

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENGALURU BENCH 'C', BENGALURUBEFORE SHRI. VIJAY PAL RAO, JUDICIAL MEMBER  
AND  
SHRI. S. JAYARAMAN, ACCOUNTANT MEMBERI.T(TP).A No.1139/Bang/2011  
(Assessment Year : 2004-05)

Swiss Re Shared Services (India) P. Ltd,  
2<sup>nd</sup> to 6<sup>th</sup> floor, Vaswani Centropolis,  
No.21, Langford Road, Bengaluru 560 027 .. Appellant  
PAN : AFCPR5285B  
v.

Deputy Commissioner of Income-Tax,  
Circle 12(3), Bengaluru .. Respondent

I.T(TP).A No.1205/Bang/2011  
(Assessment Year : 2004-05)

Deputy Commissioner of Income-Tax,  
Circle 12(3), Bengaluru .. Appellant  
v.

Swiss Re Shared Services (India) P. Ltd,  
2<sup>nd</sup> to 6<sup>th</sup> floor, Vaswani Centropolis,  
No.21, Langford Road, Bengaluru 560 027 .. Respondent  
PAN : AFCPR5285B

Assessee by : Shri. Sampath Raghunathan, Advocate  
Revenue by : Shri. M. K. Biju, JCIT

Heard on : 07.02.2017  
Pronounced on : 03.05.2017

**ORDER****PER S. JAYARAMAN, ACCOUNTANT MEMBER :**

These appeal and cross appeal are filed by the assessee and the Revenue against the order of the CIT (A) -IV, Bengaluru, dt.23.09.2011, for the assessment year 2004-05.

02. Swiss Re Shared Services (India) Private Limited , the assessee, was incorporated on August 18, 2000, is a wholly owned subsidiary of Swiss Reinsurance Company, Zurich. It is providing IT Enabled Back-Office Services in the field of insurance for its global affiliates viz contract administration, claims administration, technical insurance accounting support and other services. It is registered under the Software Technology Parks of India ('STPI') Scheme with the Government of India, based in Bangalore and is eligible to claim tax benefit under section 10A . For the assessment year 2004-05, on its international transactions in providing ITE Services (non-voice based) to its group companies, the assessee had undertaken analysis selecting the TNMM as the most appropriate method. For the 16 companies identified as comparables , it arrived the operating profit earned on operating costs ,after providing 2% working capital adjustment, at 14% . Since the assessee's operating profit earned on operating costs was at 9 % , it considered that the price charged by the it was within +5% and hence its transactions are at arm's length.

04. The TPO did not concur with the TP analysis undertaken by the assessee. Before the TPO , the assessee proposed another 6 comparables. In his TP order dt.12.12.2006, the TPO retained 5 comparables , out of 22 chosen by the assessee , introduced 3 new comparables and computed the average net margin of the comparables at 33.33 % on operating cost (after providing a working capital adjustment of 1.82%) as against 14% originally computed by the assessee. Accordingly, the TPO made an

addition of Rs.1,58,56,899/- to the total income in connection with its international transaction.

05. On the assessee's objections, the CIT(A) excluded 3 comparables (2 on the ground of RPT and one on the ground of abnormal losses i.e. normalisation of expenses made by the TPO is rejected), made certain corrections on the margin computations and computed the average net margin of the remaining 5 comparables at 33.19 % on operating cost (after providing a working capital adjustment of 1.15%) and thus confirmed the addition at Rs.1,02,78,529/-only. Aggrieved, the assessee filed this appeal with the following grounds .

**1 Assessment and reference to Transfer Pricing Officer ('TPO') are bad in law**

- a) The assessment order passed by the DCIT under section 143(3) of the Income-tax Act, 1961 ('the Act') and the order passed by the Commissioner of Income-tax (Appeals)-IV, ('the CIT(A)') under section 250 of the Act, are bad in law and on facts.
- b) The CIT(A) erred in determining the arithmetical mean of arm's length net cost plus margin at 33.19% and a transfer pricing adjustment of Rs. 1,02,78,529.
- c) The CIT(A) erred in law in not appreciating the meaning of the erstwhile phrase 'having regard to' in sections 92 and 92CA(4) of the Act.
- d) The CIT(A) erred in law in confirming that the amendment made to section 92CA(4) *vide* the Finance Act, 2007 was to set right the lacuna in the said section.

**2 Determination of arm's length price**

- a) The CIT(A) erred in determining a transfer pricing adjustment of Rs 1,02,78,529 towards Information Technology ('IT') Enabled services by substituting the arm's length price as determined by the Appellant.
- b) The CIT(A) erred in rejecting the value of international transaction as recorded in the books of account, as the arm's length price.

**3 The fresh comparable search undertaken by the TPO is bad in law**

- a) The CIT(A) erred in law in holding that the fresh comparability analysis using non contemporaneous data conducted by the TPO and further substituting the Appellant's analysis with fresh benchmarking analysis by the TPO on his own conjectures and surmises. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the TPO is liable to be quashed.
- b) The TPO erred in not sharing the fresh comparability analysis conducted by him at the time of assessment.
- c) On the facts and in the circumstances of the case and in law, the TPO erred and the CIT(A) further erred in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transaction which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act.

**4 Determination of arm's length price by the TPO**

- a) The AO/TPO grossly erred on facts and the CIT(A) further erred in confirming the benchmarking of IT Enabled services transactions of the Appellant with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed and risk undertaken by the Appellant *vis-à-vis* comparable companies.
- b) The CIT(A) erred in facts in confirming the comparability analysis conducted by the TPO, without analysing the functional and risk profile of Appellant *vis-à-vis* comparables selected in the Transfer Pricing Order.
- c) The AO/TPO erred on facts in rejecting most of the comparable companies arrived at in the Transfer Pricing Study.

**5 Erroneous data used by the AO/TPO**

- a) The AO/TPO has erred in law and the CIT(A) further erred in confirming the use of data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.
- b) The AO/TPO erred in law and the CIT(A) further erred in not applying multiple-year data while computing the margin of alleged comparable companies.

**6 Non-allowance of appropriate adjustments to the comparable companies, by the AO/TPO**

The AO/TPO erred in law and on facts and the CIT(A) further erred in not allowing appropriate adjustments under Rule 10B to account for differences in risk profile between the Appellant and the comparable companies.

**7 Interest levied under section 234B of the Act**

The CIT(A) erred in confirming the interest levied by the AO under section 234B of the Act.

**8 Relief**

- a) The Appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.
- b) The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, the above grounds of appeal, at any time before or during the hearing of the appeal.
- c) Further, the Appellant prays that the adjustment in relation to Transfer Pricing matters made by the AO/TPO and upheld by the CIT(A) is bad in law and is liable to be deleted.

06. Subsequently, the assessee filed additional grounds of appeal with the following submissions:

1. The above referred appeal is in respect of the order passed by the learned Deputy Commissioner of Income-Tax, Circle 12(3), ('Assessing Officer' / 'AO'). The Assessing Officer had passed the Assessment Order against which the Appellant had filed objection before the Commissioner of Income Tax (Appeals) ('CIT (A)'). The CIT(A) partially dismissed the objections and confirmed the assessment order. Pursuant to the CIT(A) Order, the Appellant is in appeal before the Hon'ble Bench.

2. Without prejudice to the grounds of appeal filed by the Appellant before the Hon'ble Bench on 22 November 2011, the Appellant wishes to raise additional grounds of appeal in relation to the separate benchmarking carried out by the Transfer Pricing Officer ('TPO').
3. The additional grounds of appeal pertain to rejection of Tricom India Limited. The referred comparable was part of the Transfer Pricing Study conducted by the Appellant. The TPO had also selected this company as comparable in the order u/s 92CA of the Act.

With respect to rejection of a comparable, the ground pertains to question of law and facts. The Appellant submits that it is not estopped from rejecting companies selected as comparables in the Transfer Pricing study, based on facts available in the public domain and also relying on the decision of the Hon'ble Special Bench in the case of Dy. CIT v. Quark Systems (P.) Ltd. [2010] 38 SOT 307 (Chd.- SB)

4. Further, the TPO had selected Vishal Information Technologies Limited, Fortune Infotech Limited and Airline Financial Support Service (India) Limited as comparables. The Appellant had placed its objections against Vishal before the CIT(A).

The Appellant prays for the rejection of these comparables based on information available in the public domain and subsequent judicial pronouncements.

With respect to rejection of a comparable, the ground pertains to question of law and facts. The Appellant submits that it is not estopped from rejecting companies selected by the TPO in his TP Order based on facts available in the public domain and subsequent judicial pronouncements.

5. Also, the TPO had erroneously computed the margin of Nucleus Netsoft & Gis India Limited.
6. The Appellant humbly prays that the additional grounds be admitted and adjudicated along with the other grounds of appeal in the course of hearing of the appeal.

#### 6.1 Assessee's prayer for admission of additional grounds are as under :

1. The above referred appeal is in respect of the order passed by the learned Deputy Commissioner of Income-Tax, Circle 12(3), ('Assessing Officer'/ 'AO'). The Assessing Officer had passed the Assessment Order against which the Appellant had filed objection before the Commissioner of Income Tax (Appeals) ('CIT(A)'). The CIT(A) partially dismissed the objections and confirmed the assessment order. Pursuant to the CIT(A) Order, the Appellant is in appeal before the Hon'ble Bench.
2. Without prejudice to the grounds of appeal filed by the Appellant before the Hon'ble Bench on 22 November 2011 and 29 January 2016, the Appellant wishes to raise

additional grounds of appeal in relation to the separate benchmarking carried out by the Transfer Pricing Officer ('TPO').

3. The additional grounds of appeal pertain to rejection of Tricom India Limited, Ultramarine Pigments Limited, Wipro BPO Solutions Limited, Fortune Infotech Limited and Allsec Technologies Limited as comparables.

The Appellant prays for the rejection of these comparables based on information available in the public domain and subsequent judicial pronouncements.

With respect to rejection of a comparable, the ground pertains to question of law and facts. The Appellant submits that it is not estopped from rejecting companies selected by the TPO in his TP Order based on facts available in the public domain and subsequent judicial pronouncements.

4. The Appellant humbly prays that the additional grounds be admitted and adjudicated along with the other grounds of appeal in the course of hearing of the appeal.

## 6.2 Additional grounds of appeal :

- 1 The learned TPO erred in selecting Tricom India Limited, Vishal Information Technologies Limited and Fortune Infotech Limited as comparable in the order u/s 92CA despite these companies being functionally dissimilar to the services rendered by the Appellant.
- 2 The learned TPO erred in selecting Airline Financial Support Service (India) Limited as comparable in the order u/s 92CA despite Airline Financial Support Service (India) Limited being a JV between Tata Sons & Swissair and predominantly a captive service provider.
- 3 The learned TPO has erred in incorrectly computing the margin of Nucleus Netsoft & Gis India Limited.

07. Aggrieved on the decision of the CIT (A), the Revenue also filed its cross appeal and revised its grounds as under:

1. The order of the Learned CIT (A) in so far as it relates to the following grounds is opposed to law and facts of the case.
2. The Ld.CIT (A) erred in holding that all companies having related party transactions ought to be excluded as comparables irrespective of the percentage of related party transactions.
3. The learned CIT (A) erred in holding that foreign exchange loss or gain, amortization expenses of pro-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc from the cast base are parts of operating cost or operating income, as the case may be, when the TPO has excluded this data from that of the comparables.
4. The learned CIT (A) erred in holding that the assessee is eligible for a standard deduction of 5% from the Arm's Length Price (ALP) determined by the TPO/ AO.
5. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

08. On the admission of additional grounds we heard the rival submissions and admit them on the merits of the assessee's submissions extracted, supra, and also for the reason that they are based on precedents set by the Tribunal and does not require any additional evidence/ examination by the lower authorities.

09. Before us, the AR pressed for ground no 4 a & b and through the above additional grounds rejection of Tricom India Private Ltd, Ultramarine & Pigments Ltd, Wipro BPO Solutions Ltd, Fortune Infotech Ltd, Vishal Information Technology Ltd, Air Line Financial Support Services India Ltd and rectification of NCP margin of Nucleus Netsoft & Gis India Ltd . On rejection of Tricom India Private Ltd , Wipro BPO Solutions Ltd, Fortune

Infotech Ltd and Vishal Information Technology Ltd, he relied on this Tribunal decision in the case of 24/7 Customer.Com P Ltd v DCIT , Circle 11(2), Bangalore [2013] 140 ITD 344 (ITAT[Bang]) of assessment year 2004-05 in IT A No. 227 (Bang) of 2010 , which was engaged in the business of call centre services exclusively to its AEs. On rejection of Ultramarine & Pigments Ltd, the AR relied on the Hyderabad Tribunal decision in the case of Brigade Global Services P Ltd v ITO [2013] 33 taxmann.com 618 (Hyd) which was engaged in providing back office processing services.

9.1 Let us examine the relevant portion of the order from 24/7 Customer.Com P Ltd v DCIT , Circle 11(2), Bangalore [2013] 140 ITD 344 (ITAT[Bang]) as under :

#### 15. Comparables Companies Owning Intangibles

15.1 In Ground No. 1, the assessee has contended that the learned CIT (Appeals) erred in accepting comparable companies owning intangibles as proposed by the TPO. The learned counsel for the assessee submitted that the assessee is a captive service provider engaged in the business of providing call centre services and would fall under the IT Enabled service sector. It is argued that while the assessee does not own brand intangibles some of the comparables chosen by the TPO have their own, software products and hence own intangibles. It is submitted that such companies, having the ability to deliver services, penetrate the market and provide faster delivery, ought not to have been taken as comparable companies as has been done in the case of Wipro BPO Ltd., Tricom India Ltd. and Fortune Infotech Ltd. It is urged that these companies ought to be excluded from the list of comparables. The learned counsel for the assessee argued that intangible assets, in the normal commercial sense, are those which have intrinsic productive value, even though they may not have any intangible form and substance such as Research & Development, Patents and Software. He quoted from the synthesis report of the OECD, which forms part of the paper books, to stress that intangible assets play an important role in value creation and enabling productivity and efficiency to reap economic gains. It was contended that in the service industry, service providers who have better brand or other intangible assets get better premium for their services, as in the case of some of the comparable companies selected by the TPO. Whereas, it is submitted that, the assessee is only rendering call centre services

and does not possess any intangibles nor does it derive any benefit from intangibles in providing these services.

15.2 The learned Departmental Representative on his part supported the orders of the learned CIT (Appeals) which he contended was well explained. It was submitted by the learned Departmental Representative that the assessee had not pointed out any provisions in the Act or Rules or OECD guidelines which imposes any prohibition in taking comparables with intangibles so long as there is functional similarity of comparables vis-à-vis the tested party. The learned Departmental Representative argued that Brands can give business but not profits. The learned Departmental Representative pointed out the assessee itself does not have any consistent stand in the matter as in its own T.P. Study the assessee has taken companies like Tata Share Registry and Max Health which had their own intangibles. The learned Departmental Representative submitted that the arguments put forth by the assessee shifted to suite its own purpose. In these circumstances, the learned Departmental Representative contended that the findings of the learned CIT (Appeals) be upheld.

15.3.1 We have heard both parties and have carefully perused and considered the submissions made, details filed and material on record. It is a well accepted principle that only those companies which are on similar standards need to be considered for comparability. In this context, a co-ordinate bench of this Tribunal in the case of Genisys Integrating Systems (India) (P.) Ltd. (supra ) has reiterated that all the comparables have to be compared on similar standards. Therefore, companies which possess their own unique software intangibles cannot be compared with the assessee, as the former would derive significant advantage from unique software compared with the assessee, which is performing call centre services for it's A.E. in the USA.

15.3.2 In the case of M/s. Wipro BPO Ltd., this comparable is under consideration for exclusion as a comparable, in this case for this Assessment Year 2004-05, on account of the application of the turnover filter of Rs. 1 Crore to Rs. 200 Crores. (refer para 14.3 supra)

15.3.3 In respect of M/s. Tricom India Ltd., the learned counsel for the assessee contended that it has registered an abnormal growth of 33% increase in PAT in the relevant period due to the fact that it has developed its unique software to provide BPO services to its customers. The learned counsel for the assessee referred to the Annual Report of this comparable, wherein it is mentioned that it does specialized services such as Title Plant maintenance and Electronic Data discovery which gives it an edge over other Indian Company competition thereby enabling it to generate higher revenues and margins. It was also submitted by the learned counsel for the assessee that it has a process of continuous in house R & D process for upgradation of software and training its professionals to develop its own software to cater to the needs of its clients.

On appraisal of the submissions and the material on record, it would certainly stand to reason that a company having unique software developed in house which also renders specialized services in its area of specialization gets that sort of competitive edge that gives it an advantage. Applying the principle that companies which are on similar standards only should be taken as comparables, we hold that this company

which has unique intangibles cannot be taken as a comparable for the assessee and accordingly direct the Assessing Officer / TPO to exclude it from the list of comparables in this case.

M/s. Fortune Infotech Ltd.

15.3.4 The learned counsel for the assessee contended that this company was using web based software, unique technology and technical know how imported from its business partner for providing BPO services and submitted letter dt.11.9.2012, enclosing web site extracts detailing the intangibles developed by this company.

On perusal of the details furnished and submissions made, it is seen that this company has developed its own software called "Finetran" and "image index" for performing specialized services in medical transcription and patient record management. On appraisal of the same, we are of the opinion that this comparable company has developed unique software from which it would derive substantial benefits/advantages when compared with the assessee which is undertaking pure call centre services. Applying the principle that companies which are on similar standards only should be taken as comparables, we hold that this company which has unique intangibles cannot be taken as a comparable for the assessee and accordingly direct the Assessing Officer/TPO to exclude it from the list of comparables in this case.

16. Parent Company Losses

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17. Individual Companies for Comparability

17.1 Having held that there was no infirmity in the action of the TPO in rejecting the TP Study of the assessee and having decided the principles as discussed in the preceding paragraphs, we now proceed to examine the individual companies chosen as comparables. As mentioned earlier, the assessee had selected a list of 7 companies in the TP Study. During the transfer pricing audit proceedings, the assessee updated the comparability analysis based on current year's data and submitted a list of seven comparable companies. The TPO considered the updated set of comparables submitted by the assessee and come up with a final set of eight comparable companies, which are as under :

S.No.	Name of the comparable	Operating Revenue	Operating cost (OC)	Operating Profit (OP)	OP/OC
1.	Nucleus Netsoft & G.S. India Ltd.	1.66	1.94	0.28	16.87 %
2.	Vishal Information Technologies Ltd.	9.37	13.88	4.51	48.13 %
3.	Wipro BPO Ltd.	322.3	430.31	108.01	33.51 %
4.	Tricom India Ltd	6.34	9.24	2.90	45.74 %
5.	Fortune Infotech Ltd	8.08	11.28	3.30	40.84 %
6.	Spares Telesystems & Solutions Ltd.	10.32	15.44	4.57	40.10 %
7.	Ultramarine Pigments Ltd.	6.18	10.99	3.91	63.27 %
8.	Allsec Technologies Ltd.	24.10	24.94	0.83	3.44 %
		Arithmetical Mean	36.49%		

From the record, it is seen that the TPO rejected the transfer pricing documentation mentioned by the assessee mainly on three parameters/defects namely :

- (i) The assessee did not use data of the relevant financial year i.e. 2003-04
- (ii) The assessee rejected certain companies as comparables even though they are functionally comparable.
- (iii) The assessee considered certain companies catering to the domestic sector, whereas the assessee is catering to the export sector.

17.2 Nucleus Netsoft GIS India : In respect of this comparable, both the assessee and the TPO agree that there is no dispute as this is a comparable company.

17.3 Vishal Information Technologies Ltd. (VIT) In the case of this comparable, we find that the Mumbai Tribunal in the case of Asstt. CIT v. Maersk Global Service Center (India) (P.) Ltd. [2011] [133 ITD 543](#) / 16 taxmann.com 47 has held that since Vishal Information Technologies Ltd is outsourcing most of its work it has to be excluded from the list whereas the assessee in the cited case was carrying out the work by itself. In the instant case of the assessee also the assessee was carrying out its work by itself whereas in the case of VITL, it is outsourcing most of its work. We are therefore of the considered opinion that the decision of the ITAT, Mumbai in the cited case on the issue of excluding VITL as a comparable squarely applies. This decision was followed by the decision of the co-ordinate bench of this Tribunal in the case of Netlinx India (P.) Ltd in ITA No.454/Bang/2011 dt.19.10.2012] wherein it was held that Vishal Information Technologies Ltd cannot

be considered as a comparable. We, therefore, respectfully following the decision of the Mumbai Tribunal in the case of Maersk Global Service Centre (India) (P.) Ltd. case (supra) direct the Assessing Officer/TPO to exclude Vishal Information Technologies Ltd. from the list of comparables.

Wipro BPO Ltd.

17.4 As per the details on record, the turnover/Revenue of Wipro BPO Ltd. in the period relevant to Assessment Year 2004-05 is Rs. 322 Crores. Further, this company having the influence of "Wipro" brand may be seen as having its unique intangibles. Following the decision of the co-ordinate bench of this Tribunal in the case of Genisys Integrating Systems (India) (P.) Ltd. (supra), we have already held that companies whose turnover is outside the range of Rs. 1 Crore to Rs. 200 Crores are to be excluded from the set of comparables and accordingly direct the Assessing Officer/TPO to exclude Wipro BPO Ltd from the list/set of comparable companies for the assessee's case in Assessment Year 2004-05.

Tricom India Ltd.

17.5 This comparable has already been considered and dealt with by us in para 15.3.3 of this order (supra) wherein we have directed the Assessing Officer/TPO to exclude it from the list of comparables for the assessee's case in Assessment Year 2004-05.

Fortune Infotech Ltd.

17.6 This comparable has also been considered and dealt with by us in para 15.3.4 of this order (supra) wherein we have directed the Assessing Officer/TPO to exclude it from the list of comparables for the assessee's case for Assessment Year 2004-05. "

Thus, the Tribunal has examined and excluded Tricom India Private Ltd , Wipro BPO Solutions Ltd, Fortune Infotech Ltd and Vishal Information Technology Ltd from the list of comparables on three counts viz those comparables which have RPT in excess of 15% of the total turnover after due verification, on the turnover filter of Rs one crore to Rs.200 crore (Wipro BPO Solutions Ltd was excluded) and on functional dissimilarity (Tricom India Private Ltd , Wipro BPO Solutions Ltd, Fortune Infotech Ltd and Vishal Information Technology Ltd were excluded). Applying it, we direct the Assessing Officer/TPO to exclude, Tricom India Private Ltd ,

Wipro BPO Solutions Ltd, Fortune Infotech Ltd and Vishal Information Technology Ltd from the list of comparables on functional dissimilarity. The Tribunal in the above decision upheld exclusion of Wipro BPO Solutions Ltd on the basis of turnover filter of Rs one crore to Rs.200 crore also. Earlier, the ITAT had accepted the turnover range of Rs. 1 to 200 crores and observed that this range cannot be fixed, as facts may vary from case to case. But this method of adopting 200 crores without any proper basis or logic resulted in unreasonable judgements. Hence, the ITAT in McAfee ruling held that a range of upper limit at ten times and lower limit of ten times i.e., one tenth can be adopted. The ITAT in that case also held that there could margin of variations but these broad parameters could be adopted on uniform basis. In the assessee's case, its turnover, as per assessment order is Rs.9.35 crores. Therefore, following McAfee ruling, the range would be 0.95 crore to 93.5 crores. As per the Tribunal decision, supra, the turnover/Revenue of Wipro BPO Ltd. in the period relevant to Assessment Year 2004-05 is Rs. 322 Crores. Therefore, Wipro BPO Solutions Ltd does not fall within the said range and hence it should be excluded on turnover filter also. To this extent, the assessee's appeal is allowed. However, the Revenue is on appeal against the decision of the CIT (A) on the application of the 0% RPT filter. Applying the above decision, we direct the Assessing Officer/TPO to exclude those comparables which have RPT in excess of 15% of the total turnover after due verification. To this extent, the Revenue's appeal is also allowed.

10. The AR pleaded that the comparable Ultramarine Pigments Ltd is to be excluded on various grounds including on abnormal margin and the gist his submissions are extracted as under :

**Ultramarine Pigments Limited ought to be rejected:**

**1 Fails Employee Cost Filter (Pg. 17 of the Annual Report):**

Particulars	Amount (in INR)
Employee Cost	63,532,055
Director's Remuneration	5,332,269
Total Employee Cost	68,864,324
Total Sales	539,290,155
<b>Employee Cost Filter</b>	<b>11.78%</b>
Sales	365,002,783
Income from processing	73,657,815
Income from IT enabled services	100,629,557
<b>Total</b>	<b>539,290,155</b>

Further, no segmental employee details break-up has been provided in the annual report.

Swiss Re's Employee Cost has been provided below:

Particulars	Amount (in INR)
Salaries and bonus	29,241,901
Contribution to provident fund	1,287,438
MD's Remuneration	8,703,282
Staff Welfare Expenses	1,144,809
<b>Total Employee Cost</b>	<b>40,377,430</b>
Total Sales	93,535,571
<b>Employee Cost Filter</b>	<b>43.17%</b>

**2 ITeS Revenue to total sales filter (Pg. No. 17 of the Annual Report)**

Particulars	Amount (in INR)
ITES Revenue	100,629,557
Total Sales	539,290,155
<b>Employee Cost Filter</b>	<b>18.66%</b>

Further, the Assessee would also like to highlight that the ITES Revenue as per the segmental workings differ from the ITES revenue as per the profit and loss account:

ITES Revenue as per the Segmental Reporting – Pg. 26 of the Annual Report – INR 100,918,630

ITES Revenue as per the profit and loss account – Pg 17 of the Annual Report – INR 100,629,557

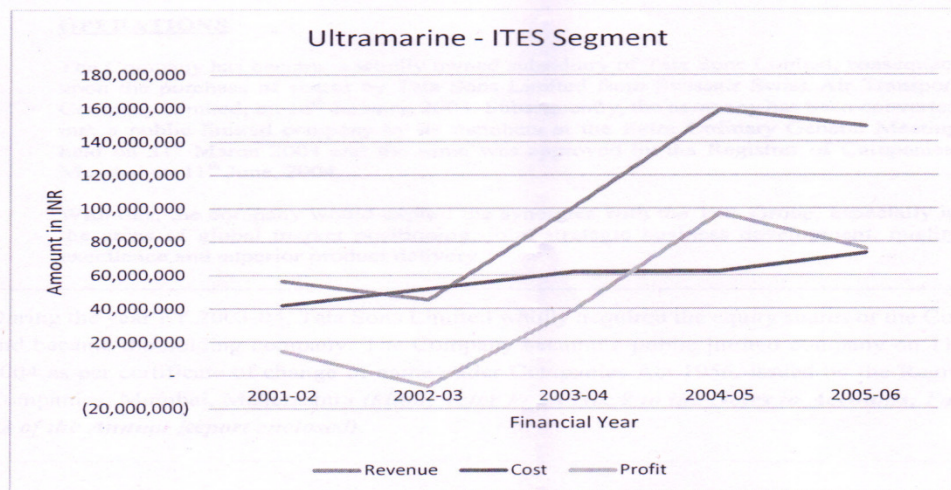
Difference in both the ITES Revenues amount to INR 289,072

### 3 Abnormal Margin:

The margins fluctuation of Ultramarine Pigments Limited has been provided below for your kind perusal

FY	Revenue	Cost	Profit	NCP
2001-02	56,327,407	41,924,569.22	14,402,837.78	34.35%
2002-03	45,182,399	51,706,777.88	(6,524,378.88)	-12.62%
2003-04	100,918,630	61,875,652.78	39,042,977.22	63.10%
2004-05	159,250,896	62,208,881.74	97,042,014.26	155.99%
2005-06	149,249,266	73,303,374.21	75,945,891.79	103.60%

The variation in margins of Ultramarine Pigments Limited over the years have been pictorially represented below:



and the AR relied on the Hyderabad Tribunal decision in the case of Brigade Global Services P Ltd v ITO [2013] 33 taxmann.com 618 (Hyd) which was engaged in providing back office processing services. He has submitted that if this comparable is included inspite of this submission, then the comparable Allsec Technologies Ltd should also be included despite abnormal losses vide his appeal grounds 4a, 4b & the additional grounds. Let us examine the relevant portion of the order from Brigade Global Services P. Ltd v. ITO [(2013) 33 taxmann.com 618 (Hyd) as under :

"39. The authorised representative submitted in respect of Ultramarine & Pigment Ltd. (item No. 17 in the chart) introduced by the assessee and accepted by the lower authorities but later on rejected by the assessee on the ground that during the current financial year, the company had made abnormal profits. The authorised representative submitted that the company showing abnormal profits, which is beyond the norms or the standards of industry cannot be taken as comparables. Reliance for this proposition is placed on the decision of the Mumbai Bench in the cases of Adobe Systems India P. Ltd. v. Addl.CIT [2012] 14 ITR (Trib) 84 (Delhi), ITO v. Saunay Jewels P. Ltd. [2010] [42 SOT 4](#) (Mum), Mentor Graphics (Noida) P. Ltd. v. Deputy CIT [2007] [109 ITD 101](#) (Delhi) and the case of the Income-tax Appellate Tribunal, Pune Bench in the case of E-Gain Communication P. Ltd. v. ITO [2008] [118 TTJ \(Pune\) 354](#) and Sapient Corporation P. Ltd. v. Deputy CIT [2012] [15 ITR \(Trib\) 285](#) (Delhi).

40. The Departmental representative submitted that M/s. Ultramarine Pigments Ltd. cannot be excluded from comparables. According to the assessee's counsel, the Assessing Officer was not correct in accepting this company which has 123 per cent. increase in revenue in one year, as a comparable in this case. However, the assessee itself has proposed this company as a comparable in their transfer pricing documentation. Further, it is seen that the Transfer Pricing Officer has considered only the segmental results, pertaining to the financial year 2003-04 in the case of the above company for comparability analysis in this case. As per the financial data pertaining to such segmental results, the amount of income is shown at Rs. 10.9 crores, which is comparable, keeping in view the turnover of Rs. 13.05 crores shown by the assessee for the assessment year 2004-05. It is also relevant to mention here that, the Transfer Pricing Officer has noted that the extraordinary profits earned in subsequent financial year 2004-05, is not relevant as the matter here pertains to financial year 2003-04. Having regard to such facts, the Transfer Pricing Officer was justified in considering the segmental results in respect of the above company, for comparability analysis in this case. Accordingly, the Assessing Officer was also justified in accepting such segmental results in respect of the above company for comparability analysis in this case.

41. We have heard both parties on this issue. It is an admitted fact that the cases which were showing abnormal trading results, as discussed in the earlier paras, by relying on the order of the Bangalore Bench in the case of Genisys Integrating Systems (India) P. Ltd. [2012] [15 ITR \(Trib\) 475](#) (Bang), companies showing abnormal results cannot be considered as comparables. It is an admitted view that the companies making abnormal profits as compared to the assessee cannot be considered as comparables while determining the arm's length price. For this purpose we place reliance on the decision of the Special Bench in the case of Deputy CIT v. Quark Systems P. Ltd. [2010] [4 ITR \(Trib\) 606](#) (Chandigarh) [SB]. Accordingly, in our opinion, super profit companies per se are liable to be excluded from the comparables."

From the above, it is clear that the assessee has made out a clear case in its favour. Since, the Tribunal after due analysis has excluded

Ultramarine Pigments Ltd, applying it the AO/TPO is directed to exclude this comparable on the ground of super profits .Assessee's grounds of appeal allowed to this extent.

11. The next issue is seeking exclusion of the comparable Air Line Financial Support Services India Ltd. The AR pleaded that despite this comparable being a JV between Tata Sons & Swissair and a predominantly a captive service provider , it is included as a comparable the gist his submissions are extracted as under:

*Airline Financial Support Services*

- Airline Financial Support Services ('AFSS or the Company') was incorporated in 1992 as a purely captive arm of Swissair to provide the core critical and complex services in airline revenue accounting for the airline.
- The Tata Group acquired Swiss Airline's 75.1% stake in the joint venture. AFSS has become a wholly owned subsidiary of Tata Sons Limited, consequent to the purchase of shares by Tata Sons Limited from Swiss Air Transport Company Limited, on 16<sup>th</sup> January 2004. The Company has been converted into a public limited company by its members (*refer Page No. 6 of the Annual Report enclosed*).

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**OPERATIONS**

The Company has become a wholly owned subsidiary of Tata Sons Limited, consequent upon the purchase of shares by Tata Sons Limited from Swissair Swiss Air Transport Company Limited, on 16<sup>th</sup> January, 2004. Subsequently, the company has been converted into a public limited company by its members at the Extra Ordinary General Meeting held on 31<sup>st</sup> March 2004 and the same was approved by the Registrar of Companies, Mumbai on 11<sup>th</sup> June, 2004.

With this, the company would exploit the synergies with the Tata Group, especially in the areas of global market positioning, joint strategic business development, quality excellence and superior product delivery.

- During the year FY 2003-04, Tata Sons Limited wholly acquired the equity shares of the Company and became the holding company. The Company became a public limited company on 11<sup>th</sup> June 2004 as per certificate of change of name under Companies Act 1956, issued by the Registrar of Companies, Mumbai, Maharashtra (*kindly refer Point No. 9 to the Notes to Accounts, Page No. 22 of the Annual Report enclosed*).

**9. Holding Company**

During the year, Tata Sons Limited wholly acquired the equity shares of the Company and became the holding company. Consequent to the acquisition by Tata Sons Limited, the Company had applied for registration as a public limited company. The Company became a public limited company on 11<sup>th</sup> June 2004, as per certificate of change of name under the Companies Act, 1956, issued by Registrar of Companies, Maharashtra, Mumbai.

We have heard the rival submissions and gone through relevant material. Since the lower authorities had no occasion to examine these aspects , we deem it fit to remit this issue back to the TPO for re-examination and re-adjudication in accordance with law after affording due opportunity to the assessee.

12. The next issue is that the Revenue's appeal ground that the Ld CIT(A) erred in holding that foreign exchange loss or gain, amortisation expenses of pre-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc from the cost base are parts of operating cost or operating income, as the case may be, when the TPO has excluded this data from the comparables.

In this regard, the CIT (A) held that "It is also submitted that while computing the margins of the comparable companies, the learned TPO has excluded certain costs such as amortisation expenses of pre-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc from the cost base. Further in respect of M/s. Fortune Infotech Ltd and M/s. Nucleus Net Soft & Gis India Ltd, the TPO has erroneously computed the mark up. In this respect, it is submitted that such expenses are incurred by the enterprise in its normal course of business associated with such costs are factored into the sale price at the time of determination of the sale price of the services. Therefore, exclusion of such costs for the purpose of the calculation of operating profits would not be in line with the audited accounts.

Out of the final comparables selected, it is noticed that in the case of MIs. Nucleus Net Soft & Gis India Ltd and Airline Financial Services Ltd, the TPO has excluded bad debts from the operating cost, the bad debts is an extraordinary expenditure and it cannot be said that the bad debts are connected with the operating profits of the company of the relevant year, unless it is proved that the bad debts are connected to the business of the relevant year. Therefore, the TPO was justified in

excluding the bad debts from the operating cost .In the case of Fortune Infotech on perusal of the Profit & Loss A/c, it is noticed that the net operating income is Rs.11.37 crores, against which the operating cost including the depreciation works out to Z 8.64 crores. Thus the operating profit works out to Rs. 2.73 crores which works out to 31.59%, whereas the TPO has taken the operating ir1me at Rs. 11.26 crores, the total expenses at Rs 8.53 crores, out of which he reduced the amortisation expenses of 14 lakhs and other cost of Rs. 40 lakhs and came to adjusted profit of 40.84%, but no reasons for such adjustments have been given, the working capital adjustment have been allowed at 4.05%. The undersigned perused the capitaline data base and prowess data base from which it is not possible to identify the cost of Rs. 40 Iakhs not considered by the TPO as operating cost. In such circumstances there is no alternate but to accept the working of the margin after the working capital adjustment at 28.43% as computed by the appellant. However, the appellant was fair in pointing out that according to him the post working margin on cost in the case of Tricom India Ltd works out to 44.11% instead of 40.65% taken by the Transfer Pricing Officer. The margins are accordingly modified while working out the arithmetic mean of the margin of the comparables”.

We have heard the rival submissions. From the above, it is clear the CIT(A) has considered that such expenses which are incurred by the enterprise in its normal course of business associated with such costs are factored into the sale price at the time of determination of the sale price of the services. Therefore, he held that exclusion of such costs for the purpose of the calculation of operating profits would not be in line with the audited accounts. Further, out of the final comparables selected, the CIT (A) has noticed that in the case of M/s. Nucleus Net Soft & Gis India Ltd and Airline Financial Services Ltd, the TPO has excluded bad debts from the operating cost and held that the bad debts is an

extraordinary expenditure and it cannot be said that the bad debts are connected with the operating profits of the company of the relevant year, unless it is proved that the bad debts are connected to the business of the relevant year. Therefore, the CIT (A) held that the TPO was justified in excluding the bad debts from the operating cost unless it is proved that the bad debts are connected to the business of the relevant year.. While we are upholding these principles, however, we remit the matter to the AO/TPO to re-examine as to whether there is any calculation error adopted by the CIT(A)/ TPO in applying these principles and if so, to make suitable correction to that extent, after affording due opportunity to the assessee. To this extent, the Revenue's appeal is treated as allowed.

13. In the next ground the assessee is seeking correction in computing the margin of Nucleus Netsoft & Gis India Ltd.

We have heard the rival submissions. The relevant portion of the order of the CIT (A) is extracted in para.12 (supra). However, this issue is remitted back to the AO / TPO for re-examination and recomputation of the margin of Nucleus Netsoft & Gis India Ltd, after affording due opportunity to the assessee. This ground of the assessee is allowed.

14. The last issue is that the Revenue's appeal ground that the Ld CIT(A) erred in holding that the assessee is eligible for a standard deduction of 5% from the Arm's Length Price determined by the TPO/AO.

We have heard the rival submissions. The CIT (A) allowed this claim based on this Tribunal decision. Now, this issue is a settled one and hence the Revenue's grounds fail.

15 In the result, the assessee's appeal is allowed and the Revenue's cross appeal is partly allowed.

Order pronounced in the open court on 3<sup>rd</sup> day of May , 2017.

Sd/-

Sd/-

(VIJAY PAL RAO)  
JUDICIAL MEMBER

(S. JAYARAMAN)  
ACCOUNTANT MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar

