

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

**BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.955/Del./2015  
(ASSESSMENT YEAR : 2010-11)**

M/s. Agnity India Technologies Pvt.Ltd., vs. DCIT,  
C – 42, Sector 58, Circle 1 (2),  
Noida. New Delhi.

**(PAN : AABCB2399B)**

**(APPELLANT)**

**(RESPONDENT)**

ASSESSEE BY : Ms. Ananya Kapoor, Advocate  
REVENUE BY : Shri H.S. Choudhary, CIT DR

Date of Hearing : 16.08.2017  
Date of Order : 20.09.2017

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

The Appellant, M/s. Agnity India Technologies Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 24.12.2014, passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2010-11 on the grounds inter alia that :-

*“That on the facts and circumstances of the case, and in law;*

*1. The assessment order passed by the Ld. AO in partial pursuance to the directions issued by the Hon'ble DRP is a vitiated order as the Hon'ble DRP erred both on facts and in law in confirming of the Transfer Pricing ('TP') additions made by the Ld. AO / Ld. Additional Commissioner of Income Tax, Transfer Pricing Officer, Noida (Ld. TPO).*

*1.1. That the assessment order passed by the Ld. AO is bad in law in as much as the same was passed in complete disregard to the scheme of the Act which mandates the AO to incorporate the directions of the DRP in the final order*

*2. The Ld. AO / Ld. TPO and the Hon'ble DRP erred in ignoring the fact that the reference made by the Ld.AO suffers from jurisdictional error as the Ld. AO did not record any reasons in the draft assessment order based on which it was concluded that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the Arm's Length Price (,ALP'), as is required under section 92CA(1) of the Act.*

*3. The Ld. AO / Ld. TPO and the Hon'ble DRP erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case.*

*4. The Learned Assessing Officer ('Ld. AO') has erred in facts and circumstances of case and in law by passing an order for Assessment Year 2010-11 which is bad-in-law.*

*5. The Ld. AO/Ld. TPO and the Hon'ble DRP erred on facts and in law in partially confirming the adjustment of Rs.11,587,357 in the assessment order passed under section 143(3) of the Income-tax Act, 1961 ('the Act'), by holding that the international related party transaction of the Appellant with*

*respect to the provision of software development services do not satisfy the arm's length principle envisaged under the Act. In doing so the Ld. AO/Hon'ble DRP has erred:*

*5.1 by disregarding the economic analysis conducted by the Appellant to determine the Arm's Length price (ALP) of the international transaction pertaining to software development services in compliance with section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (Rules) in the Transfer Pricing (TP) documentation;*

*5.2 by disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2009-10) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation;*

*5.3 by rejecting comparability analysis in the TP documentation/Fresh search and in conducting a fresh comparability analysis based on application of the following additional! arbitrary filters in determining the ALP for software development services;*

- Rejection of companies whose data is not available for the current year (i.e. FY 2009-10);*
- Rejection of companies having operating income from IT services to sales less than 75%*
- Rejection of companies with research & development expenses to sales more than 3%*
- Applying sales filter of Rs. 5 crores for selecting comparable companies*
- Not fully accepting the application of the filter of net worth less than zero*

- *Rejection of companies with advertising, marketing and distribution expenses to sales more than 3%*

*5.4 by including high profit making companies in the final comparables set for benchmarking a low risk captive unit such as the Appellant, thus demonstrating an intention to arrive at a pre-formulated opinion without complete and adequate application of mind with a single-minded intention of making an addition to the returned income of the Appellant;*

*5.5 by including certain companies in the final set of comparables which are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

*5.6 by excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

*5.7 by ignoring the business/ commercial reality that since the Appellant (vis-a-vis its e services) is remunerated on an arm's length cost plus basis, undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact; and*

*5.8 by disregarding judicial pronouncements in India while computing an adjustment to the transfer price of the international transaction entered into by the Appellant.*

*5.9 The Ld. AO has erred by not limiting the amount of adjustment to the lower end of the arithmetic mean as envisaged under second proviso to section 92C sub section 2 of the Act.*

**6. That the learned AO, on the facts and in the circumstances of the case and in law, has erred in levying an interest u/ s 234A, B C & D of the Act.**

**7. Ignoring the fact that the appellant is entitled to tax holiday under section 10B of the Act on its of deriving a tax advantage by manipulating transfer prices of its international transactions.**

**8. That given the facts and circumstances of the case and in law, the Hon'ble DRP has grossly erred in confirming the action of the Ld. AO of initiating penalty proceedings under section 271(1)(c) of the Act.”**

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Agnity India is a 100% subsidiary of BayPackets Inc. USA which was acquired by Agnity Inc. USA, the Indian software development facility of Baypackets USA changed its name from Genband Technologies Pvt. Ltd. to Agnity India Pvt. Ltd.. During the year under assessment, the assessee continued to operate as a contract software development service provider for overseas group companies which develops software primarily for telecom industry. Agnity India is primarily involved in the last three stages i.e. coding, testing and post-production support. These activities are either wholly or partly sub-contracted by group companies to Agnity India. It also helps group companies in the customization of software as per their client's requirements.

3. During the year under assessment, the taxpayer entered into international transactions as under :-

<i>S.No.</i>	<i>Description of the transactions</i>	<i>Amount (in Rupees)</i>
<i>1.</i>	<i>Provision of software development services</i>	<i>15,42,52,086</i>

4. Assessee in its TP study to benchmark its international transactions selected 16 companies as comparables but in the fresh search before TPO, the assessee selected 14 comparables. TPO finally selected 14 comparables having average Operating Profit / Operating Cost (OP/OC) at 26.42% without working capital adjustment and computed arms length price as under :-

<i>Operational Cost</i>	<i>133,182,977</i>
<i>Arm's Length Price at a Margin of 26.42%</i>	<i>168,369,920</i>
<i>Price received</i>	<i>154,252,086</i>
<i>105% of the Price received</i>	<i>161,964,690</i>
<i>Proposed Adjustment u/s 92CA</i>	<i>14,117,834</i>

5. Assessee carried the matter by way of filing objections before the Id. DRP. After directions issued by the Id. DRP, the Id. TPO taken 10 comparables having average OP/OC of 24.52%. On the basis of direction issued by Id. DRP/TPO, the AO made adjustment at arms length price at a margin of 24.52% at Rs.16,58,39,443/- in addition to the price received from the assessee and thereby made cumulative adjustment to the tune of

Rs.1,15,87,357/- u/s 92CA. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. 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.

7. Undisputedly, TNMM used by the assessee for benchmarking its international transaction as most appropriate method is accepted by the Id. TPO.

8. Undisputedly, after the directions issued by the Id. DRP, there remains 10 comparables to calculate the margin for benchmarking the international transactions, which are as under:-

<i>S.No.</i>	<i>Company Name</i>	<i>Adjusted PBIT/ Cost (%)</i>
<i>1</i>	<i>Akshay Software Technologies Ltd.</i>	<i>3.78</i>
<i>2</i>	<i>Evoke Technologies</i>	<i>23.6</i>
<i>3</i>	<i>LGS Global Ltd.</i>	<i>12.19</i>
<i>4</i>	<i>Larsen &amp; Tubro Infotech Ltd.</i>	<i>24.12</i>
<i>5</i>	<i>Persistent Systems Ltd.</i>	<i>33.96</i>
<i>6</i>	<i>Sasken Communication Technologies Ltd.</i>	<i>23.68</i>
<i>7</i>	<i>Thinksoft Global Services Ltd.</i>	<i>18.47</i>
<i>8</i>	<i>Wipro Technologies Ltd.</i>	<i>74.66</i>
<i>9</i>	<i>Mindtree Ltd (IT) Services</i>	<i>13.88</i>
<i>10</i>	<i>Tata Elexi Ltd.</i>	<i>16.84</i>
	<i>Average</i>	<i>24.52</i>

9. Post directions issued by Id. DRP margin of the comparables came to be 24.52% qua software development services vis-à-vis

margin of the taxpayer at 15.82%, the AO made recomputation for benchmarking the international transactions of the assessee as under :-

<i>Operational Cost</i>	<i>133,182,977</i>
<i>Arm's Length Price at a Margin of 24.52%</i>	<i>165,939,443</i>
<i>Price received</i>	<i>154,252,086</i>
<i>105% of the Price received</i>	<i>161,964,690</i>
<i>Proposed Adjustment u/s 92CA</i>	<i>11,587,357</i>

10. So, the AO made TP adjustment of Rs.1,15,87,357/- as against earlier adjustment made by the TPO at Rs.1,41,17,834/-.

11. At the very outset, Id. AR for the assessee challenging the impugned order passed by Id. AO/TPO/DRP cut short her arguments by seeking exclusion of only **Wipro Technologies Ltd.** finally selected as comparable by the TPO/DRP having OP/OC at 74.66%.

12. Assessee challenged the inclusion of Wipro Technologies Ltd. as a comparable on the grounds inter alia that Wipro Technologies Ltd. is having a significant brand name; that during FY 2009-10 the comparable company undergone business restructuring/extra ordinary circumstances; that comparable company has earned abnormally high margin / volatile profit margin during FY 2009-10; that the comparable company is having high turnover; that the assessee company has failed to qualify

Related Party Transactions (RPT) applied by TPO as it provides transactions to Citi Group and consequently falls within the domain of section 92B(2) of the Act (deemed international transactions) and relied upon cases cited as *Open Solutions Software Services Pvt. Ltd. vs. DCIT – ITA No.7078/Del/2014 dated 17.04.2017*, *M/s. Cash Edge India (Pvt.) Ltd. vs. ITO in ITA No.64/Del/2015 dated 23.09.2015*, *Pr.CIT vs. M/s. Cash Edge India Pvt. Ltd. of Hon’ble Delhi High Court dated 04.05.2016* and *Saxo India Pvt. Ltd. vs. ACIT in ITA No.6148/Del/2015 dated 05.02.2016*.

13. However, on the other hand, the ld. DR for the Revenue to repel the arguments addressed by the ld. AR for the assessee contended that when the entire income of the comparable company has earned from acquisition of the Citi Group, brand name is not going to effect the profitability; that undisputedly Wipro Technologies Ltd. has acquired Citi Technology Services Limited during the year under assessment w.e.f. 21.01.2009 as per Master Service Agreement (MSA) which profits for the delivery of at least \$ 5 Million in service revenues over the period of contract and the services were in the nature of software development services.

14. So far as objections/contentions raised by assessee against retention of Wipro Technologies Ltd. as a comparable on ground of business restructuring / extra ordinary circumstances is concerned,

TPO has merely observed that the assessee has not demonstrated how business restructuring and extra ordinary circumstances has effected pricing and profitability of the company.

15. Undisputedly, by virtue of the Master Service Agreement (MSA), Wipro Technologies Ltd. acquired all Citi Group interests w.e.f. 01.01.2009. It is also not in dispute that MSA provides for the delivery of at least \$ 500 million in service revenue over the period of six years contract. When we examine the contentions raised by the Id. AR for the assessee in the light of the aforesaid undisputed facts, Wipro Technologies Ltd. is not a suitable comparable. Identical issue has come up before coordinate Bench of the Tribunal in *Open Solutions Software Services Pvt. Ltd. and Saxo India Pvt. Ltd.* (supra).

16. This issue has also come for determination before coordinate Bench of the Tribunal in case cited as *Open Solutions Software Services Pvt. Ltd.*, available at pages 1 to 16 of the paper book. Undisputedly, *Open Solutions Software Services Pvt. Ltd.* is engaged in business of providing software development, research and other related services to its parent company and entered into international transactions for providing software development, research related services to the tune of Rs.38,40,88,682/- during AY 2010-11. Wipro Technologies Limited come up as a

comparable for benchmarking the international transactions which has been ordered to be excluded by the coordinate Bench by making following observations:-

“7. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as the material referred to and relied upon before us. One of the main ground for exclusion of this company is that it fails the criteria of 25% of RPT filter for the reason that its entire revenue is on account of related party transactions. As pointed out by the Ld. Counsel prior to 20.01.2009, ‘Wipro Technology Services Ltd.’ was part of City group and was known as ‘City Technology Services Ltd.’ (CTS) which provided services to the Citi Group. With effect from 20.01.2009, Wipro Ltd. acquired the entire 100% holding of ‘Citi Technology Services Ltd’ which was subsequently renamed as ‘Wipro Technology Services Ltd.’ As a pre-arrangement, Wipro Ltd made an agreement with Citi Group Inc. for acquiring of a City group interest in CTS and signed Master Service Agreement with Citi Group Inc., for the delivery of similar technology, infrastructure, services and application, development and maintenance service for the period of 6 years, which was provided by erstwhile CTS. The MSA provided that at least \$500 million in service revenues over the period of contract should be paid. This prearrangement between the Citi group and Wipro Ltd. would make the subsequent rendition of services by this company to the Citi group fall within the meaning of deemed international transaction as defined u/s 928(2) which reads as under.

“S.92B(2): A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other

person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

The aforesaid provision clearly envisages that, if a transaction has been entered into by an enterprise with unrelated party, then for the purpose of Section 92B(1) it is deemed to be transaction entered into between related parties (two A.Es) if there exists prior agreement in relation to the relevant transaction between third party and the A.E. In other words, as per terms of Section 92B(2), even if the transaction is between unrelated party and an enterprise, then, it would be deemed to be an international transaction if there was any prior agreement between the related parties on the basis of which present transaction is being undertaken. Here in the present case it is the precisely the same situation, because there was a prior agreement between the City group and City Technology Services Ltd. who were related party, that is, at that time the transaction was between two A.Es, hence related party transaction. Later on, when one of the A.E. was acquired by an unrelated party, i.e., Wipro Ltd., then also if any revenue IS received from Citi Group on account of such prior agreement or pre-arrangement, then it is deemed to be an international transaction and once that is so then due to RPT filter this company would fail the test of such a filter, because admittedly entire revenue of this company is on account of RPT. Thus, we agree with the contentions of the Ld.Counsel that this company cannot be taken as a comparable for bench marking assessee's margin."

17. Similarly, coordinate Bench of the Tribunal in *Saxo India Pvt. Ltd.* (supra), available at pages 56 to 92 of the paper book, while examining suitability of Wipro Technologies Ltd. for benchmarking the international transaction with *and Saxo India*

*Pvt. Ltd.* (supra) undisputedly engaged in the business of design and development of customized software application, the same was ordered to be excluded by returning following findings :-

**“16.3.** *It is observed from the above contention reproduced in the TPO's order that Wipro Technology Services Ltd., which was earlier Citi Technology Services Ltd., was held by Citi Corp. Banking Corporation, USA upto 20th January, 2009. Wipro Ltd., parent company of the assessee, executed an agreement with Citi Group Inc., for acquiring Citi Technology Services Ltd., now called Wipro Technology Services Ltd. On 21.1.2009, Wipro Ltd. signed a master agreement with Citi Group Inc., for the delivery of technology Infrastructure Services and application development and maintenance services for the period of six years, which also includes the year under consideration. This shows that income from software development support and maintenance services was earned by Wipro Technology Services Ltd., from Citi Group Inc., by means of master service agreement entered into between Wipro Ltd., its parent company and Citi Group Inc., a third person.*

**16.4.** *We have noticed above from the language of Rule 10B(1)(e)(ii) that it is the net profit margin realized from a comparable uncontrolled transaction, which is considered for the purposes of benchmarking. The epitome of 'comparable uncontrolled transaction' is that the companies or transactions in order to fall within the ambit of sub- clause (ii) of rule 10B(1)(e), should be both comparable as well as uncontrolled. 'Uncontrolled transaction' has been defined in Rule 10A(a) to mean: 'a transaction between enterprises other than associated enterprises, whether resident or non-resident.' This shows that in order to be called as an uncontrolled transaction, it is sine qua non that the same should be between the enterprises other than the associated enterprises. Section 92B(2) provides that: 'A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction' between such other person and the associated enterprise,*

*or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise'. (on going through the prescription of sub-section (2) of section 92B, it is clearly borne out that a transaction with a non-AE shall be deemed to be a transaction entered into between two AEs if there exists a prior agreement in relation to the relevant transaction between the third person and the AE or the terms of the relevant transaction are determined in substance between the third person and the AE. When we consider section 92B(2) in combination with Rule 10A(a), it follows that the transaction between non-AEs shall be construed as a transaction between two AEs, if there exists a prior agreement in relation to the relevant transaction between third person and the AE. If such an agreement exists, the third person is also considered as an AE and the transaction with such third person becomes international transaction within the meaning of section 92B. Once there is a transaction between two associated enterprises, it ceases to be an 'uncontrolled transaction' and, thereby, goes out of reckoning under Rule 10B(l)(e)(ii).*

*16.5. Adverting to the facts of the instant case, we find that Wipro Technology Services Ltd. earned a revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services. This agreement was, in fact, executed between the assessee's AE, Wipro Ltd., and Citigroup Inc., a third person. This unfolds that the transaction of earning revenue from software development support and maintenance services by Wipro Technology Services Ltd., is an international transaction because of the application of section 92B(2) i.e., there exists a prior agreement in relation to such transaction between Citigroup Inc. (third person) and Wipro Ltd. (associated enterprise). In the light of this structure of transaction, it ceases to be uncontrolled transaction and, hence, Wipro Technology Services Ltd., disqualifies to become a comparable uncontrolled transaction for the purposes of inclusion in the final list of comparables under Rule 10B(l)(e)(ii). We, therefore, direct removal of this company from the list of comparables.”*

18. Not only this, Wipro Technologies Ltd. is a giant company having world wide brand domain vis-à-vis assessee company. Coordinate Bench of the Tribunal in case of *Equant Solutions India Pvt. Ltd. vs. DCIT in ITA No.1202/Del/2015 dated 17.05.2016* (available at pages 127 to 157 of the paper book) examined the suitability of Wipro Technologies Ltd. vis-à-vis Equant Solutions India Pvt. Ltd. which is also into software development services and ordered to exclude the same for Related Party Transactions with Citi Technology Services Ltd. and has also been ordered to be excluded on the ground that brand value of this comparable affects the profitability.

19. Furthermore because of highly abnormal margin and volatile profit margin, Wipro Technologies Ltd. does not qualify as a valid comparable as is evident from following table :-

<i>2009-10</i>	<i>2010-11</i>	<i>2011-12</i>
<i>OP/TC Margin</i>		
<i>73.77%</i>	<i>52.55%</i>	<i>80.81%</i>

20. The contentions raised by Id. DR to retain Wipro Technologies Limited as a comparable for benchmarking the international transaction are not tenable, having been already replied with by the coordinate Bench of the Tribunal in numerous cases.

21. Even otherwise, when we compare the turnover of Wipro Technologies Ltd. vis-à-vis assessee company there is huge difference because in AY 2009-10 Wipro Technologies Ltd. has a turnover of Rs.400 crores as against turnover of the assessee at Rs.15.42 crores. So, we are of the considered view that high turnover is due to brand name of this comparable company and as such is not a valid comparable.

22. So, in view of what has been discussed above and following the decisions rendered by coordinate Bench of the Tribunal in *Open Solutions Software Services Pvt. Ltd. and Saxo India Pvt. Ltd.* (supra), Wipro Technologies Limited is not a suitable comparable, hence ordered to be excluded for benchmarking the international transaction.

23. Resultantly, the appeal filed by the assessee is allowed.

**Order pronounced in open court on this 20<sup>th</sup> day of September, 2017.**

**Sd/-  
(B.P. JAIN)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 20<sup>th</sup> day of September, 2017  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
NEW DELHI.

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