix) Nihilent Technologies Limited
- (x) Inteq Software Private Limited
- (xi) Rheal Software Private Limited
- (xii) R.S.Software (India) Limited
- (xiii) Infobeans Technologies Limited

3. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in incorrectly rejecting the following companies which ought to have been included as they are engaged in software development services as comparables, without appreciating that the said companies fulfilled all the filters and were functionally comparable to the Appellant:

- (i) Evoke Technologies Private Limited
- (ii) Infomile Technologies Limited
- (iii) 12T2 India Limited
- (iv) Kireeti Soft Technologies Limited
- (v) Sugar Soft India Limited
- (vi) Akshay Software Technologies Limited

(vii) Harbinger Systems Private Limited

4. Without prejudice to the above grounds on rejection of functionally dissimilar comparable companies, on the facts and in the circumstances of the case and in law, the Ld. TPO erred by incorrectly computing the margin of the following comparable companies *i.e.* (i) Nihilent Technologies Limited, (ii) Thirdware Solution Limited iii) Sasken Communication Technologies Ltd.

5. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld TPO in rejecting the transfer pricing analysis/study prepared by the Appellant for the software development segment, without appreciating that none of the conditions mentioned in clauses (a) to (d) of section 92C(3) of the Act were satisfied. The Ld. TPO further erred in and the Hon'ble DRP further erred in upholding/confirming the action of The Ld. TPO in applying inappropriate filters and conducting a fresh benchmarking which was erroneous and liable to be rejected.

6. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld TPO in not allowing risk adjustment in accordance with the provisions of rule 10B of the Income-tax Rules, 1962 to account for differences between the international transactions undertaken by the Appellant, being a captive unit, and those undertaken by the comparables.

7. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in considering bad debts, provision for bad and doubtful debts and provision for warranty as non operating expenditure while computing the PLI of the comparables.

8. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Learned TPO in not allowing Working Capital Adjustment in accordance with the provisions of rule 10B of the Income-tax Rules.

9. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld TPO in:

(i) Considering the receivables from Associated Enterprise (AE) as a separate international transaction,

(ii) Making an adjustment with respect to interest on the receivables from AE.

10. Without Prejudice, on the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld TPO without appreciating the fact that once the working capital adjustment is granted, no further adjustment on account of interest on delayed trade receivables is warranted.

11. Without prejudice to what has been stated above, the Ld. TPO erred in not following his order for AY 2012-13 and the directions of Hon'ble DRP for AY 2011-12 in the Appellant's own case, wherein the Hon'ble DRP opined that once receivables and payables are considered

in computing the working capital adjustment a further separate adjustment in the nature of interest on receivables is not warranted.

12. Without prejudice to what had been stated above: on the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld TPO in considering the State Bank of India's ('SBI') short term deposit rates as the Comparable Uncontrolled Price (CUP) to benchmark the impugned interest on delay in receipt of outstanding receivables instead of LIBOR rate.

13. On the facts and in the circumstances of the case and in law, the Ld.AO/Ld.TPO and the Hon'ble DRP erred in passing impugned orders without providing the Appellant with sufficient and adequate opportunity and in breach of the principles of natural justice and in arriving at conclusions therein based on incorrect factual averments/allegations/legal inferences without considering/appreciating the facts of the case and, the submissions made by the Appellant and therefore, the said impugned orders, being bad in law are liable to be quashed or alternatively set aside.

The Appellant craves leave to add, alter, vary, omit, substitute and or amend the above grounds of appeal (which are without prejudice to one another) at any time before or at the time of hearing of the appeal so as to enable the Honorable Members to decide this appeal according to law.

3. Ground No. 1, 5 and 13 are general in nature, hence no separate adjudication is considered necessary.

4. Ground No. 6, 7 and 8 are not pressed by the Ld.A.R during the appeal hearing and hence ground No. 6,7 and 8 are dismissed as not pressed.

5. Brief facts of the case are that the assessee-company is engaged in the business of sale of user license of enterprise application software, software development and rendering software related services to the group companies and external parties. For the A.Y.2015-16, the assessee-company filed its return of income on 27-11-2015 admitting total income of Rs. 8,63,65,260/-. The case was selected for scrutiny and from the audit report in Form 3CEB, the AO found that the assessee had entered into international transactions with the Associated Enterprises (AE) to the extent of Rs. 267,28,58,059/-, hence, referred the issue to the Transfer Pricing Officer (TPO) for determining the arm's length price(ALP) of the international transactions. The TPO proposed for adjustment of Rs. 9,82,73,154/- in respect of the following segments of the assessee-company:-

<i>Sl. No.</i>	<i>Description</i>	<i>Amount (INR)</i>
1	Provision of SDS	4,82,45,245
2	Provision of ITES	3,17,70,722
3	Software distribution and related services	NIL
4	Interest on receivables	1,82,57,187
	Total	9,82,73,154

5.1 The AO issued draft assessment order on which the assessee filed a petition u/sec. 144C of the

Act, before the Dispute Resolution Panel (DRP) and the DRP had passed the order u/sec. 144C(5) on 16-8-2019. Subsequently, the AO passed the assessment order u/sec. 143(3) r.w.s. 144C on 26-9-2019 and made the adjustment of Rs. 4,60,53,538/- relating to software development and interest on receivables. On which the assessee filed appeal before the Tribunal.

**5.2** The international transactions entered by the assessee as under:-

<i>Nature of transaction</i>	<i>Amount (Rs.)</i>
Software distribution and related services (product supply fee, one point support, PSO recharges, royalty expenses, customer support, management fee and annual maintenance fee)	30,04,53,550
Software development services	46,69,84,481
Related IT services	87,99,18,654
Shared services	29,77,48,104
Reimbursement of expenses	1,22,99,059
Recovery of expenses	23,14,792

**5.3** The assessee carried the economic analysis and has summarized the international transactions as under:-

<i>Nature of International Transaction</i>	<i>Amount (Rs.)</i>	<i>MAM</i>	<i>PLI</i>	<i>Margin of taxpayer</i>	<i>Margin of comparables</i>
Software distribution and related services	30,04,53,550	RPM	GPM	50.70%	6.94%
Software development services	46,69,84,481	TNMM	OP/OC	15.43%	10.70%
Related IT services	87,99,18,654	TNMM	OP/OC	15.32%	10.70%
Share services ITES	29,77,48,104	TNMM	OP/OC	11.32%	9.05%
Reimbursement of expenses	1, 22,99,059	NA	NA	NA	NA
Recovery of expenses	23,14,792	NA	NA	NA	NA

**5.4** Now the dispute is with regard to adjustments on account of software development services (SDS) and the interest on receivables. The assessee has made the turnover of Rs. 46.69 crores in SDS and held that TNMM is the most appropriate method and arrived at the margin 15.43% *i.e.* OP/OC against the margin of comparables at 10.70%, hence, held that the assessee's margin is at arm's length and has proposed 'NIL' adjustments in respect of software development services (SDS). The TPO rejected the transfer pricing study in respect of software development services due to defects in filters as discussed in para 7.1.1 of the TPO's order which reads as under:

**"7.1.1 Rejection of TP Study**

In the case of tax payer, the TPO is mainly concerned about whether the information or data used in the computation of the arm's length price is reliable and correct. It is clear from the provisions of sec.92C(3)(c) read with sec.92CA that on the basis of material or information or

documents in the possession of TPO, if he is of the opinion that the information or data used in computation of the arm's length price is not reliable or correct, the TPO may proceed to determine the arm's length price in relation to the international transactions in accordance with sec.92C(1) and 92C(2) on the basis of such material or information or document available with him.

The search criteria and the acceptance/rejection matrix applied by the company for screening the initially identified cases for arriving at a final comparable set are as under :

<i>Sl. No.</i>	<i>Particulars</i>	<i>Remarks of the TPO</i>
1.	Companies with Net sales more than 1 Cr.	This is an appropriate filter
2.	Companies with manufacturing income plus trading income less than 50% of sales	A subjective filter. To be seen on a case to case basis.
3.	Companies with positive net worth	Appropriate filter.
4.	Companies undertaking significantly different functions compared to the taxpayer-excluded	A subjective filter. To be seen on a case to case basis.
5	Rejected companies reporting related party transactions less than 25%	Appropriate filter"

**5.5** The TPO after rejecting TP study of the tax payer, has adopted the following filters:-

- (a) Use of current year data where available.
- (b) Companies having different financial year ending (*i.e.* not March 31, 2015) or data of the company which does not fall within 12 month period *i.e.* 1-4-2014 to 31-3-2015, were rejected.
- (c) Companies whose income was less than Rs. 1 crore, were excluded.
- (d) Companies whose software development service income is less than 75% of its total operating revenues were excluded.
- (e) Companies who have more than 25% related party transactions of the sales were excluded.
- (f) Companies who have export service income less than 75% of the sales were excluded.
- (g) Companies with employee cost less than 25% of turnover were excluded.

**5.6** The TPO rejected the 11 comparables selected by the taxpayer and undertaken fresh search and finally selected 16 comparables as per page No. 40 of the TPO's order and arrived at margin of 20.55% at 35th percentile and 37.90% AT 65th percentile as under:-

<i>Sl. No.</i>	<i>Company name</i>	<i>Financial Year wise OP/OC (%)</i>			
		<i>2014-15</i>	<i>2013-14</i>	<i>2012-13</i>	<i>Average</i>
1.	Kals Information Systems Ltd.,	5.77	16.94	13.51	11.88

2.	E-Zest Solutions Ltd.,	12.59	15.80	-	14.05
3.	CG-VAK Software & Exports Ltd.	19.87	13.81	22.07	18.50
4.	Tata Elxsi Ltd., (Seg)	23.33	22.02	11.24	19.34
5.	Rheal Software Pvt. Ltd.	2.76	36.64	-	19.88
6.	Mindtree Ltd.,	20.55	21.18	19.75	20.55
7.	Larsen & Toubro Infotech Ltd.	24.22	23.54	25.10	24.21
8.	R.S. Software (India Ltd.,)	32.66	24.14	17.44	24.82
9.	Infobeans Technologies	20.70	41.95	29.22	29.91
10.	Persistent Systems Ltd.,	31.11	35.44	28.20	31.69
11.	Nihilent Technologies Ltd.,	29.19	35.72	-	32.21
12.	Aspire Systems (India) Pvt. Ltd.,	30.98	38.04	-	34.18
13.	Inteq Software Pvt. Ltd.,	31.16	45.00	-	37.90
14.	Infosys Ltd.,	40.29	36.28	29.25	38.59
15.	Thirdware Solutions Ltd.,	43.69	44.68	32.65	41.12
16.	Cybage Software Pvt. Ltd.,	68.17	68.82	60.81	66.27
	35th Percentile				20.55%
	Median				27.37%
	65th Percentile				37.90%

**5.7** The TPO computed the ALP adopting the median margin of 27.37% as under:

SOFTWARE DEVELOPMENT SEGMENT		
<i>Particulars</i>	<i>Formula</i>	<i>Amount (in Rs. )</i>
Taxpayers operating revenue	OR	46,44,04,588
Taxpayers operating cost	OC	40,42,15,932
Taxpayers operating profit	OP	6,23,88,656
Taxpayers PLI	PLI = OP/OC	15.43%
35th Percentile Margin of Comparable set		20.55%
Adjustment Required (if PLI < 35th Percentile)		Yes
Median Margin of comparable set	M	27.37%
Arm's Length Price	ALP =(I+M)*OC	51,48,49,833
Price Received	OR	46,66,04,588
Shortfall being adjustment	ALP - OR	4,82,45,245

Accordingly the TPO suggested for adjustment of Rs. 4,82,45,245/- on account of shortfall.

**5.8** The Ld.DRP allowed part relief and consequently adjustment of Rs. 3,54,72,020/- was made in the final assessment order passed u/s 143(3) r.w.s. 144C in respect of SDS.

**6.** Ground No. 2 is related to exclusion of comparable companies from final list of comparables selected by the TPO/AO. The assessee has requested for exclusion of 13 companies from the final

list of comparables, however during the appeal hearing, Id.AR has not pressed the comparables listed in serial Nos. (viii) to (xiii) as under :

- (viii) Aspire Systems (India) Pvt. Ltd.,
- (ix) Nihilent Technologies Ltd.,
- (x) Inteq Software Pvt. Ltd.,
- (xi) Rheal Software Pvt. Ltd.,
- (xii) R.S. software (India) Ltd., and
- (xiii) Infobeans Technologies Ltd.,

Therefore the assessee's appeal for exclusion of six comparables listed above from the final list of comparables is dismissed as not pressed.

**6.1** In respect of the remaining comparables in ground No. 2, *i.e.* Infosys Ltd., Larsen & Toubro Infotech Ltd., Mindtree Ltd., Tata Elxsi Ltd. (Seg), Persistent Systems Ltd., Thirdware Solution Ltd., the Ld.AR argued that exclusion of the above companies are covered by the order of this Tribunal in assessee's own case and other cases decided by the ITAT, Hyderabad for the A.Ys. 2013-14 & 2014-15 on identical facts. Therefore submitted that the issue is squarely covered in favour of the assessee. The comparable companies covered for exclusion by the order of this Tribunal are discussed as under :

- (1) Infosys Ltd.
- (2) Larsen& Toubro Infotech Ltd.
- (3) Mindtree Ltd., Tata Elxsi Ltd. (Seg)
- (4) Persistent Systems Ltd. and
- (5) Thirdware Solution Ltd.

**6.2** In respect of Infosys Ltd., Larsen & Toubro Infotech Ltd. and Mindtree Ltd., this tribunal has considered the issue in assessee's own case for the A.Y.2013-14 to 2014-15 and excluded the comparables with a finding that these companies are giant companies in the area of development of software. For the sake of clarity and convenience, we extract paras 7.3 to 7.6 in assessee's own case for the A.Ys. 2013-14 & 2014-15 in *Infor (India) (P.) Ltd. v. Dy. CIT* [2019] 109 taxmann.com 435 (Hyd. - Trib) which reads as under:-

"7.4 As regards exclusion of Infosys Ltd, Larsen & Toubro Infotech Ltd and Mindtree Ltd, the common ground of the assessee is that they have huge turnover of Rs. 42,531 crores, Rs. 4,648.38 crores and Rs. 3,031.6 crores respectively as against the assessee's turnover of Rs. 116.00 crores only. The learned Counsel for the assessee also argued that they are functionally dissimilar and own intangibles etc.

7.5 The learned DR argued that unless the assessee demonstrates as to how the huge turnover

impacts the margin of the said companies, they should not be excluded from the final list of comparables.

7.6 Having regard to the rival contentions and the material on record, we find that the Hon'ble Delhi High Court in the case of *CIT v. Agnity India Technologies (P) Ltd.* [2013] 36 Taxmann.com 289 (Delhi H.C) has held Infosys Ltd as not comparable as it is a giant company in the area of development of software. The same ratio applied to both L&T and Mindtree as well. Thus, we direct exclusion of all these three companies on account of huge turnover."

**6.2.1** Both the Ld.AR and the Ld.DR have agreed that there is no change in the facts of the case for the year under consideration. The assessee's turnover was Rs. 46.69 crores whereas the turnover in the above companies is huge and uncomparable. Therefore, respectfully following the view taken by this Tribunal in the assessee's own case (*supra*), we hold that the above companies are not comparables and direct the TPO/AO to delete the above companies from the list of final comparables.

**6.3** With regard to Tata Elxsi Ltd., Thirdware Solutions Ltd. and Persistent Systems Ltd., are concerned for the A.Ys. 2013-14 & 2014-15, this Tribunal directed the TPO (AO) to exclude the 03 companies from the list of final list comparables for non-availability of segmental details. For the sake of clarity and convenience, we extract para Nos. 7.7 & 7.8 which reads as under:-

'7.7 As regards Tata Elxsi Ltd, Thirdware Solutions Ltd and Persistent Systems Ltd are concerned, we find that their comparability to the assessee has been considered in the assessee's own case for the A.Y 2007-08 and it is submitted that there is no change of activities of either the assessee or the comparables during the relevant A.Y before us *i.e.* A.Y 2014-15.

7.8 The learned DR has not rebutted this contention of the assessee. Therefore, respectfully following the decision of the Coordinate Bench at Mumbai in ITA No. 520/Mum/2012 dated 4-12-2018, in the case of Infor Global Solutions India (P.) Ltd. v. Deputy Commissioner of Income Tax, we direct the exclusion of these three companies from the final list of comparables. For the sake of ready reference, the relevant paras are reproduced hereunder:

"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.

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.

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".

**6.3.1** In respect of Thirdware Solutions Ltd., the assessee also relied on the decision of the ITAT, Pune Bench in the case of *Apoorva Systems (P.) Ltd. v. Dy. CIT* [IT Appeal No.1921 (Pune) of 2014, dated 25-1-2017], wherein the coordinate bench of the tribunal held that the companies are functionally different hence it is to be excluded from the list of final companies.

**6.3.2** Both the Ld.AR and Ld.DR submitted that there is no change in the facts either in the case of assessee's company or in the case of comparables. No major changes in the activities of the comparables of the assessee's have been brought to our notice. Therefore, respectfully following the view taken by the coordinate bench of the tribunal in the earlier years, we direct the TPO (AO) to exclude the Tata Elxsi Ltd., Thirdware Solutions Ltd. and Persistent Systems Ltd. from the final list of the comparables.

**6.4** Ld.AR requested for exclusion of Cybage Software Pvt. Ltd. from the final list of comparables and argued that though Cybage Software Pvt. Ltd. is comparable functionally, the profit margin is very high as much as 60.81 to 68.17% which is not possible in normal conditions. Ld.AR submitted that the assessee company's margin is 15.32% against the average margin of comparables selected by the assessee at 10.70%. Therefore, requested to exclude the Cybage Software Pvt. Ltd. from the final list of comparables. The Ld.AR argued that the average margin of other companies is ranging from 11.88% - 41.12% as evidenced from the final list of comparables selected by TPO and average of Cybage Software Pvt. Ltd. worked out to 66.27% which is more than 1/3rd average of the rest of the companies. Therefore, argued that Cybage Software Pvt. Ltd. is not a comparable in view of highest margins. The assessee also objected before the AO for taking Cybage Software Pvt. Ltd. as comparable stating that it is functionally

dissimilar and diversified activities engaged in product development and insufficient information available in the public domain. Both the Ld.TPO and the Ld.DRP rejected the contentions of the assessee. The Ld.DR supported the orders of the lower authorities.

**6.4.1** We have considered the rival submissions and observe that Cybage Software Pvt. Ltd., though comparable company, the margin declared by the Cybage Software Pvt. Ltd. is abnormally high which is as much as 68.17% in the year under consideration and average margin is at 66.27%. The Ld. TPO has excluded the loss companies and also the companies which are with lowest margins as argued by the Ld.AR and which was not disputed by the department. Following the same analogy Cybage Software Pvt. Ltd. required to be excluded. The TPO or DRP has not gone into the reasons for such huge margins. Without having complete information we are unable to accept the contention of the Ld.TPO and DRP to include Cybage Software Pvt. Ltd. as comparable, therefore we direct the TPO/AO to exclude Cybage Software Pvt. Ltd. from the final list of comparables.

**7.** In ground No. 3, the assessee has requested for inclusion of the following companies as comparables.

- (i) Evoke Technologies Pvt. Ltd.,
- (ii) InfoMile Technologies Ltd.,
- (iii) I2T2 India Ltd.,
- (iv) Kireeti Soft Technologies Ltd.,
- (v) Sagar Soft India Ltd.,
- (vi) Akshay Software Technologies Ltd.,
- (vii) Harbinger Systems Pvt. Ltd.

**7.1** The Ld. AR requested for inclusion of the above companies who fulfill all the filters and were functionally similar to that of the assessee-company. During the appeal hearing, Ld.AR did not press for inclusion of Akshay Software Technologies Ltd. and Harbinger Systems Pvt. Ltd., therefore the assessee's ground for inclusion of comparables in respect of Akshay Software Technologies Ltd. and Harbinger Systems Pvt. Ltd. is dismissed as not pressed.

**7.2** In respect of Evoke Technologies Pvt. Ltd., Kireeti Soft Technologies Ltd., InfoMile Technologies Ltd. I2T2 India Ltd., Ld.AR did not make any argument for inclusion of companies, therefore assessee's ground for inclusion of the said companies as comparables is dismissed as not pressed.

**7.3** The assessee vehemently argued for inclusion of SagarSoft India Ltd. as comparable in the final list of comparables. However, we observe that SagarSoft India Ltd. is persistent loss company and the DRP has rejected the assessee's request for inclusion of the said company for the following reasons:-

"2.25.1 Having considered the submissions and on perusal of the annual report, we note that

as per the information in the profit & loss account, the company has revenue from software development services. The TPO rejected due to persistent losses. We note that this company has persistent losses at operating level as evident from the annual reports and also in the assessee's submissions in page No. 313 of the Application. Consistently, we are upholding the application of persistent loss filter and accordingly, we uphold the action of the TPO."

**7.3.1** The assessee has requested for exclusion of Cybage Software Pvt. Ltd. since, the margin of Cybage Software Pvt. Ltd. is persistently abnormal and very high which is considered in favour of the assessee in this order. Following the same reason, since, SagarSoft India Ltd., is persistent loss company, the assessee's request for inclusion of SagarSoft India Ltd. as comparable company deserves to be rejected. Therefore, following the reason given in the case, Cybage Software Pvt. Ltd., the assessee's ground for inclusion of SagarSoft India Ltd. being persistent loss company is dismissed.

**8.** Ground No. 4 is in respect of incorrect computation of margins in respect of Nihilent Technologies Ltd., Thirdware Solution Ltd. and Sasken Communication Technologies Ltd.

**8.1** We have heard both the parties. We have directed the AO to delete the Thirdware Solution Ltd. from the final list of comparables in ground No 2 in this order, therefore, no separate adjudication is necessary in respect of margin of Thirdware Solution Ltd.

With regard to computing the correct margin in respect of Nihilent Technologies Ltd. and Sasken Communication Technologies Ltd. The issue is remitted back to the file of the TPO (AO) to compute correct margins of comparable companies after giving opportunity to the assessee. Accordingly, the issue in respect of Nihilent Technologies Ltd. and Sasken Communication Technologies Ltd. is remitted back to the file of TPO (AO) for limited purpose of computing the correct margins and this ground is allowed for statistical purpose.

**9.** Ground Nos.9 to 12 are related to charging of interest on receivables. The AO/TPO/DRP made the adjustment of Rs. 1,05,81,517/- on account of interest on receivables. The Ld.AR during the appeal hearing argued that since, the assessee has adopted TNMM as most appropriate method, no separate adjustment is required in respect of interest on receivables. According to the Ld.AR, the TNMM method itself takes care of all such adjustments. Without prejudice to the argument of no separate interest adjustment is required in the case of TNMM, the Ld.A.R argued that credit period of 150 days need to be allowed in assessee's case, since, the industry average is 150 days as against the average period allowed by the AO for 30 days. Further, the Ld.AR argued that the AO/TPO/DRP has taken SBI deposit rate for working the interest on receivables. Since the activities are export activities, Ld.AR requested for LIBOR rate.

**9.1** On the other hand, Ld.DR supported the orders of the authorities below.

**9.2** We have heard rival contentions and find that this issue came up for adjudication in the assessee's own case for the A.Ys. 2013-14 & 2014-15. After the amendment of law inserting *Explanation* to section 92B of the Act, the interest on trade receivables also became an international transaction and therefore, the ALP adjustment is required to be made in respect of trade receivables also. Accordingly ITAT has decided the issue against the assessee in the earlier years in assessee's own case for the A.Y.2013-14 and 2014-15 (*supra*). For the sake of clarity and

convenience, we extract the relevant part of the order of this tribunal in para 86 & 87 which reads as under:-

"86. The common grounds of appeal for the A.Ys 2013-14 and 2014-15 are against the ALP adjustment of interest on trade receivables. Though the learned Counsel for the assessee has relied upon the assessee's own case for the A.Y 2011-12, we find that after the amendment to section 92B of the Act, the interest on trade receivables has become an international transaction and therefore, the ALP adjustment is required to be made. The assessee's contention that it has not paid any interest on outstanding payables and therefore, the interest should not be charged on the trade receivables is not sustainable for these A.Ys. The argument that it is a debt free company and therefore, no interest is also to be charged is not acceptable.

87. The learned Counsel for the assessee has placed reliance upon various case law. However, we find that they are relating to the A.Ys prior to the amendment of section 92B of the Act. However, the interest on trade receivables should be calculated at the interest rate applicable for the relevant period as is charged by SBI on the short term deposits. The AO has allowed the credit period of 60 to 90 days as per the agreement for A.Y 2013-14 but for the A.Y 2014-15 he has allowed only 30 days as credit period. This action of the AO cannot be upheld. If there is a clause in the agreement about credit period, the interest should be calculated only on the period exceeding such credit period in the agreement, but if there is no credit period specified in the agreement, then the credit period of 90 days or the industry average credit period should be considered with the assessee's own credit period and any deviation alone should be considered for ALP adjustment. The AO/TPO is directed accordingly. The assessee's grounds of appeal for both the A.Ys 2013-14 and 2014-15 are treated as allowed for statistical purposes accordingly."

**9.2.1** Since there are no changes in the facts, we hold that this issue squarely covered by the decision of this Tribunal. Accordingly, we direct the TPO (AO) to allow credit period of 90 days or the industry average and only in respect of the deviation, the interest to be considered for ALP adjustment.

**9.2.2** With regard to interest whether to be charged as per Libor or SBI interest rate, the issue has already been considered by the Tribunal in the earlier year and held that interest to be charged as per SBI short term deposit rates. Since there are no changes in the facts, respectfully following the view taken by this tribunal in assessee's own case, we hold that interest is to be charged at the rates of short term deposits of SBI as decided by the ITAT in its earlier year orders. Accordingly, this issue is remitted back to the file of TPO (AO) to recompute the interest. Appeal of the assessee on this ground is treated as allowed for statistical purposes.

**10.** In the result, appeal filed by the assessee is partly allowed and stay application is dismissed.

ANIRUDDHA

\*Partly in favour of assessee.