

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM**

**आयकर अपील सं. / ITA No.456/PUN/2017**

**निर्धारण वर्ष / Assessment Year : 2012-13**

M/s. FIS Solutions (India) Pvt. Ltd.,  
(formerly known as SunGard  
Solutions (India) Pvt. Ltd.)  
Westend Centre One,  
Survey No.169/1, Sector II,  
Pune – 411007

..... अपीलार्थी/Appellant

PAN: AAACE7476K

Vs.

The Dy. Commissioner of Income Tax,  
Circle – 6, Pune

..... प्रत्यर्थी / Respondent

Assessee by : Shri Darpan Kirplani  
Revenue by : Shri A.K. Modi, CIT

सुनवाई की तारीख / <b>Date of Hearing : 06.05.2019</b>	घोषणा की तारीख / <b>Date of Pronouncement: 17.05.2019</b>
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, JM:**

The appeal filed by assessee is against the order of DCIT, Circle 6, Pune, dated 22.12.2016 relating to assessment year 2012-13 passed under section 143(3) r.w.s. 144C of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

**A. General**

1. erred in assessing the total income at Rs.810,769,315 as against income of Rs.602,526,660 (as per the return of income filed by the Appellant on 29 November 2012);

**B. Transfer Pricing adjustment under provisions of Chapter X of the Act in respect of international transaction of provision of software development services**

2. rejecting comparable companies based on strict comparison of products/services while using Transaction Net Margin Method as the most appropriate method;

3. disregarding the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing study report

4. cherry picking the high margin companies and rejecting the low margin companies by applying arbitrary filters to arrive at a fresh set of comparable companies and not sharing the search strategy adopted for selection of alleged comparable companies during the course of assessment proceedings;

5. erroneously computing the operating margins of the companies by considering foreign exchange gain / loss as non-operating in nature;

6. erred in computing the working capital adjustment for comparable companies while giving effect to the directions passed by the Hon'ble DRP;

7. rejecting the use of multiple year data for determining the arm's length price of the international transactions of the appellant pertaining to provision of software development services to its AE;

8. not allowing adjustments for difference in risk undertaken, difference in marketing and R&D activities in accordance with the provisions of Rule 10B of the Rules;

9. denying the benefit / reduction of 5 percent from the arithmetic mean as provided in proviso to section 92C(2) of the Act;

10. not appreciating that the Appellant has no motive to shift profits outside India, as the Appellant has been availing the benefit of deduction under Section 10A of the Act during the year under consideration;

**C. Initiation of penalty proceedings under section 271(1)(c) of the Act**

11. erred on facts and in law in initiating the penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income.

3. The issue raised in the present appeal is against transfer pricing adjustment made in the hands of assessee in respect of international transaction of provision of software development services.

4. The learned Authorized Representative for the assessee pointed out that in case ground of appeal No.4 is decided i.e. against exclusion of five concerns, then the margins shown by the assessee would be within +/- 5% range of mean margins of comparables finally selected. The learned Authorized Representative for the assessee also pointed out that the issue of exclusion of said concerns is squarely covered by the order of Pune Bench of Tribunal in the case of M/s. PubMatic India Private Limited Vs. ACIT in ITA No.655/PUN/2017, relating to assessment year 2012-13, order dated 09.03.2018 and also in assessee's own case in respect of two concerns.

5. The learned Departmental Representative for the Revenue however, stressed that in case the said concerns are excluded, then only two concerns would be left in the list for benchmarking international transactions of the assessee.

6. First of all, we take up the ground of appeal No.4 raised by assessee, which is challenging the inclusion of following concerns as functionally comparable to the assessee:-

- i) Thirdware Solutions Ltd.,
- ii) Cybermate Infotek Ltd.,
- iii) Cybercom Datamatics Information Solutions Ltd.,
- iv) Infobeans Systems Pvt. Ltd.,
- v) E-Zest Solutions Ltd.

7. The assessee had entered into several international transactions with its associated enterprises. However, the issue which needs to be adjudicated is in respect of provision of software services provided by the assessee to SunGard International INC at ₹ 39.10 crores. The assessee had applied TNMM method and worked out the PLI on Operating Profit / Operating Cost at 17.80%. The assessee had selected certain concerns as functionally comparable and since

the mean margins of said concerns were within +/- 5% of margins shown by the assessee, arm's length price of international transactions was taken at Nil. However, the Transfer Pricing Officer (TPO) revised the filters to be applied and consequently, picked up different set of concerns as comparable, against which show cause notice was issued to the assessee and after considering the objections of assessee finally eight concerns were found to be comparable to the assessee. The mean PLI of said concerns after working capital adjustment was 28.89% and the TPO thus, proposed an upward adjustment of ₹ 37.31 crores. The Assessing Officer issued draft assessment order to the assessee, against which the assessee filed objections before the Dispute Resolution Panel (DRP), which gave certain directions and consequent to the same, finally eight concerns were retained as comparables whose mean margins after working capital adjustment were 23.99% and hence, an upward adjustment of ₹ 20.82 crores was made in the hands of assessee by the Assessing Officer in the final assessment order passed.

8. The assessee is aggrieved by the aforesaid adjustment made in its hands and has pointed out that certain concerns are not to be included as these were not functionally comparable. In this regard, the learned Authorized Representative for the assessee has pointed out that in the case of another concern M/s. PubMatic India Private Limited, which was also providing software development services to its associated enterprises, the Tribunal in ITA No.655/PUN/2017, relating to assessment year 2012-13, order dated 09.03.2018 have held some of said concerns functionally not comparable. The learned Authorized Representative for the assessee has taken us through different paras of the said decision of Tribunal.

9. The first concern which the assessee wants to be excluded is Cybermate Infotek Ltd., which was engaged in providing both software development services and was also a product company and segmental details were not available and in the absence of the same, the margins of said concern could not be applied to benchmark arm's length price of international transactions undertaken by concern which was exclusively providing software development services to its associated enterprises. The Tribunal on analyzing the functionality of said concern also applied the ratio laid down by the Hon'ble High Court of Delhi in Prl.CIT Vs. Saxo India Pvt. Ltd. in ITA No.682/2016, for assessment year 2011-12, judgment dated 28.09.2016 and held as under:-

*"10. We proceed to decide the present appeal in line with the arguments put forward by the learned Authorized Representative for the assessee. The learned Departmental Representative for the Revenue has objected to the submissions made by the assessee. The first concern which is sought to be excluded by the assessee is Cybermate on the ground that it was engaged in providing both software development services and was a product company and in the absence of segmental details, the same cannot be compared. Both these business activities were clubbed under the head „Software segment“ and in the absence of segmental details being available, the assessee argues that the same cannot form part of list of comparables. The perusal of annual report of the said concern reflects the said concern to be engaged in providing software development services as well as developing variety of software products i.e. in the field of Hospital Management, Software HEAL SOFT and 38 other products. The financials of the said concern reflect no segmental reporting and the services are declared under one head. In such circumstances, where the segmental details were not available of the concern which was engaged in multiple activities i.e. in the present case, in providing software development services as well as being a product company; then we hold that the margins of said concern cannot be applied to benchmark the international transactions of the concern which was engaged in providing software development services to its associated enterprises. The assessee was also providing back office support services to its associated enterprises but was maintaining segmental details for both the activities undertaken by it and hence, the two transactions have been benchmarked separately even by the TPO and the Assessing Officer. The concern which is functionally different from the assessee i.e. in addition to providing software development services, was also product company, then the margins of said concern cannot be compared with the margins of assessee.*

*11. The Hon'ble High Court of Delhi in Prl.CIT Vs. Saxo India Pvt. Ltd. in ITA No.682/2016, for assessment year 2011-12, judgment dated 28.09.2016 had held that the cost for a particular segment had to be available in order to determine the exact profitability and if same was not available, then the said company could not be selected as comparable company. The Hon'ble High Court of Delhi (supra) while deciding the case of a company which was engaged in providing software development services and its margins were compared with a company which were involved in both software development*

*services as well as sale of software products held that the said concern was to be rejected from final set of comparables.*

12. *The Mumbai Bench of Tribunal in Ness Technologies (India) Pvt. Ltd. Vs. ACIT in ITA No.7016/Mum/2012, relating to assessment year 2008-09, order dated 24.09.2014 had excluded Cybermate as not comparable to the company providing software development support services to associated enterprises. The learned Authorized Representative for the assessee has pointed out that profile of concern Cybermate for assessment year 2008-09 and in the year under appeal i.e. assessment year 2012-13 is the same and hence, the said proposition is to be applied. We find merit in the plea of assessee in this regard.*

13. *We further find that Pune Bench of Tribunal in MSC Software Corporation India (P.) Ltd. Vs. ACIT (2017) 80 taxmann.com 55 (Pune-Trib) while deciding the case of exclusion of a product company had held as under:-*

*“18. On perusal of record and the order of Tribunal in John Deere India Pvt. Ltd. Vs. ACIT (supra), we find that the concern E-zest Solutions Ltd. is a product company and is engaged in both the provision of software services and sale of software services. On the other hand assessee is engaged in Software development services where the segmental details are not available accordingly, E-zest Solutions Ltd. is functionally not comparable. Accordingly we hold that the said concern is to be excluded from the final set of comparables.”*

14. *The said proposition was applied by Pune Bench of Tribunal in DCIT Vs. Amber Point Technology India Pvt. Ltd. in ITA Nos.756 & 757/PUN/2014 and cross appeals in ITA Nos.761 & 762/PUN/2014, relating to assessment years 2008-09 and 2009-10 order dated 25.01.2018 for exclusion of concern which was engaged in providing both software services and was also selling its products. Accordingly, we hold that the concern Cybermate which is engaged in both sale of software products and providing software development services and where no segmental details are available for each of the segments, then the margins of said concern could not be applied to benchmark the arm's length price of international transactions of providing software development services to associated enterprises by the assessee.”*

10. Following the same parity of reasoning, we hold that the concern Cybermate Infotek Ltd. being engaged in both sale of software products and also providing software development services and in the absence of any segmental details of two divisions being available, the margins of said concern cannot be applied in order to benchmark arm's length price of international transactions undertaken by the assessee, which was solely engaged in providing software development services.

11. Now, coming to the next concern i.e. Cybercom Datamatics Information Solutions Ltd., which was also a product company and was also providing software development services to its associated enterprises, the Tribunal in M/s. PubMatic India Private Limited Vs. ACIT (supra) vide para 15 on same analogy has held as under:-

*“15. Similarly, the concern Cybercom is also a product company and was providing software development to its associated enterprises and was also selling developed software products. Both the activities were clubbed under one software segment. As per the annual report of said company, it was engaged in providing consultancy and advisory services and was also carrying out the business of development, testing, marketing and manufacturing of information technology products and services. The annual report of the said concern placed at page 918 of Paper Book declares the said facts and it is undisputed that the said concern is engaged in sale of software products. Following our reasoning in the paras hereinabove in respect of Cybermate, we hold that Cybercome is also to be excluded from final set of comparables.”*

12. Accordingly, we hold that Cybercom Datamatics Information Solutions Ltd. also cannot be included in final list of comparables while benchmarking international transactions of assessee of providing software development services to its associated enterprises.

13. The third concern by the inclusion of which the assessee is aggrieved is Infobeans Systems Pvt. Ltd. The Tribunal in M/s. PubMatic India Private Limited Vs. ACIT (supra) also took note of functionality analysis of the said concern, which was earning foreign exchange from export of goods on FOB basis, while deciding similar issue also noted the extraordinary event of demerger during the year and held as under:-

*“16. The third concern which the assessee wants to be excluded is Infobeans Systems Pvt. Ltd. on the ground that the said concern was earning foreign exchange from export of goods on FOB basis. Hence, the same was not comparable with a concern engaged in software development services. Our attention was drawn to the financials of the said concern placed at page 624 onwards, wherein in the Profit and Loss Account, the revenue from sale of software was also shown. The learned Authorized Representative for the assessee also stressed that no segmental details were available. Further, our attention was drawn to the notes to accounts, wherein the export of goods on FOB and services rendered is reported.*

17. Another aspect which has been stressed by the assessee is the extraordinary event of demerger, wherein the financial statements of said concern included the financial statements of software business of demerged company i.e. Seed Enterprises Pvt. Ltd., are available at pages 614 and 633 of the Paper Book.

18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee.”

14. Applying the same parity of reasoning, we hold that Infobeans Systems Pvt. Ltd. is also not to be included in the final list of comparables.

15. Further, we may also refer to the observations of DRP on Safe Harbour Rules and also deliberations of the Tribunal in M/s. PubMatic India Private Limited Vs. ACIT (supra) on this issue vide para 19, which reads as under:-

“19. Before pointing, we may also refer to the observations of DRP on Safe Harbour Rules but the same at present cannot be applied and in any case the same cannot be applied to equate software product with software development company. Another aspect which had taken place during the accounting period is the demerger of business of Seed Enterprises Pvt. Ltd., for which the said concern had filed revised accounts. The extraordinary event which had taken place makes the said concern as not comparable to the assessee. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in M/s. Aptara Technologies Pvt. Ltd. Vs. ACIT in ITA No.259/PN/2015 and cross appeal in ACIT Vs. M/s. Aptara Technologies Pvt. Ltd. in ITA No.579/PN/2015, relating to assessment year 2010-11, order dated 31.05.2016 and in Cummins Turbo Technologies Limited Vs. DDIT in ITA No.784/PN/2014, relating to assessment year 2009-10, order dated 30.03.2016. Accordingly, we direct the Assessing Officer to exclude Infobeans Systems Pvt. Ltd. from final set of comparables.”

16. On this ground also, Infobeans Systems Pvt. Ltd. is to be excluded from the final set of comparables as held in earlier decision of Pune Bench of Tribunal.

17. Coming to the next concern Thirdware Solutions Ltd., the Tribunal in M/s. PubMatic India Private Limited Vs. ACIT (supra) noted that the said concern was deriving revenue from sale of license and software services export from SEZ units and also revenue from subscriptions, etc. The said concern had imported raw materials and was also owning intangibles and in the absence of any segmental details, was held to be not functionally comparable. The relevant findings of Tribunal in this regard are in paras 20 to 22. Further, the Tribunal in assessee's own case in I.T.(T.P)A No.1487/Bang/2012, relating to assessment year 2008-09, order dated 30.07.2015 at para 14.3.1 while deciding appeal for assessment year 2008-09 had held the said concern to be not functionally comparable to the assessee. Following the same parity of reasoning, we hold that Thirdware Solutions Ltd. is to be excluded from final list of comparables.

18. The last concern which the assessee wants to be excluded is E-Zest Solutions Ltd., which was engaged in KPO services. The case of assessee is that such a concern cannot be held to be functionally comparable to the assessee as it was engaged in provision of KPO services. Such a proposition was laid down by the Tribunal in paras 8.1 to 8.4.2 in assessee's own case in assessment year 2008-09 (supra).

19. Further, the Hon'ble High Court of Delhi in Rampgreen Solutions Pvt. Ltd. Vs. CIT (2015) 377 ITR 533 (Del) had held that the margins of concern providing BPO services cannot be compared with margins of concern providing KPO services. Following the same parity of reasoning, we hold that E-Zest Solutions Ltd. is not to be included in the final set of comparables. Accordingly, we hold that concerns Cybercom Datamatics Information Solutions Ltd.,

Cybermate Infotek Ltd., Thirdware Solutions Ltd., Infobeans Systems Pvt. Ltd. and E-Zest Solutions Ltd. are to be excluded from final list of comparables while benchmarking international transactions undertaken by assessee. Hence, the ground of appeal raised by assessee is allowed. The learned Authorized Representative for the assessee pointed out that in case this issue is allowed in favour of assessee, the other grounds of appeal would become academic in nature, hence the same are dismissed.

20. In the result, the appeal of assessee is allowed.

Order pronounced on this 17<sup>th</sup> day of May, 2019.

**Sd/-**  
**(D.KARUNAKARA RAO)**  
लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(SUSHMA CHOWLA)**  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 17<sup>th</sup> May, 2019.

GCVSR

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :**

1. The Appellant;
2. The Respondent;
3. The DRP-3, Mumbai;
4. The Pr.CIT-3, Pune;
5. The DR 'C', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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