

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH: BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.349/Bang/2014
Assessment Year: 2005-06

M/s. Mindtree Limited (Previously known as M/s. Aztecsoft Limited now merged with M/s. Mindtree Limited) Global Village, RVCE Post Mysore Road Bangalore-560 059  <b>PAN NO : AABCA2122R</b>	<b>Vs.</b>	Deputy Commissioner of Income-tax Circle-11(1) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

IT(TP)A No.878/Bang/2014
Assessment Year: 2005-06

Deputy Commissioner of Income-tax LTU Bangalore	<b>Vs.</b>	M/s. Mindtree Limited (Previously known as M/s. Aztecsoft Limited now merged with M/s. Mindtree Limited) Global Village, RVCE Post Mysore Road Bangalore-560 059
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Jaya Krishna, A.R.
<b>Respondent by</b>	:	Shri Priyadarshi Mishra, D.R.

<b>Date of Hearing</b>	:	21.10.2020
<b>Date of Pronouncement</b>	:	22.10.2020

**O R D E R**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

These cross appeals are directed against the order dated 24-04-2014 passed by Ld CIT(A)-IV, Bangalore and they relate to the assessment year 2005-06.

2. Both the parties have filed revised grounds of appeal. The revenue is contesting following issues:-

- (a) Whether the Ld CIT(A) was justified in directing deduction of Satellite link charges from Total turnover also while computing deduction u/s 10A of the Act.
- (b) Relief granted in respect of Transfer pricing adjustment.

3. The assessee is in appeal in respect of following issues:-

- (a) Whether the tax authorities are justified in deducting Satellite link charges from Export turnover while computing deduction u/s 10A of the Act.
- (b) Transfer pricing adjustment sustained by Ld CIT(A).

4. Facts relating to the case are discussed in brief. The original name of the company was M/s Aztec Software & Technology Services Ltd. It has merged with M/s Mindtree Limited. The assessee is engaged in developing software solutions for its customers in USA. The Transfer Pricing Officer (TPO) noticed that there were contradictions between Transfer pricing report and Audit report given in Form 3CEB with regard to the nature and amount of international transactions pertaining to this year. Ultimately, the TPO rejected the transfer pricing study of the assessee.

5. The TPO noticed that the turnover of the assessee was Rs.82.34 crores. The TPO adopted Transactional Net Margin Method (TNMM) as most appropriate method. He adopted Operating Profit /Operating Revenue (OP/OR) as the Profit level indicator. The TPO, by making his own search, selected following 17 comparable companies.

<i>SI. No.</i>	<i>Comparables Selected by TPO</i>	<i>Sales (Rs. In Cr.)</i>	<i>OP to Total Cost</i>
1.	Bodhtree Consulting Ltd.	3.87	24.85
2.	Lanco Global Systems Ltd.	6.11	13.65
3.	Exensys Software Solutions Ltd.	7.30	70.68
4.	Sankhya Infotech Ltd.	12.99	27.39
5.	Sasken Network Systems Ltd.	14.44	16.64
6.	Four Soft Ltd.	15.94	22.98
7.	Thirdware Solution Ltd.	29.11	66.09
8.	R S Software (India) Ltd.	81.69	8.07
9.	Geometric Software Solutions	95.44	20.34
10.	Tata Elxsi Ltd. (seg.)	146.46	24.35
11.	Visualsoft Technologies Ltd.	185.43	23.52
12.	Sasken Communication	189.05	14.42
13.	iGate Global Solutions Ltd.	406	4.32
14.	Flextronics Software Systems Ltd.	457.45	32.19
15.	L&T Infotech Ltd.	562.45	10.33
16.	Satyam Computer Services Ltd.	3464.2	29.44
17.	Infosys Technologies Ltd.	6859.7	42.83
Arithmetical Mean			26.59

6. The average margin of above said comparables calculated at OP/TC was 26.59% and at OP/OR was 21%. The TPO computed the transfer pricing adjustment as under:-

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Total Sales of the tax payer	-	82,34,36,000
Total cost by applying margin of 21% (ALP of cost)		65,05,14,440

Actual cost incurred by the tax payer		70,10,27,000
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**Break up of Actual cost:-**

Pertaining to Unrelated parties		53,98,36,000
Pertaining to related parties		16,11,91,000

The TPO held that the unrelated party costs are at arms length.

ALP cost		65,05,14,440
Less:- Unrelated parties cost		53,98,36,000
		-----
ALP of related party costs		11,06,78,440
		=====
Actual related party costs		16,11,91,000
(-) ALP of related party costs		11,06,78,440
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Transfer pricing adjustment		5,05,12,560
		=====

7. During the course of arguments, the Ld A.R submitted that the TPO has made transfer pricing adjustment at entity level instead of doing the same to AE transactions. However, the computation made by the TPO would show that the TPO has made adjustment in respect of AE transactions only.

8. The AO completed the assessment by making the TP adjustment proposed by the TPO. The assessee challenged the transfer pricing adjustment made by the TPO by filing appeal before Ld CIT(A). The first appellate authority excluded following five comparables accepting the contention of the assessee for application of turnover filter.

Sl. No.	Name of Company	Turnover (Rs.In crores)
(a)	Igate Global	406
(b)	Fletronics software systems Ltd	457.45
(c)	L & T Infotech Ltd	562.45
(d)	Satyam Computer Services Ltd	3464.20
(e)	Infosys Ltd	6859.70

In this regard, the Id CIT(A) followed the decision rendered by Bangalore bench of Tribunal in the case of Genisys Integrating Systems Vs. DCIT (15 ITR (Trib) 475) and certain other decisions, wherein identical view has been expressed. In the above said cases, it was held that the companies having turnover of less than 200 crores cannot be compared with the companies having more than 200 crores. The turnover of the assessee company is Rs.82.34 crores and hence it falls under the category of companies having turnover of 1 to 200 crores. The above said five companies are having turnover of more than 200 crores and hence the Ld CIT(A) held that these companies cannot be considered as comparable companies.

9. The assessee also sought exclusion of certain other companies on the ground of functional dissimilarity. The Ld CIT(A), however, rejected the same by following certain case laws. All those case laws had expressed the view that once a company falls under the category of “software development services, they cannot be excluded merely on the reason that they are operating in different verticals.

10. The revenue is in appeal challenging the decision of Ld CIT(A) in excluding above said five comparable companies. The Ld D.R placed his reliance on the decision rendered by Tribunal in the case of Wills Processing services india (P) Ltd and also in the case of

Societe Generale Global Solutions P Ltd and contended that the turnover filter is not to be applied.

11. On the contrary, the Id A.R supported the order passed by Ld CIT(A) on this issue.

12. We heard rival contentions and perused the record. The question of application of turnover filter was examined by the co-ordinate bench in a detailed manner in the case of Autodesk India (P) Ltd (2018)(96 taxmann.com 263)(Bang.) and it was held that the turnover filter can be applied. The relevant discussions and decision taken by the co-ordinate bench are extracted below for the sake of convenience:-

***IT(TP)A No.616/Bang/2013: Revenue's appeal for AY 2005-06***

*17. The first issue to be decided in Revenue's appeal is the application of turnover filter for exclusion of companies that are otherwise found to be functionally comparable. The Grievance of the revenue in this regard is projected in Gr.No.2 of the Grounds of appeal raised by the revenue in its appeal. The basic facts to be noticed with regard application of turnover filter are that the Assessee's turnover for the relevant previous year was Rs.10.65 crores. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the Assessee before the CIT(A) was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The CIT(A) agreed with the submission of the Assessee and he excluded the following 5 companies whose turnover was above Rs.200 Crores from the list of comparable companies, viz., (i) Flextronics Ltd., (ii) L & T Infotech Ltd., (iii) M/s. Infosys Technologies Ltd., (iv) Satyam Computer Services Ltd., (v) iGate Global Solutions Ltd. The CIT(A) in coming to the above conclusion placed reliance on the decision of the ITAT Bangalore in the case of Genisys Integrating Systems (India) (P) Ltd. v. Dy. CIT [\[2012\] 53 SOT 159/20 taxmann.com 715 \(Bang.\)](#) wherein it was held when there is a limit for the lower end for identifying the*

*comparable companies, there is no reason why there should not be an upper limit also, as size matters in business.*

*17.1 The learned DR submitted that high turnover is not a relevant criterion to regard a company as not comparable, so long as the two companies are functionally comparable. If functions by two companies are identical then they have to be regarded as comparable. According to him therefore the CIT(A) was not justified in excluding 5 companies on the ground that their turnover was above Rs.200 Crores and cannot be compared with the Assessee whose turnover was around Rs.10.65 Crores. In support of his contention the learned DR placed reliance on the following decisions:*

Sl. No.	Name of the case	Citation	Relevant paragraph
1.	NTT DATA Global Delivery Services Ltd. v. Asstt. CIT	<a href="#">[2016] 69 taxmann.com 7 (Bang. - Trib.)</a>	23 & 24
2.	LSI Technologies India Pvt. Ltd. v. ITO	<a href="#">[2016] 70 taxmann.com 189 (Bang. - Trib.)</a>	14.3
4.	Societe Generale Global Solution Centre (P.) Ltd. v. Dy. CIT	<a href="#">[2016] 69 taxmann.com 336 (Bang. - Trib.)</a>	10
5.	Willis Processing Services (I) (P.) Ltd. v. Dy. CIT	<a href="#">[2013] 30 tamann.com 350/57 SOT 339 (Mum.)</a>	47
6.	Capgemini India (P.) Ltd. v. Asstt. CIT	<a href="#">[2015] 58 taxmann.com 175/232 Taxman 149 (Bom.)</a>	4.3

*17.2 The learned DR also filed before us a note contending that in software industry, size has no influence on the margins earned by an entity. According to him economies of scale are relevant only in capital intensive companies which have substantial fixed assets in the form of plant and machinery. According to him, in software industry, size does not matter, what matters is the human capital. According to him application of the filter of turnover might be justified for excluding companies with low turnover of say Rs.1 crore or less because the margin earned by these companies might widely fluctuate due to narrow capital base and lack of competitive strength, lack of operational efficiencies and also lack of human resources. They also escape the eyes of regulators. He drew our attention to the turnover and profit margins of company Infosys Technologies Ltd. For FY 1997 to 2010 and submitted that in FY 1997 the company had turnover of Rs.139 Crores and its profit margin was 34.95% whereas in FY 2010 its turnover was Rs.21140 crores but its profit margin was only 44.91%. According to him therefore the profit margins hover between 35% and 40% over the period of 15 years and therefore high turnover does not necessarily mean high profit margins. He also gave a chart showing turnover and margin of 20 companies*

*in the IT-BPO industry for three years. According to him the chart would show that for the same range of turnover companies earned different profit margins. Therefore according to him there is no relation between the margins earned and the turnover of a company. According to him software industries operate on the basis of cost plus margin of profits and therefore turnover would be irrelevant and have no impact of the profit margins. His further submission was that under Rule 10B(3) of the Income Tax Rules, 1962 (Rules) it is only functions performed, assets employed and the risks assumed that are relevant criteria for comparison and turnover is not a prescribed criterion for the purpose or comparison. He fairly admitted that there are differences of opinion amongst various benches of the Tribunal on the application of turnover filter and that some Benches have held that high turnover was relevant criteria for excluding comparable companies. His prayer in the alternative was for constitution of a special bench to resolve the conflict.*

*17.3 Per Contra the learned counsel for the Assessee submitted that ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. v. Dy. CIT [\[2018\] 89 taxmann.com 44](#) order dated 13.10.2017, considered the various aspects of application of turnover filter for excluding companies and has noted that the first decision rendered on application of this filter was in the case of Genisys Integrating Systems (I)(P) Ltd. (supra) rendered on 5.8.2011. In the case of Dell International Services India (P) Ltd. (supra), the tribunal took note of a divergent view expressed by ITAT Bangalore Bench in the case of Robert Bosch Engg. and Business Solutions Ltd. v. Dy. CIT ITA No.1519/Bang/2013 order dated 13.9.2017 after considering the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India (P.) Ltd. v. Dy. CIT [\[2017\] 82 taxmann.com 167 \(Delhi - Trib.\)](#), that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The Tribunal in the case of Dell International (supra) also took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software (P.) Ltd. v. Dy. CIT [\[2016\] 67 taxmann.com 243 \(Bang. - Trib\)](#) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India (P.) Ltd. (supra) and the decision to the contrary in the case of CIT v. Pentair Water India (P.) Ltd. [\[2016\] 69 taxmann.com 180/381 ITR 216 \(Bom.\)](#) wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water India (P.) Ltd. (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):*

*'41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs.*



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*1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:—*

*"9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which are (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."*

*42. The Assessee's turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of comparable companies is held to be correct and such action does not call for any interference.'*

*17.4 His submission was that the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India (P.) Ltd. (supra) was not on the application of turnover filter. He brought to our notice that the relevant substantial question of law in the case of Christcapital decided by the Hon'ble Delhi High Court was (i) whether comparables can be rejected on the ground that they have exceptionally high profit margins as compared to the Assessee in Transfer Pricing Analysis.(ii) Whether factors like differential functional and risk profile coupled with high*

degree of volatility in operating profit margins is sufficient ground to reject comparables for transfer pricing analysis. In answering the above question, the Hon'ble Court however at page 218 of the report (the said decision is Chryscapital Investment Advisors India (P.) Ltd. (supra)) observed that the mere circumstance that a company otherwise conforming to the stipulations in rule 10B(2) of the Rules in all details, presenting a peculiar feature- such as a huge profit or a huge turnover, ipso facto does not lead to its exclusion. The Court further observed that the Transfer Pricing officer, first, has to be satisfied that such differences do not "materially affect the price ..... or cost". Secondly, an attempt to make reasonable adjustment to eliminate the material effect of such differences has to be made. According to him therefore the observations of the Hon'ble Delhi High Court in so far as it relates to application of turnover filter are obiter dictum. Obiter dictum though is entitled to a weight cannot be equated with ratio decidendi of a case. In support of his contention as above, he relied on the decision of the Hon'ble Supreme Court in the case of Director of Settlements A.P. v. M.R. Apparao [2002] 4 SCC 638. Countering the submission of the learned DR that the decision of the Hon'ble Bombay High Court rendered in the case of Pentair (supra) is not ratio decidendi as it was merely dismissal of appeal u/s.260A of the Act on the ground that no substantial question of law arose for consideration, learned counsel drew our attention to the decision of the Bombay High Court in the case of Pentair water India (P.) Ltd. (supra) paragraph 9, wherein the Hon'ble Bombay High Court after referring to a decision of the Hon'ble Delhi High Court rendered in the case of CIT v. Agnity India Technologies (P) Ltd. [\[2013\] 36 taxmann.com 289/219 Taxman 26 \(Delhi\)](#), clearly observed that turnover is obviously a relevant fact to consider the comparability. Our attention was also drawn to paragraph-3 of the decision rendered in the case of Pentair (supra) wherein the department specifically contended that the Tribunal erred in holding that size and turnover of a company are deciding factors for treating a company as comparable. According to him therefore it was not a case of merely dismissal of appeal u/s.260A of the Act as unadmitted on the ground that no substantial question of law arose for consideration but was precedent in so far as the Hon'ble Court has expressed a clear opinion on the issue.

**17.5** The learned counsel for the Assessee also drew our attention to a decision of the Hon'ble Delhi High Court rendered in the case of Pr. CIT v. New River Software Services (P) Ltd. [\[2017\] 85 taxmann.com 302](#) wherein the Hon'ble Delhi High Court followed the decision of the Hon'ble Bombay High Court rendered in the case of Pentair (supra) and held that Infosys BPO was rightly excluded as not being a comparable company. Our attention was also drawn by him to a decision of the Hon'ble Punjab & Haryana High Court in the case of CIT v. Mercer Consulting (I) (P) Ltd. [\[2016\] 76 taxmann.com 153/390 ITR 615](#) wherein the Hon'ble Court held that a giant company cannot be compared with a company which was a captive service provided assuming limited risks.

**17.6** As far as the decisions of the Tribunal rendered on the application of turnover filter that are contrary to the decision rendered in the case

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*of Genisys Integrating Systems (supra), the first submission of the learned counsel for the Assessee was that those decisions were rendered at a later point of time and were to be regarded as per incurium since these decisions were also rendered by a bench of equal strength and either the subsequent decisions refused to follow or were rendered in ignorance of an earlier binding precedent. He submitted that if a bench of equal strength differs with a view taken earlier, the proper course for them is to make a reference to larger bench. They cannot refuse to follow a binding decision. If they do so, the decisions so rendered have to be regarded as per incurium. Even if they are rendered in ignorance of the earlier binding precedent, they have to be regarded as per incurium. In this regard the learned counsel for the Assessee placed reliance on the decisions of Hon'ble Supreme Court in the case of Union of India v. Raghbir Singh AIR 1989 SC 1933, Union of India v. S.K. Kapoor [2011] 4 SCC 589 and Sundeep Kumar Bafna v. State of Maharashtra [2014] 16 SCC 623. In the aforesaid decisions the Hon'ble Supreme Court held that in a situation where there are conflicting decisions of High Court on an issue which are irreconcilable and pronounced by judges of co-equal strength, then the earlier view has to be followed as the later decision has to be regarded as per incurium. The Hon'ble Supreme Court in the case of Sundeep Kumar Bafna (supra) held that a decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench and when High Courts encounter two or more mutually irreconcilable decisions of the Supreme Court cited at the Bar, the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam. The following were the relevant observations of the Hon'ble Supreme Court:*

*"19. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

*It was therefore submitted by him that the earliest view rendered by the ITAT Bangalore Bench in the case of Genisys Integrating (supra) should be followed.*

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*17.7 We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chriscapital Investment Advisors (India) Pvt. Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of Pentair Water India (P.) Ltd. (supra) has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.*

*17.8 In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India (P.) Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay*

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*High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)."*

We have noticed that the Ld CIT(A) has followed the decision rendered by co-ordinate bench in the case of Genisys Integrating Systems (supra) and the decision rendered in the above said case was followed in the Autodesk India (P) Ltd extracted supra. In the case of Autodesk India (P) Ltd, the co-ordinate bench has distinguished the decisions relied upon by Ld D.R. Accordingly, we uphold the order of Ld CIT(A) in excluding above said five comparable companies applying turnover filter.

13. We shall now take up the appeal of the assessee. Though the assessee has raised many grounds, the ld A.R submitted that the assessee is seeking exclusion of following four companies upheld by Ld CIT(A):-

- (a) Bodhtree Consulting Ltd
- (b) Tata Elxsi Ltd
- (c) Exensys Software Solutions Ltd
- (d) Thirdware Solution Ltd.

The Ld A.R submitted that all the above said four companies were examined by the Bangalore bench of Tribunal in the case of CGI Information Systems & Management Consultants (P) Ltd (IT(TP)A No.612/Bang/2013) on functionality different basis. Accordingly, he prayed for exclusion of above said four companies.

14. On the contrary, the Ld A.R submitted that the Ld CIT(A) has relied upon certain case laws and held that the functionality difference cannot be a criteria to exclude the companies.

15. We have heard rival contentions and perused the record. We notice that the Bangalore bench of Tribunal has excluded above said four companies holding that these are not comparable companies in the case of CGI Information systems & Management Consultants (P) Ltd (supra). The relevant discussions made by the Tribunal in respect of above said four companies are extracted below:-

**(A) Bodhtree Consulting Ltd:-**

*15.2. We have perused submissions advanced by both sides in light of records placed before us.*

*We find that Ld.CIT(A) directed their exclusion of these comparables as they are functionally dissimilar to Assessee. Ld. CIT (A) observed that engaged in developing Software Products and for the reason that this company was rendering both SWD services and was also in providing Information Technology Enabled Services (ITES) and break up of revenues from diverse segments was not available. This Tribunal in case of Sysarris Software (P.) [Ltd.vs.DCIT](#), reported in, (2016)67 taxmann.com 243, IT(TP)A No.612/Bang/2013 A. Y : 2005 - 06 wherein vide paras 20-21, Bodhtree has been held to be not functionally comparable with a company providing SWD services.*

**(B) Tata Elxsi Ltd:-**

*17. Ground No. 6 is against exclusion of Tata Elxsi Ltd Ld. CIT. DR submitted that this company is into software development services as provided in the annual report of the company. He also submitted that there are segmental information available in respect of both the segments being software development services and system integration and support services and therefore Ld. CIT (A) should not have excluded the same.*

*17.1. Ld.AR on the contrary placing reliance upon view expressed by Ld. CIT(A) submitted that the segment selected by Ld. TPO for purposes of comparability comprises of services such as product design, design engineering and visual computing labs which are in the nature of IT enabled services, and therefore not comparable with software development services*

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*provided by assessee. He also placed reliance upon orders passed by this Tribunal in assessee's own case for assessment year 2007-08 reported in (2013) 36 Taxmann.com 374, assessment year 2008- 09 by order dated 18/07/2014 in ITA (TP) A No. 1192/B/2012 IT(TP)A No.612/Bang/2013 A. Y : 2005 - 06 and assessment year 2009-10 by common order dated 18/03/2016 in ITA(TP)A No. 1621 and 1664/be/2014. 17.2. We have perused submissions advanced by both sides in light of records placed before us.*

*We note that Ld. CIT (A) excluded this comparable as it was engaged in development of niche products and services which was entirely different from services rendered by assessee to its associated enterprises. Ld.CIT(A) categorically observed that revenue earned by this company comprises of products as well and therefore though the company satisfies that turnover criteria the functional differences requires it to be eliminated. We do not find any infirmity in the observations of Ld. CIT (A) and the same is upheld.*

**(C) Exensys Software Solutions Ltd:-**

*18. Ground No.7 is against exclusion of Exensys software solutions Ltd and Thirdware solutions Ltd by Ld.CIT (A) Ld.CIT.DR submitted that these comparables were excluded for having abnormal profits by Ld.CIT (A). Ld.CIT DR referred to and relied upon his arguments advanced while dealing with ground No. 2 on turnover filter considered herein above. 18.1. On the contrary, Ld.AR placed reliance upon decision of this Tribunal in case of [ITO vs Net Devices Pvt.Ltd](#) reported in [2015] 63 taxmann.com 94.*

*18.2. We have perused submissions advanced by both sides in light of records placed before us.*

*Apart from the fact that, profit margins of these companies were abnormally high owing to extraordinary events that happened during the relevant previous year, these two companies have to IT(TP)A No.612/Bang/2013 A. Y : 2005 - 06 be excluded on the ground that these two companies are functionally dissimilar to that of the Assessee which is contract software service provider. As far as Exensys Software Solutions Ltd., is concerned, we have already held that Ld.CIT(A) was justified in excluding this company from the list of comparable companies on the ground that its profits were abnormally high owing to extraordinary event of merger/amalgamation that took place during the relevant previous year.*

**(D) Thirdware Solutions Ltd:-**

*18.2.1. Ld.AR submitted that Thirdware Solutions Ltd., is engaged in multiple diverse activities in FY 2004-05 including (a) software development services under which the company provides application development, customer relationship management and ERP; and (b) sale of software*

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*product and related services, without proper segmental data being available for the said diverse activities.*

*18.2.2. We note that it is for such reasons Bangalore ITAT in Net Devices India Pvt. Ltd. (supra) at paras 8.1-8.3 and 9.1-9.3 at pages 15-19 and 19-21 respectively] excluded these comparables as functionally not similar service provider such as Assessee. Respectfully following the same we uphold observations of learn CIT (A).*

*Accordingly this ground raised by revenue stands dismissed.*

16. Following above said decision of the Tribunal, we direct exclusion of above said four companies. The AO/TPO shall re-compute ALP of the international transactions accordingly.

17. The assessee has raised a ground as to whether the satellite charges incurred in foreign currency are required to be reduced from export turnover while computing deduction u/s 10A of the Act. The revenue has raised a ground as to whether the Ld CIT(A) was justified in following the decision of Karnataka High Court rendered in the case of Tata Elxsi Ltd, i.e., exclusion of expenses incurred in foreign currency from both export turnover and total turnover while computing deduction u/s 10A of the Act. The Ld A.R submitted that the assessee would be satisfied, if parity is given in respect of deduction from both export turnover and total turnover.

18. The Hon'ble Supreme Court has settled this issue in the case of CIT vs. HCL Technologies Ltd (TS – 218 – SC -2018). The relevant observations made by Hon'ble Supreme Court are extracted below:-

“20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.



21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.”

Accordingly, following the decision rendered by Hon'ble Supreme Court, we uphold the order passed by Ld CIT(A) on this issue.

19. In the result, the appeal of the revenue is dismissed and the appeal of the assessee is treated as allowed.

Order pronounced in the open court on 22<sup>nd</sup> Oct, 2020

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 22<sup>nd</sup> Oct, 2020.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,**  
**ITAT, Bangalore.**