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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 767/2017**

COMMISSIONRER OF INCOME TAX
INTERNATIONAL TAXATION-3 ..... Appellant
Through : Mr. Rahul Chaudhary, Senior Standing Counsel for the Income Tax Department.

versus

UT STARCOM INC. (INDIA BRANCH) ..... Respondent
Through : Mr. Prakash Kumar, Advocate.

**CORAM:**
**JUSTICE S. MURALIDHAR**
**JUSTICE PRATHIBA M. SINGH**

**O R D E R**

**% 25.09.2017**

1. The Revenue is in appeal against an order dated 23rd December 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5848/Del/2011 for the Assessment Year 2007-08.

2. The following two questions have been urged by the Revenue for consideration:

> "(i) Whether the Tribunal erred in law in directing exclusion of Infosys Technologies Ltd and Kals Information Systems Ltd in respect of Software Development Segment and exclusion of Vishal Information Technology Ltd (now Coral Hub Limited) in respect of IT Enabled Services Segment though all the

aforesaid companies were functionally similar under Transaction Net Margin Method?

(ii) Whether the Tribunal erred in law in laying down stringent standards of comparability analysis as applicable to traditional methods such as Comparable Uncontrolled Price (CUP) Method for selecting comparables under Transactional Net Margin Method (TNMM)?"

3. Having heard learned counsel for the Revenue, the Court is of the view that the ITAT has given cogent reasons for excluding the aforementioned comparables applying TNMM and its order suffers from no legal infirmity giving rise to any substantial question of law.

4. The appeal is dismissed.

**S. MURALIDHAR, J.**

**PRATHIBA M. SINGH, J.**

**SEPTEMBER 25, 2017**
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**IN THE INCOME TAX APPELLATE TRIBUNAL**
**(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER**
**and**
**SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5848/Del./2011**
**(ASSESSMENT YEAR : 2007-08)**

| | | |
|---|---|---|
| Ut Starcom Inc. (India Branch),<br>805, Signature Towers – II,<br>South city – I,<br>Gurgaon (Haryana).<br>**(PAN : AAACU5017A)** | vs. | DDIT, Circle 2 (2),<br>New Delhi. |
| (APPELLANT) | | (RESPONDENT) |

ASSESSEE BY : Shri Rajan Sachdev, CA
REVENUE BY : Shri T.M. Shiva Kumar, CIT DR

Date of Hearing : 07.12.2016
Date of Order : 23.12.2016

**O R D E R**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

The Appellant, UT Starcom Inc. (India Branch) (hereinafter referred to as 'the assessee company') by filing the present appeal sought to set aside the impugned order dated 29.09.2011, passed by the AO under section 144C (1) read with section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2007-08 in consonance with the orders passed by the ld. DRP/TPO on the concise grounds inter alia that :-

"On the facts and in the circumstances of the case and in law, the learned Additional Director of Income Tax, Transfer Pricing Officer - 11(4), New Delhi ("Ld. TPO") and the learned Deputy Director of Income-tax, Circle 2(2), International Tax, New Delhi ("Ld. AO") under directions issued by the Hon'ble Dispute Resolution Panel - II, New Delhi ("DRP"), erred in making an addition to the Appellant's total income of INR 5,45,17,350 (i.e. INR 2,07,82,181 based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act') and INR 3,37,35,169 based on the other provisions of the Act.)

1. Transfer Pricing adjustment

1.1 On the facts and in the circumstances of the case, the Ld. TPO/ AO has erred in misconstruing the directions of Hon'ble DRP issued under section 144C( 5) of the Act while issuing final assessment order under section 143(3) read with section 144C(13) of the Act resulting in incorrect transfer pricing adjustment of INR 2,07,82,181 instead of INR 23,98,098.

1.2 On the facts and in the circumstances of the case and in law, the Ld. TPO has erred and the Hon'ble DRP has further erred in upholding / confirming the action of the Ld. TPO of disregarding, without material defects, the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing study report maintained as per section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('the Rules') and the various submissions made by the Appellant.

1.3 On the facts and in the circumstances of the case and in law, the Ld. TPO and Hon'ble DRP has erred, in adopting an arbitrary search strategy for selection of alleged comparable companies. Specifically, the Ld. TPO and Hon'ble DRP has grossly erred -

1.3.1 By adopting a flawed process of using notices under section (6) of the Act and relying on the same without providing complete information to the Appellant or an opportunity to cross examine the parties.

1.3.2 By disregarding the multiple year data approach and considering the data which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

1.3.3 By adopting inappropriate filters in the process of selecting comparable companies;

1.3.4 By adopting companies as comparables having complete disregard to their functional comparability;

1.3.5 By inappropriately computing the operating margins of the alleged comparable companies.

1.4 On the facts and in the circumstances of the case and in law, the Ld. TPO has erred and the Hon'ble DRP has further erred in upholding / confirming the action of the Ld. TPO in not allowing appropriate adjustment(s) in accordance with the provisions of rule 1 OB of the Rules.

1.5 On the facts and in the circumstances of the case and in law, the Ld. TPO has erred and the Hon'ble DRP has further erred in upholding / confirming the action of the Ld. TPO in making in adjustment to the arm's length price of international transactions without giving benefit of the proviso to section 92C(2) of the Act.

1.6 On the facts and in the circumstances of the case and in law, the Ld. TPO has erred and the Hon'ble DRP has further erred in upholding / confirming the action of the Ld. TPO in not following principle of consistency

1.7 On the facts and in the circumstances of the case and in law, the Ld. TPO has erred and the Hon'ble DRP has further erred in upholding / confirming the action of the Ld. TPO in making the adjustment without demonstrating that the Appellant had any motive to shift profits outside of India.

1.8 On the facts and in the circumstances of the case and in law, the Ld. TPO followed an unjustified approach by issuing two show-cause notices without providing appropriate responses against the replies filed by the Appellant in response to the first show-cause notice. Accordingly, the change in the approach followed by the Ld. TPO clearly demonstrates a biased state of mind and is against the principle of natural justice.

1.9 On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO/ TPO has erred not granting reasonable and adequate opportunity to the Appellant.

2. Denial of claim under Section 10A of the Act

2.1 That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in denying and the Hon'ble

DRP has further erred in confirming the disallowance of Appellant's claim of deduction under Section 1 OA of the Act amounting to Rs. 3,37,35,169/-.

2.2 That on the facts and circumstances of the case and in law, the Ld. AO has erred in holding and the Hon'ble DRP has further erred in confirming the action of Ld. AO, that there is no export of software by the Branch in India to the Head Office.

2.3 That on the facts and circumstances of the case and in law, the Ld. AO has erred in holding and the Hon'ble DRP has further erred in confirming the action of Ld. AO, that the Appellant is not a separate taxable entity and as a consequence a person cannot earn profit from itself.

2.4 That on the facts and circumstances of the case and in law, the Ld. AO is not appreciating and the Hon'ble DRP has further failed to appreciate that if the approach adopted by them is considered to be in accordance with law, no income could be said to result in the hands of the appellant.

2.5 That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have reached to erroneous conclusion of disallowing the deduction u/s 10A of the Act by placing their reliance on certain judicial precedents which are not applicable to the Appellant's case.

2.6 That on the facts and circumstances of the case and in law, the Ld. AO has erred in and the Hon'ble DRP has further erred in not following principle of consistency.

3. Interest under Section 234B of the Act

That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest under section 234B of the Act consequent to the above disallowances.

4. Penalty proceedings u/s 271 (1)(c ) of the Act

That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings u/s 271 (1 )(c) of the Act as per the impugned order consequential to the above disallowances.

The above grounds are notwithstanding and without prejudice to each other. The objections embodied in the above grounds are mutually exclusive."

2. Assessee company, M/s. UT Starcom Inc. (India Branch), USA (UTS US), being global leader in manufacture, integration and support of IP based, end-to-end networking and telecommunication solutions, set up its branch office in India in December 2001, to enable UTS US to offer its products and services in the Indian market. The assessee provides software development services and marketing support and IT Enables customer support services to UTS US Customers in Asia-Pacific region.

3. Assessee company entered into international transactions, hereinafter mentioned, and consequently the matter was referred to the TPO under section 92CA (1) of the Act for determination of the Arms Length Price (ALP) :-

| S.No. | Description of transaction | Method | Value (in Rs.) |
|---|---|---|---|
| 1. | Software development services | TNMM | 10,69,48,787 |
| 2. | IT Enabled Services | TNMM | 4,43,50,895 |
| 3. | Sales and marketing Support Services | TNMM | 6,60,79,561 |
| 4. | Cost recharges paid | TNMM | 70,02,078 |
| 5. | Purchase of fixed assets | TNMM | 1,34,73,082 |
| 6. | Purchase of finished goods | TNMM | 169,44,92,221 |
| 7. | Sale of fixed assets | CUP | 2,53,66,396 |
| 8. | Reimbursement of expenses (Received) | CUP | 40,90,599 |
| | **Total** | | **196,18,03,618** |

4. Assessee company's international transactions relating to Software Development Services (SDS) and IT Enabled Customer Support Services (ITES) segments have been disputed by the ld. Transfer Pricing Officer (TPO). Assessee company, in order to

benchmark its international transactions relating to SDS segment adopted Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit / Total Cost (OP/TC) as Profit Level Indicator (PLI) and by utilizing multi-year data chosen 18 comparables having average margin of 13% as against assessee company's margin of 12% and claimed its international transactions at ALP. However, TPO while using current year's data by applying filters of wages to cost, persistent losses, related party transactions (RPT) of more than 25% in turnover chosen 11 comparables having margin of 21.64% and computed the difference in ALP at Rs.87,71,509/-.

5. In case of ITES segment, taxpayer also adopted TNMM as the most appropriate method and OP/OC as PLI, chosen 16 comparables having average margin of 11% and after using multiple year data as against 14% shown by the assessee. Again TPO by using current year's data chosen 9 comparables having average margin of 26.24% and arrived at the difference in ALP at Rs.47,47,215/-. TPO has also not allowed adjustment on account of working capital and risk.

6. Assessee company has claimed working capital adjustment on the ground that due to difference in level of working capital employed by the assessee vis-à-vis comparable companies working

capital adjustment is required in this case. TPO in order to determine the liability of working capital adjustment (WCA) examined major comparables of the assessee and came to the conclusion that the companies are efficient profit maximizer but poor management may be the reason and as such, disallowed the working capital adjustment. Similarly, assessee also claimed risk adjustment while computing the margin on the ground that assessee is a risk free entity and operates in a controlled business atmosphere and consequently claimed the risk adjustment borne by comparables vis-à-vis assessee. So, the TPO computed the arms length price of international transactions qua software development services segment at Rs.87,71,509/- and IT Enabled Customer Support Services (ITES) segment at Rs.47,47,215/- and directed the AO to enhance the income of the assessee by Rs.1,35,18,724/-

7. Assessee carried the matter by raising the objections before the ld. DRP by way of filing the appeals who has affirmed the order passed by AO/TPO. Feeling aggrieved with the order passed by TPO/DRP/AO, assessee company has come up before the Tribunal by way of filing the present appeals.

8. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

**TRANSFER PRICING GROUNDS**

**GROUND NO.1.1**

9. Assessee raised this ground that TPO/AO has made incorrect transfer pricing adjustment of Rs.2,07,82,181/- instead of Rs.23,98,098/- by misconstruing the directions of ld. DRP issued u/s 144C (5) of the Act. To proceed further directions issued by ld. DRP qua this ground are reproduced as under for ready perusal :-

> "74. Working capital adjustment: The taxpayer has objected to the TPO's action in not allowing adjustment on account working capital. According to the taxpayer the TPO was not justified in denying the claim on the ground of non availability of data about payables and receivables. It was submitted that such data is available and working capital adjustment can be computed.
>
> 75. We find merit in the taxpayer's above contention. For the purposes of proper comparability differences in the prices charged by the assessee and the comparables arising on account of different levels of working capital are required to be eliminated. The OECD guidelines also support this view. The guidelines say that in a competitive environment, money has a time value. In a competitive environment the price should include an element to reflect the different payment and receipt term and compensate for the timing effect. Guidelines further say that making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables with an assumption that the difference should be reflected in profits. Though guidelines say that as a matter of routine such adjustment should not be made but also state that the same should be given if it improves the comparability. The provisions contained in Rule 10B (3) also mandate adjustments wherever there are material differences in the situations of comparables and the taxpayer. The different benches of the ITATs have upheld such adjustment [Vedaris Technology ITAT (Del); Sony India [114 ITD 448(Del), Mentor Graphics, E Gain communication 2008-TIOL-282-ITAT-PUNE, Global Vantedge 2010-TI01-24-ITAT-DEL, TNT India P

> Ltd 2011-TII-39-ITAT BANG-TP/etcl. The AO/TPO is, therefore, directed to grant working capital adjustment based on the OECD formula by taking 10.25% as PLR as this is the rate charged by the State Bank of India which is the leading bank in India on working capital loans. The aforesaid rates should, therefore, be adopted. However, for this purpose, the assessee shall have to provide reasonably accurate information about payables and receivables in both the segments i.e. SWD and ITES."

10. Bare perusal of the findings returned by ld. DRP on this ground goes to prove that the ld. DRP has conceded the contentions raised by the assessee but with a rider that for this purpose, the assessee shall have to provide reasonably accurate information about payables and receivables in both the segments i.e. Software Development Services (SDS) and ITES.

11. Ld. AR for the assessee contended that TPO has erred in computing working capital adjustment margin of comparable companies for software development services and ITES segments of the assessee by considering balances of sundry debtors, creditors and inventory at consolidated entity level i.e. assessee's India branch together with four project offices whereas relevant standalone balances of assessee companies India branch were to be considered. Assessee company brought on record audited financial statement of branch office on standalone basis and correct relevant balances have also been made available at pages 817 & 818 of the paper book vol.2 and pages 1130 & 1138 of paper book volume 3. So, when we examine the contentions raised by the ld. AR for the

assessee in the light of the directions issued by DRP reproduced in the preceding paras, the only conclusion can be drawn is that the TPO while computing the working capital adjustment margin of comparable companies for software development and ITES, he has to take it on relevant standalone balances of assessee company only. So, in the given circumstances, we restore the matter to the TPO to compute working capital adjustment margin of comparable companies for software development and ITES segment of the assessee by taking into consideration the segmental position in respect of consolidated entity level position afresh by providing an opportunity of being heard to the assessee. So, grounds no.1.1 is determined in favour of the assessee.

**GROUNDS NO.1.2 TO 1.9**

12. For benchmarking the international transactions qua Software Development Segment (SDS), the assessee challenged the selection of three comparables, namely, Infosys Technologies Limited, KALS Information System Limited and Tata Elxsi Limited by the TPO benchmarking the international transaction qua software development segment and sought exclusion of three companies, namely, Vishal Information Technologies Limited (now known as Coral Hub Limited), Triton Corporation Limited and Maple eSolutions Limited in ITES segment on account of

functional dis-similarity. We would take aforesaid comparables selected by the TPO for benchmarking SDS segment transactions one by one.

**SOFTWARE DEVELOPMENT SEGMENT**

**INFOSYS TECHNOLOGIES LIMITED**

13. The assessee challenged this comparable on three grounds, viz., (i) it operates as a full-fledged enterprise; (ii) it has significant intangibles; and (iii) this comparable is having 1231 times the turnover of the assessee and it is a giant in software development. However, ld. DR contended that huge difference in turnover is not a ground for exclusion of any comparable as the profitability element is a determining factor for inclusion or exclusion of any comparable company.

14. However, the issue as to the comparability of Infosys Technologies Limited as chosen by the TPO for benchmarking the international transactions of SDS segment of the assessee with a similarly placed company has been determined by Hon'ble Delhi High Court in case cited as **CIT vs. Agnity India Technologies Pvt. Ltd. (ITA 1204/2011 dated July 10, 2013)** (order available at page pages 223 to 228 of the compendium of case laws). For ready perusal, operative part of the aforesaid judgment is reproduced as under:-

"5. The tribunal has observed that the assessee was not comparable with Infosys Technologies Ltd., as Infosys Technologies Ltd. was a large and bigger company in the area of development of software and, therefore, the profits earned cannot be a bench marked or equated with the respondent, to determine the results declared by the respondent-assessee. In paragraph 3.3 the tribunal has referred to the difference between the respondent-assessee and Infosys Technologies Ltd. For the sake of convenience, we are reproducing the same:
"

| Basic Particular | Infosys Technologies Ltd. | Agnity India |
|---|---|---|
| Risk Profile | Operate as full-fledged risk taking entrepreneurs | Operate at minimal risks as the 100% services are provided to AEs |
| Nature of Services | Diversified-consulting, application design, development, re-engineering and maintenance system integration, package evaluation and implementation and business process management, etc. (refer page 117 of the paper book) | Contract Software Development Services. |
| Revenue | Rs.9, 028 Crore | Rs.16.09 Crores |
| Ownership of branded/proprietary products | Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProwe, Infosys mConnect, Also, the company derives substantial portion of its proprietary products (including its flagship banking product suite 'Finacle') | |
| Onsite Vs. Offshore | -As much as half of the software | The appellant provides only |

| | | |
|---|---|---|
| | development services rendered by Infosys are onsite (i.e., services performed at the customer's location overseas). And offshore (50.20%) (Refer page 117 of the paper book) than half of its service, income from onsite services. | offshore services (i.e., remotely from India) |
| Expenditure on Advertising/Sales promotion and brand building | Rs.61 Crores | Rs. Nil (as the 100% services are provide to AEs) |
| Expenditure on Research & Development | Rs. 102 crores | Rs. Nil |
| Other | | 100% offshore (from India) |

6. Learned counsel for the Revenue has submitted that the tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent-assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.

7. Learned counsel for the appellant Revenue during the course of hearing, drew our attention to the order passed by the TPO and it is pointed out that based upon the figures and data made available, the TPO had treated a third company as comparable when the wage and sale ratio was between 30% to 60%. By applying this filter, several companies were excluded. This is correct as it is recorded in para 3.1.2 of the order passed by the TPO. TPO, as noted above, however had taken three

> companies, namely, Satyam Computer Service Ltd., L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean.
>
> 8. It is a common case that Satyam Computer Services Ltd. should not be taken into consideration. The tribunal for valid and good reasons has pointed out that Infosys Technologies Ltd. cannot be taken as a comparable in the present case. This leaves L&T Infotech Ltd. which gives us the figure of 11.11 %, which is less than the figure of 17% margin as declared by the respondent-assessee. This is the finding recorded by the tribunal. The tribunal in the impugned order has also observed that the assessee had furnished details of workables in respect of 23 companies and the mean of the comparables worked out to 10%, as against the margin of 17% shown by the assessee. Details of these companies are mentioned in para 5 of the impugned order."

15. When we examine the profile of the assessee company vis-à-vis Infosys Technologies Limited in the light of the judgment in **CIT vs. Agnity India Technologies Pvt. Ltd.** (supra), there is no comparability for benchmarking the international transactions for the reasons inter alia that Infosys Technologies Limited is a giant risk taking company whereas, on the other hand, the assessee is a captive unit of its parent company and prone to minimum/ limited risk; that the Infosys Technologies Limited is having huge significant intangibles and having huge assets leading to the exorbitant turnover; that it is not in dispute that functional profile of assessee company and **CIT vs. Agnity India Technologies Pvt. Ltd.** is similar; that moreover, in the SDS segment, numerous companies are available for comparability. So, in the given circumstances, we are of the considered view that Infosys

Technologies Limited is not a valid comparable in this case, hence ordered to be excluded.

**KALS INFORMATION SYSTEMS LIMITED (KALS)**

16. Assessee sought exclusion of KALS on ground of functional dis-similarity as it is engaged in executing end to end project through the entire value chain of Software Development Life Cycle (SDLC) right from design to delivery, testing and training as has been incorporated by ld. DRP at page 9 of its order. The ld. AR for the assessee contended that so far as functions performed by the assessee company are concerned it only confines to cutting and testing in India whereas intangibles are created in the US and relied upon **Global Logic India Limited vs. DCIT (order dated June 6, 2015)** (order available at page pages 313 to 321 of the compendium of case laws)**, NetHawk Networks India Pvt. Ltd. (order dated November 6, 2013)** (order available at page pages 322 to 328 of the compendium of case laws) **and LG Soft India Private Limited (order dated March 22, 2013)** (order available at page pages 369 to 375 of the compendium of case laws).

17. Comparability of KALS with Global Logic India Pvt. Limited has been examined by the coordinate Bench, a similarly placed company which is also into the software development as in

the case of assessee company, and held to be not a comparable company. When we peruse TP study available at page 47 of the paper book-1, it is not in dispute that the assessee company is only into cutting and testing of software development in India whereas the core design is made in US and intangibles are created in US. Whereas, on the other hand, KALS has undisputedly drawn its income from software product and is engaged in executing end to end project through the entire value chain of software development life cycle and this issue has been determined by the coordinate Bench in the order (supra).

18. Moreover, when KALS has not prepared segment-wise data to prove its customized software development services and sale of proprietary products, it is difficult to fathom as to what extent the overall profit of this company have been impacted by the revenue from software products. So, we are of the considered view that KALS is also not a valid comparable, hence ordered to be excluded from the final list of comparables.

**TATA ELEXI LIMITED (TEL)**

19. Assessee challenged this comparable and sought its exclusion on the ground that TEL software development segment is into Embedded Product Design Services (Design & Development

of Hardware and Software), Industrial Design and Engineering (Mechanical Design with a focus on Industrial Design) and that its focus is on industrial design and amalgamation and visual effect (Animation and Special Effects) and that services are highly specialized and complex. Assessee relied upon the order passed by ITAT in case cited as **Virtusa (India) Pvt. Ltd. vs. DCIT (ITA No.1962/Hyd./2011 dated August 30, 2013)** (order available at page pages 286 to 293 of the compendium of case laws) **and Global Logic India Pvt. Ltd. vs. DCIT (ITA No.122/Del/2013 dated June 4, 2015)** (order available at page pages 313 to 321 of the compendium of case laws).

20. Coordinate Bench in **Virtusa (India) Pvt. Ltd. vs. DCIT** (supra) examined the comparability of TEL with Virtusa (India) Pvt. Ltd. which is also into software development services to its group company and ordered its exclusion on the ground that in response to the notice u/s 133(6) of the Act, the TEL has stated that it cannot be considered as comparable to any other software company due to its complex nature of business. The Hyderabad Bench of ITAT by following the decision of ITAT, Mumbai Bench held that due to complex nature of business as admitted by TEL itself, it cannot be treated as a valid comparable. Moreover, when numerous software development companies are available for

comparability to benchmarking international transaction, the TEL having complex business model cannot be a valid comparable in assessee's case.

21. Coordinate Bench in **Global Logic India Pvt. Ltd.** (supra) also examined the issue of comparability of TEL also with Global Logic India Pvt. Ltd. which is also a software development company though the TPO in TEL observed that it has two segments, namely, software development service segment and system integration of supports segment but assessee's objection that it is functionally different has been set aside.

22. Coordinate Bench thrashed the issue threadbare and came to the conclusion that sine TEL offers integrated hardware and package software solution, the same cannot be considered as comparable with the assessee company which is simply providing software related services. So, by following the order passed by the coordinate Bench, we are of the considered view that since the TEL software development and services segment consist of three sub-segments, namely, Embedded Product Design Services (Design and Development of Hardware and Software), Industrial Design and Engineering (Mechanical Design with a focus on Industrial Design) and Animation and Visual Effects (Animation and Special Effects), the same cannot be compared with assessee

company which is simply providing software development services without creating any intangible. So, we order to exclude this segment from the list of comparables.

**ITES SEGMENT**

**VISHAL INFORMATION TECHNOLOGIES LIMITED (NOW KNOWN AS CORAL HUB LIMITED) (VITL)**

23. Assessee sought exclusion of this comparable on the grounds inter alia that this comparable company is outsourced substantial part of its business to the other parties whereas the assessee company has used its own sources, infrastructure and manpower and relied upon the judgment cited as **Rampgreen Solutions Pvt. Ltd. vs. CIT (ITA 102/2015 dated August 10, 2015)** (order available at page pages 1 to 42 of the compendium of case laws). On the other hand, ld. DR opposed the exclusion of this company by relying upon para 35 of the ld. DRP order at page 30 wherein vide letter dated 05.02.2010 assessee relied upon data for the FY 2007-08 and not for FY 2006-07 required for the comparability of this company.

24. Comparability of VITL with Rampgreen Solutions Pvt. Ltd., undisputedly engaged in ITES services, has been examined by the Hon'ble Delhi High Court in judgment cited as ***Rampgreen Solutions Pvt. Ltd.*** and returned the following findings :-

> "38. In our view, even Vishal could not be considered as a comparable, as admittedly, its business model was completely different. Admittedly, Vishal's expenditure on employment cost during the relevant period was a small fraction of the proportionate cost incurred by the Assessee, apparently, for the reason that most of its work was outsourced to other vendors/service providers. The DRP and the Tribunal erred in brushing aside this vital difference by observing that outsourcing was common in ITeS industry and the same would not have a bearing on profitability. Plainly, a business model where services are rendered by employing own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing of services by Vishal would have no bearing on the profitability of the said entity."

25. Assessee's case is covered by ***Rampgreen Solutions Pvt. Ltd.*** (supra) because VITL's expenditure on employment cost was very small as against the proportionate cost of the assessee company which uses its own infrastructure and having permanent work force of its employees. Moreover, VITL outsourced most of its work to the other vendors/service providers as against the assessee company wherein services are rendered by employing own work force and by using its own infrastructure. So, on the basis of different cost structure, VITL is not a valid comparable for benchmarking the international transactions qua ITES segment .

**TRITON CORPORATION LIMITED AND MAPLE eSOLUTIONS LIMITED**

26. Assessee sought exclusion of both these companies on the grounds inter alia that Triton Corporation Limited acquired 100% stock in Maple eSolutions Limited during the assessment year

under consideration; that Directors/management of the company were involved in fraud due to serious allegations of financial irregularities and relied upon the orders cited as ***ITO vs. CRM Services India (P) Ltd. (ITA No.4068/Del/2009 & 4769/Del/2010 dated June306, 2011)*** (order available at page pages 158 to 169 of the compendium of case laws)***, Calibrated Healthcare Systems India Pvt. Limited vs. ACIT (ITA No.5271/Del/2012 dated December 4, 2014)*** (order available at page pages 191 to 200 of the compendium of case laws) ***and Avaya India (P) Ltd. vs. Addl.CIT (ITA No.5528/Del/2011 dated September 18, 2015)*** (order available at page pages 201 to 208 of the compendium of case laws)**.**

27. On the other hand, ld. DR opposed the exclusion on the ground that the allegations of fraud against both these companies were leveled way back in 1980 and mid-1990 and acquisition of Maple eSolutions Ltd. by Triton Corporation Limited has no effect on the profitability.

28. However, we are of the considered view that both the aforesaid companies have already been examined for comparability by the Tribunal in aforesaid judgments. **ITAT, Delhi Bench 'B', Delhi in CRM Services India (P) Ltd.** (supra) (order available at page pages 158 to 169 of the compendium of case laws)

categorically held that the business reputation of Rastogi Group owning Maple eSolutions Limited and Triton Corporation Limited under serious indictment and this fact has not been controverted by the revenue and as such, it is not safe to take these companies as valid comparables.

29. Similarly, coordinate Delhi Bench of ITAT in **Calibrated Healthcare Systems India Pvt. Ltd. vs. ACIT** (supra) (order available at page pages 191 to 200 of the compendium of case laws) has also excluded this company due to financial irregularities committed by their Directors and no contrary order has been brought on record by the revenue for inclusion of this company in the list of comparables and followed the order passed by the coordinate Bench in **CRM Services India (P) Ltd.** (supra).

30. Furthermore, the Tribunal in **Avaya India (P) Ltd.** (supra) (order available at page pages 201 to 208 of the compendium of case laws) also ordered to exclude both these comparables for benchmarking the international transactions on ground of financial irregularities and criminal proceedings initiated against the Director of the company.

31. Not only this, the ld. AR brought on record Director's report dated March 31, 2010 qua Triton Corporation Limited wherein there is a steep downfall in the income (sales and other income) for

the year ending 31.03.2010 which is Rs.7.59 lakhs as against Rs.4099.43 lakhs in the previous year ending 31.03.2009. Furthermore, it is categorically mentioned in Director's report that for most of the year, IT and ITES operations of the company continued to be suspended due to ongoing global crisis and unfavourable market conditions. In these circumstances, we order to exclude Triton Corporation Limited and Maple eSolutions Limited from the list of comparables for benchmarking international transactions.

**CORPORATE GROUNDS**

**GROUNDS NO.2.1, 2.2, 2.3, 2.4, 2.5, & 2.6**

32. Ld. AR for the assessee contended that the benefit of section 10A was granted to the assessee company in Assessment Year 2003-04 and continued upto AY 2006-07 and further relied upon the judgment passed by Hon'ble jurisdictional High Court in the case of **DDIT vs. Virage Logic International (ITA No.1108/2007 order dated 09.11.2016) & Ors.** However, on the other hand, ld. DR relied upon the order passed by ld. DRP/AO.

33. Undisputedly, the revenue has been extending the benefit of section 10A to the assessee company since AY 2003-04 upto AY 2006-07 and business model of the assessee company has not been changed qua AYs 2007-08 and 2008-09.

34. More so, the issue in controversy has been answered in favour of the assessee by the Hon'ble jurisdictional High Court in **DDIT vs. Virage Logic International** (supra) in the similar set of facts and circumstances, wherein following questions of law were framed :

> ***"(i) Whether the transfer of computer software by the Indian branch to the head office can be said to be 'sale' to the head office out of India?***
>
> ***(ii) Whether the assessee is entitled to claim benefit of Section 10A of the Income Tax Act, 1961, as the software is developed by the branch as per the requirement of Head Office and not sold to any third party?"***

35. Operative part of the judgment in **DDIT vs. Virage Logic International** (supra) is reproduced for ready perusal as under :-

> *"11. The decision in Moser Baer (supra) specifically dealt with the ITAT's logic and reasoning in the present case. There the Division Bench of this Court noted that transmission of computer software from an Indian entity to its head office on the basis of an arm's length price determined for export entitled the assessee to exemption under Section 10A. The Court is in agreement with the assessee's contention that mere omission of a provision kin to Section 80HHC Explanation (2) or the omission to make a provision of a similar kind of that encompasses Explanation 2(iv) to Section 10A by itself does not rule out the possibility of treatment of transfer/ transmission of software from the branch office to the head office as an export. A plain reading of Section 80-IA(8) shows that transfer of any goods or service "for the purpose of the eligible business" to "any other business carried on by the assessee", are covered. The only condition insisted upon by the Parliament was that the face value of such transactions was inconclusive and that the AO could determine the market value: for such transactions or sales. The incorporation in its entirety without any change in this provision [Section 80-IA(8)] to Section 10A through sub-Section (7) is for the purpose of ensuring that inter-branch transfers involving exports are treated as such as long as the other ingredients for a sale are satisfied.*

> *12. In this case the AO carried out the exercise mandated by Section 10A(7) read with Section 80-IA(8). Consequently the particulars of the price or cost reported by the assessee were not binding or conclusive but rather they attained finality in the assessment proceedings, after due addition. It underwent further inquiry/ scrutiny under Chapter X of the Act.*
>
> *13. It is undoubtedly aphorism that a legal fiction ought to be taken to its logical conclusion and the mind should not be allowed to boggle. This merely implies that a fiction should logically take a direction; the train of thought however cannot divert elsewhere. The absence of a "deemed export" provision in Section 10A similar to the one in Section 80HHC does not logically undercut the amplitude of the expression "transfer of goods" under Section 80-IA(8) – which is of now part of Section 10A. Such an interpretation would defeat Section 10A(7) entirely.*
>
> *14. For the above reasons, the Court is of the opinion that substantial questions of law framed are to be answered in favour of the assessee and against the Revenue. The ITA Nos. 1108/2007, 1249/2009 and 173/2016 are, accordingly, dismissed. It is clarified, however, that the AO is at liberty to give tax effect as a consequence of the interpretation adopted by this Court."*

The ratio of the judgment in Virage Logic International (supra) is that the transfer of computer software, by the Indian branch to the Head Office is not sale, having been developed as per requirement of Head Office, and not being sold to third party and as such entitled for the benefit of section 10A of the Act.

36. So following the law laid down by Hon'ble High Court in **DDIT vs. Virage Logic International** (supra), we are of the considered view that since assessee company has exported computer software from India to its Head Office in US as per its requirement and not sold to any third party, it is entitled to exemption u/s 10A, so AO / DRP have erred in denying the benefit of

section 10A to the assessee. So, the matter is restored to the AO to decide afresh in accordance with the law laid down by the Hon'ble jurisdictional High Court and the directions issued herein before. So, Grounds No.2.1, 2.2, 2.3, 2.4, 2.5, & 2.6 are determined in favour of the assessee.

37. Ground No.3 needs no adjudication as the same is consequential in nature.

38. Ground No.4 is premature, hence needs no adjudication.

39. In view of what has been discussed above, order passed by TPO/AO/DRP qua transfer pricing adjustment grounds as well as corporate grounds are hereby set aside and matter is restored to the TPO/AO to decide afresh in the light of the directions issued herein before. Resultantly, the appeal is allowed for statistical purposes.

**Order pronounced in open court on this 23rd day of December, 2016.**

| | |
|---|---|
| **Sd/-** | **sd/-** |
| **(S.V. MEHROTRA)** | **(KULDIP SINGH)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**Dated the 23rd day of December, 2016**
**TS**

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT (A)
5.CIT(ITAT), New Delhi. AR, ITAT

NEW DELHI.