

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: '1-2', NEW DELHI**

**BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

ITA No. 5339/Del/2011

AY: 2007-08

NTT DATA Global Delivery Services Ltd. (Formerly known as Keane Worldzen (I) Pvt.Ltd.) Splendor Trade Tower 2 nd , 3 rd , 4 th , 5 th , 6 th & 7 th Floor Golf Course Extension Road Sector 65, Village Tigra Gurgaon Haryana 122 001 PAN: AAACW3622M	vs.	ITO, Ward 5(2) New Delhi
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(Appellant)

(Respondent)

Assessee by : Sh. S.D.Kapila, Adv.

Department by : Sh. Sanjay Kumar Yadav, Sr.DR

Date of Hearing : 26.04.2018

Date of Pronouncement: 12.07.2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has originally been filed by assessee in the name of Keane Worldzen (I) Pvt.Ltd having address at: 6th Floor, Unitech Trade Centre, Sector 43, Sushant Lok Phase-I, Gurgaon, Haryana 122 002. Subsequently Ld.Counsel for assessee informed vide letter dated 31st August, 2016 regarding change in the name of assessee from Keane Worldzen (I) P.Ltd. to “NTT

DATA Global Delivery Services Ltd.,” having address at: Splendor Trade Tower, 2nd, 3rd, 4th, 5th, 6th & 7th Floor, Golf Course Extension Road, Sector 65, Village Tigra, Gurgaon, Haryana 122 001. In support of the change of name, Certificate of Incorporation issued by Ministry of Corporate Affairs has been filed along with revised Form 36B.

Present appeal has been filed by assessee against order dated 28/09/11 passed by Ld. ITO, Ward 5(2), New Delhi under section 143(3) read with section 144C (5) of the Income Tax Act, 1961 (the Act) for Assessment Year 2007-08, on the following grounds of appeal:

On the facts and circumstances of the case and in law, the Ld Income tax Officer, Ward 5(2), New Delhi (hereinafter referred to as the ‘Ld AO’) and Ld Additional Commissioner of Income Tax, Transfer Pricing Officer — 1(3) (hereinafter referred to as the ‘Ld TPO’) grossly erred in making the addition of Rs 7,63,56,998 to the Transfer Price in respect of ITES Segment of the Appellant Company. In making the said additions, the Ld AO/TPO erred in principal and on facts on the following grounds

1. *The Ld AO/TPO erred in arbitrarily rejecting the comparables selected by the Appellant Company.*
 - 1.1. *The Ld TPO arbitrarily rejected the comparables selected by the Appellant Company, without identifying any specific deficiency or insufficiency in the search process adopted by the Appellant Company.*
 - 1.2. *The Ld TPO erroneously rejected 4 out of 15 comparables selected by the Appellant Company, based on a sketchy understanding of their functional analysis.*
2. *The Ld AO/TPO has acted in an arbitrary and highly subjective manner in adopting insufficient and inappropriate filters, resulting in to rejection of companies otherwise comparable to the Appellant Company viz.*
 - 2.1. *Arbitrarily rejecting such companies, whose turnover was less than Rs One crore, which were otherwise comparable to the Appellant Company.*
 - 2.2. *Arbitrarily rejecting a company namely, Ace Software Exports Limited, which is Otherwise comparable to the Appellant Company.*
3. *The Ld. TPO erred in selecting functionally different companies as comparable to the Appellant Company. The Ld. AO/TPO erred in selecting Super normal profit making Companies as comparable to the Appellant Company .*

4. *The Ld.AO/TPO erred in depriving the Appellant Company, a low risk entity i.e. captive Service provider, adjustment towards differential in its risk profile when compared with the Set of comparable companies.*

5. *The Ld.AO/TPO erred in incorrectly computing the operating margins of finally selected comparable companies.*

6. *The Ld AO /TPO erred in not providing relief in accordance with second proviso to section 92C(2) of the Income Tax Act, 1961 (the 'Act').*

The Ld TPO erred in not making adjustments to the transaction price of the international, transaction to the lower end of the arithmetic mean of the Arm's Length Price ('ALP'). The Ld AO/TPO ought to have restricted the amount of Transfer Pricing adjustments to the lower end of arithmetic mean of the ALP after considering a tolerance level of 5%.

7. *The Ld AO/TPO erred in using single year data for the purpose of comparability analysis. The Ld AO/TPO ought to have used multiple year data which would have captured normal market cycles and reduced the variability/distortions in the financial results arising out of single year data.*

2. Brief facts of the case are as under:

Assessee filed its return of income on 01st November, 2010, declaring a total income of Rs.1,15,753/-. The case was selected for scrutiny and notice under section 143(2) was served upon assessee, in response to which Representatives of assessee appeared from time to time. Ld.AO observed that assessee is a majority owned subsidiary of Keane Worldzen Inc. It was observed that assessee along with its global partners was involved in outsourcing to companies and large global corporations to create dedicated and customised designed Indian facilities, for providing remote delivery of business process services. Ld.AO observed that during the year under consideration assessee undertook international transactions with its Associated Enterprises (AEs), the value of which was more than Rs. 5 crores. Accordingly the case was referred to TPO.

2.1. Ld.TPO observed that assessee undertook international transaction in its IT Enabled Services (ITES) segments. It was observed that ITES support charges received by assessee was quantified at Rs.46,625,914/-. Assessee selected TNMM as most appropriate method by adopting OP/OC as PLI for benchmarking international transaction. It was observed by Ld.TPO that assessee selected 15 comparables, with average profit margin at 21.51% on cost. It was submitted that assessee's margin by using OP/TC as PLI was at 15.48% and by using +/-5%, variance, assessee concluded its international transaction at arm's length price.

2.2. Ld.TPO called for various details regarding comparables selected by assessee and observed that assessee had applied RPT filter of 25% for selecting comparables. Ld.TPO dissatisfied with the selection of comparables conducted fresh search and selected its own comparables by applying turnover filter being less than Rs.500 crores, since assessee had its turnover which was less than Rs.500 crores. Ld.TPO thus selected 23 comparables having average arithmetic mean of 30.07%. He thus proposed an adjustment of Rs.70,260,350/-.

2.3. Aggrieved by proposed adjustment, assessee filed objections before DRP.

2.4. DRP in its order directed Ld.TPO to adopt correct margin in respect of comparables, and credit in respect of foreign exchange expenses to be allowed wherever applicable.

2.5. Ld.AO while passing order giving effect to DRP directions, in the final assessment order, confirmed addition amounting to Rs.7,63,56,998/-.

2.6. Aggrieved by final assessment order passed by Ld.AO, assessee is in appeal before us now.

3. Ld.Counsel submitted that only ground that assessee wishes to contend is ground No. 3 and 5 relating to inclusion/exclusion of comparables by Ld.TPO/DRP/AO.

4. On the basis of above submissions, we dismiss **Grounds 1, 2, 4, 6 and 7** as 'not pressed'.

5. Ground No. 3: Both grounds alleged by assessee are relating to comparables included/excluded by Ld. TPO/DRP/AO for the purposes of computing arm's length price of international transaction.

5.1. Before adverting to comparability analysis, it is *sine qua non* to undertake FAR analysis of assessee before us.

(A) Functional analysis

Keane group performs following functions pertaining to IT enabled services:

- marketing and business development
- conceptualisation of services
- personal management/human resource management function
- project management
- quality control

TP study report categorises assessee as captive service provider and services rendered by assessee to be purely in the nature of back office support services to its Associated Enterprises (AE). It has been submitted that assessee does not need to scout for customers nor undertake any marketing and business development activities. Assessee undertakes recruitment, hiring

and training process and is responsible for day-to-day supervision and control of its employees. Besides training provided by Keane group, assessee provides training to new joiners whenever necessary. Though day-to-day management is carried out by assessee, overall project is undertaken by Keane group, which enters into contract with independent 3rd parties and outsources services to assessee. Keane group provides for technical and administrative support to assessee in delivery of its services. Assessee follows stringent quality standards as prescribed by Keane group to ensure high-level quality of services provided to the customers of Keane group.

(B) Assets

Assessee owns minimal asset in order to run its business in India without there being any involvement of intangible.

(C) Risk analysis

In TP study, assessee has been classified to be exposed to minimal risk, as it provides services only to Keane group (ITES) as per terms of contract. Assessee is compensated at cost plus basis and it bears limited price risk to the extent that when globally prices of services go down its revenues may be impacted. Even capacity utilisation risk for assessee is borne by AE's and assessee is compensated on full cost basis and is assured of recovery of cost of any underutilised/unutilised resources dedicated towards provision of services to Keane group.

Thus on the basis of above, assessee has been categorised as a captive service provider that provides services only to its associated group enterprises.

5.2. Assessee is contending for exclusion of following comparables:

1. Accentia Technologies Ltd. (SEG.)
2. Allsec Technologies Ltd.
3. Asit. C Mehta Financial Services Ltd.
4. Bodhtree Consulting Ltd (SEG)
5. Eclerx Services Ltd.
6. HCL Comnet Systems and Services Ltd. (SEG)
7. Informed Technologies India Ltd.,
8. Infosys BPO Ltd.,
9. Maple E- Solutions Ltd.,
10. Mold- Tek Technologies Ltd (Seg)
11. Triton Corp Ltd.
12. Vishal Information Technologies Ltd.
13. Wipro Ltd. (SEG)

5.3. Accentia Technologies Ltd. (SEG.)

This company has been selected by Ld.TPO into the list of comparables. Ld.Counsel submitted that during the year under consideration Geo-Soft Technologies (Trivandrum) Ltd. and Iridium Technologies India Pvt. Ltd amalgamated with Accentia resulting in abnormal rise in profits. It has been submitted that *Delhi benches in case of Ciena India Pvt.Ltd vs. DCIT reported in (2015) 57 Taxmann.com 329 and ICC India Pvt.Ltd versus DCIT reported in (2016) 71 Taxmann.com 164 as well as Mumbai bench in Petro Araldite Pvt.Ltd vs DCIT reported in 31 Taxmann.com 281,* has held that a company cannot be considered as comparable because of financial results become distorted due to mergers,

demergers etc. It has been submitted that similar view has also been taken by *Delhi bench in case of Toluna India Pvt.Ltd vs. ACIT reported in (2014) 50 Taxmann.com 24*. Due to the amalgamation of companies into Accentia during the year in question it may not be comparable with assessee.

5.3.1. Ld. DR on the contrary submitted that annual report does not specify any amalgamation and therefore the financials cannot be considered to be distorted. This company is into medical transcription and is perfectly comparable with that of assessee being a low end BPO.

5.3.2. We have perused the submissions advanced by both the sides in the light of the records placed before us. From the audited statements of this company placed at page 286-335 of paper book volume 2, it is clear that assessee has acquired 51% stake in Geo-Soft Technologies (Trivandrum) Ltd. and 51% stake in Iridium Technologies India Pvt. Ltd. It is observed that almost approximately 68% of operating cost is towards overseas business expenses as against 'nil' in case of assessee and hence there is a difference in business model. Further substantial marketing expenses to an extent of approximately 28% of sales as against 'nil' of assessee have been undertaken by this company. Under such circumstances, we are of the considered opinion that this company is not functionally similar as well as the risk profile is quite different from that of assessee and accordingly cannot be considered to be a fit comparable. We direct this company to be excluded from the list of comparables.

5.4. Bodhtree Consulting Ltd (SEG):

This comparable has been included by ld.TPO in the list of comparables. Ld.Counsel submitted that this company is functionally not similar, as it is into software development and data cleaning segment *vis-a-vis* captive service provider like assessee. It has been submitted that ld.TPO considered data cleaning segment as ITES, only on the basis of companies reply under 133 (6) of the Act. However on perusal of the reply it is very clear that company provides cleansing services only to those clients for whom it had developed software applications. Thus Ld. counsel submitted that cleansing services rendered by this company is ancillary to software development services provided to those clients to whom it had provided the software applications.

5.4.1. On the contrary ld. DR placed reliance upon the order of ld. TPO.

5.4.2. We have perused the submissions advanced by both the sides and observed from the TP study report placed at page 336-367 that it is into software development and data cleansing segment. It has been categorised to have only one segment being software development and is engaged in providing open and end-to-end web solutions, software consultancy, design and development of solutions using the latest technologies.

5.4.3. We therefore do not find this company to be a comparable with that of assessee and direct Ld.TPO to exclude this from the list of comparables.

5.5. Eclerx services Ltd.,

This comparable was included by Ld.TPO, as it is providing knowledge-based specialised services. It has been submitted by

Ld.Counsel that *Hon'ble Delhi High Court* in the case of *Rampgreen Solutions Pvt. Ltd., vs. CIT* reported in (2015) 377 ITR 533 has held that KPO segment cannot be compared with ITES segment. *Hon'ble Court* has held Eclerx to be a KPO, whereas present assessee is a captive service provider.

5.5.1. Ld.DR submitted that functions performed by assessee is also KPO and therefore is a fit comparable.

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

It is observed from TP study placed at page 395-416 that this company is engaged in providing high-level services involving specialised knowledge and domain expertise and is a leading provider of KPO services, whereas assessee is a captive service provider which provides services only to its group concerns on the requirement as per the contract. It has been submitted that *Delhi Bench* of the ITAT in *iQor India Services (P.) Ltd v. ITO [2015] 57 taxmann.com 416/69 SOT 37 (URO)* held as under:—

'Eclerx Services Ltd.

Eclerx is engaged in providing data analytics services with expertise in financial service and retail and manufacturing. The service provided by the company are high end in nature involving special knowledge and domain expertise and therefore, not functionally comparable with the assessee company which is engaged in providing low end ITES enabled call centre services to its AE. The fact Eclerx Services Ltd. is providing high end services involving special knowledge and domain expertise is evident from the company's own reply to the notice u/s 133(6) which is placed at pages 976 to 979 of the paper book filed by the assessee. The Hon'ble Special Bench of the Tribunal in case of Maersk Global Centre (India) (P.) Ltd. v. Asstt. CIT [2014] 147 ITD 83/43 taxmann.com 100 (Mum.) had excluded Eclerx Services Pvt. Ltd. from the list of

comparables for the reason that it is providing high end services involving specialised knowledge and domain expertise and same cannot be compared with companies which are mainly engaged in providing low end services to group companies.

The relevant finding of the Hon'ble Tribunal read as follows :—

"In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007- 08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals - financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the

assessee company which is mainly engaged in providing low-end services to the group concerns.

For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tek Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP."

5.5.3. The above ruling of Special Bench is equally applicable to facts of assessee, as is evident from functional profile of assessee. For the aforesaid reasons, we direct Eclerx Services Ltd. be excluded from final list of comparables.

5.6. HCL Comnet Systems and Services Ltd. (Seg.)

Ld.TPO included this company. It has been submitted by Ld. Counsel that ld.TPO obtained certain data relating to Financial Year 2006-07 from this company which has not been shared with assessee. It has also not been explained the basis of extrapolation of data for first-quarter from the earlier years annual report ending June, 2007. Ld.Counsel also submitted that adjustment in respect of forex loss has also not been given in computing the margin of this company.

5.6.1. On the contrary Ld.DR submitted that segmental information available in audited report of this company placed at page 417-498 of paper book classifies itself to be an ITES company. He placed reliance upon schedules to accounts, wherein revenue recognition has been categorised to be from IT enabled services, which is derived from both the time based and

unit priced contracts separately specified. Ld.DR thus supported this company to be comparable with that of assessee.

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

5.6.3. From the audited accounts it is observed that IT enabled services have been separately segmented. Further ld.TPO used materials which have not been shared with assessee. Even the portion of information sought to be relied by ld.TPO, reproduced in the order is not legible. Under such circumstances we direct this comparable back to ld.TPO for reconsideration. Foreign exchange earnings/loss by this company may also be considered by ld.TPO while considering comparability on functions and risks assumed in providing services. We direct Ld.TPO to provide all information is obtained by him from this company to assessee and to give proper opportunity to assessee as per law.

Accordingly we remit the matter back to file of Ld.TPO who shall consider acceptability or otherwise of the company, after properly considering the objections raised by assessee.

5.7. Informed Technologies India Ltd.,

This comparable has been selected by ld.TPO. Ld.Counsel submitted that it is functionally dissimilar as it is a knowledge-based back office processing Centre. He placed reliance upon decision of *Hon'ble Delhi High Court* in case of *Rampgreen Solutions Pvt. Ltd., (supra)*. Ld.Counsel also placed reliance upon the decision of *Delhi bench* in case of *ICC India Pvt.Ltd vs. DCIT (supra)*.

5.7.1. On the contrary Ld.DR submitted that it is a fit comparable as assessee is also a KPO.

5.7.2. We have perused submissions advanced by both the sides in the light of records placed before us. It is observed that from TP study of this company, placed at pages 499-538 of paper book, that this company has been categorised to be operating as IT enabled, knowledge based back office processing centre. It has been submitted therein that the company serves needs of financial content sector in USA by collecting and analysing data on financial fundamentals, corporate governance, directors/executive compensation and capital market. The outsource services consists of financial database and back-office activity for research/advisory reports. It has been submitted in the TP study of this company that it focuses on the niche market segment of financial content and has developed repeat business with its customers which are well-known and respected American incorporates. It also focuses on enhancing expertise and domain knowledge.

5.7.3. Based on the above functions performed by this company, we do not find it to be a fit comparable with assessee, which is a captive service provider providing services only to its group concern. We accordingly direct this company to be excluded from the list of comparables.

5.8. Infosys BPO Ltd.

This company has been included by Id.TPO. Ld.Counsel submits that this company is into high-end knowledge process outsourcing services, whereas assessee is a captive service provider to its Associated Enterprises only. He placed reliance upon the decision of *Hon'ble Delhi High Court* in the case

of *CIT v. Agnity India Technologies (P.) Ltd.* [2013] 36 *Taxmann.com* 289. It was further submitted that, it also provides product based solutions such as source to pay business platform, Hire to retire business platform, Order management business platform, Newspaper in a box, Integrated Date Lifecycle Management solution, etc. It was submitted that Infosys BPO is a giant and a top BPO services provider. It has turnover of 649 cr and total asset base of approx. 450 cr (Gross Fixed assets Rs. 116 cr).

5.8.1. Ld.DR placed reliance upon the order of authorities below.

5.8.2. We have perused the submissions advanced by both the sides in the light of the records placed before us. From TP study placed at page 539-638 of the paper book, it is observed that this company has huge turnovers, owns IPR and brand value on products and provides services to vast clientele. Under such circumstances this company cannot be accepted to be a fit comparable in case of assessee who is a captive service provider providing services only to its group concerns.

5.8.3. Accordingly we direct this company to be excluded from the list of comparables.

5.9. Mold- Tek Technologies Ltd (Seg)

This company has been included by ld.TPO. However Ld.Counsel submits that it is pioneer in structural engineering services and provides highly technical and specialised engineering services by use of information technology which is incidental. Further it has been submitted that there are no segmental information

regarding this comparable and has relied upon decision of *Delhi Tribunal in the case of ICC India Pvt.Ltd., vs. ACIT (supra)*.

5.9.1. Ld.DR placed reliance upon order of ld.TPO.

5.9.2. We have perused submissions advanced by both the sides in the light of records placed before us. From TP study placed at page 670-724 of paper book, it is observed that it is involved in providing structural engineering services to high-rise buildings. It is observed that this company has undergone merger with Tools Pvt. Ltd., and acquisition of Crossroads IMC USA. Post amalgamation accounts of companies were revised for the financial year 2006-07 because of which this company has underwent a huge change in business module. *Delhi benches of this Tribunal in Cienna India Pvt.Ltd (supra) as well as Mumbai bench in Petro Araldite Pvt.Ltd (supra)* held that a company cannot be considered as comparable because of financial results becoming distorted due to mergers, demergers etc. Similar view has been taken in case of *Toluna India Pvt.Ltd (supra)*. and *ICC India Pvt.Ltd versus DCIT (supra)*.

5.9.3. Respectfully following the same we direct this comparable to be excluded from the list of comparables.

5.10. Wipro Ltd (SEG)

5.10.1. This Comparable has been included by Ld.TPO.

This is TPO's comparable in which segmental details has been obtained u/s. 133(6) of the Act. However, assessee has sought its exclusion on grounds of significantly higher turnover, abnormal margins, presence of intellectual property, diversified business,

brand value and turnover. He placed reliance upon the decision of *ICC India Pvt.Ltd., vs. ACIT (supra)*..

On the contrary, Ld.DR submitted that there is no related party transaction during the year under consideration.

5.10.2. We have heard the rival submissions of both sides in the light of records placed before us.

It is observed that Co-ordinate Bench of the Delhi Tribunal in *ICC India Pvt.Ltd., vs. ACIT (supra)* has excluded this comparable by placing reliance upon *Calibrated Healthcare Systems (I) (P) Ltd. Vs ACIT (OSD) reported in (2015) 54 Taxmann.com 53*. It is observed that in this decision this tribunal has examined comparability of WIPRO and ordered its exclusion on the ground that this is a giant entity with marked differences as regards risk profile, nature of services, ownership of IP rights, expenditure on R&D, etc. So, following the decision rendered by co-ordinate bench as well as the fact that the assessee company is a captive service provider taking minimum risk having no intangibles cannot be compared with WIPRO which is having diversified business, ownership of significant intangibles and huge expenditure on R&D etc. So, it is directed to exclude this company from the final list of comparables

5.11. Asit C.Mehta

This comparable has been included by Ld.TPO. Ld.Counsel submits that functions performed by this company cannot be compared with that of assessee as it belongs to a different vertical and hence has different cost structure. It has been submitted

that this company is a member of BSE, NSE, commodity exchange, portfolio management and depository services etc.

In this connection he placed reliance upon relied on the decision of *Hydrabad Tribunal* in case of *C3i Support Services (P) Ltd.*, reported in *(2014) 46 Taxmann.com 453*, where in under similar circumstances this company has been rejected on the grounds that the employee cost of the company is only 24.78% of its revenue compared to assessee's 44%.

Ld. DR placed reliance upon the orders of authorities below.

Considering the coordinate bench decisions we direct the TPO/AO to exclude the same.

We have perused the submissions advanced by both the sides and the light of the records placed before us.

It is observed from the audited accounts that it derives income from various activities like brokerage, commission and arbitrage; trading in securities; premium on equity index option; equity stock option.

The activities carried on by this company involve immense knowledge and expertise for advising its clients towards investment in stock. Such vast knowledge based function cannot be categorised with a back-office service provider like assessee which provides services on the basis of contracts entered into by assessee to its AE's only.

Accordingly we direct exclusion of this comparable from final list.

6. Additional ground

“On the facts and in the circumstances of the case the Ld.AO/DRP were not correct in including the following entities in the list of appropriate comparables:-

- i. *Maple E-Solutions Ltd.*
- ii. *Triton Corp Ltd.*
- iii. *Vishal Informations Technologies Ltd.*
- iv. *Flextronics Software Systems Ltd.*
- v. *R Systems International Ltd.”*

6.1. Assessee raised additional ground, wherein inclusion of following comparables has been challenged. It has been submitted that details in respect of these comparables were available before authorities below and thereby under Rule 11 of ITAT Rules, assessee is entitled to raise this additional ground before us today.

6.2. Ld. DR did not object to the additional ground being raised/admitted at this juncture.

6.3. We therefore allow assessee to argue upon comparables challenged for its inclusion/exclusion in additional ground which are as under:

Vishal Information Technologies Ltd

This comparable was selected by Ld.TPO. Ld.Counsel submitted that this company is not similar in function, assets and risk profile with that of assessee and it has a different business module. Further it has been submitted that *Hon’ble Delhi High Court* in the case of *Rampgreen Solutions Pvt Ltd., (supra)* categorised this comparable to be a KPO service provider. Further Ld.Counsel submitted that this entity outsources its ITES services to third-party vendor thereby increasing operating expenses.

6.3.1. Ld. DR placed reliance upon the orders of authorities below.

6.3.2. We have perused the submissions advanced by both the sides in the light of the records placed before us. It is observed that Hon'ble Delhi High Court in the case of Rampgreen Solutions Private Limited (supra) has considered this to be a KPO service provider. In the facts of present assessee before us, services are rendered to group concerns, strictly on the basis of contract and requirement of its AE. And therefore this company cannot be comparable with the functions performed by present assessee before us.

6.3.3. Accordingly we direct this company to be excluded from the list of comparables.

7. Flextronics Software (Segment)

It is assessee's submission that in the revised order, Ld.TPO while considering this comparable included Rs.5.4 crores of foreign exchange gain/loss at entity level, whereas segment information has been used by Ld.TPO. It is assessee's contention that due to this anomaly, OP/TC has increased to 54.72% from 8.62% whereas the correct computation of mark-up would work out to 9.31%.

7.1. We restore this comparable to the file of the TPO to re-compute the correct margins if so warranted, after due verification of the assessee's claim/computation.

8. R Systems International Ltd.

This comparable was selected by ld.TPO. Ld. counsel however submitted that while computing the average margin, Ld.TPO did

not treat provision for doubtful debts of Rs. 5.08 crores and miscellaneous balances of Rs. 3.39 crores written off as operating expenses.

Ld. DR submitted that the said provisions were excluded as it was not recurring in nature.

We have perused the submissions on the basis of records placed before us.

It is seen that the assessee had not raised this particular issue before DRP and is agitating for first time before us. Much reliance has been placed on the decision of ITAT Delhi Bench in *Sony India (P.) Ltd v. Dy. CIT* [2008] 114 ITD 448 wherein it has been held that there is no justification for excluding provisions written back in the Profit and Loss account as not forming part of the operating profit of the tax payer.

8.1. In the interest of justice, we restore the issue of writing back of provision for doubtful debts to be verified and treated as operating expense by the Ld.TPO after proper verification in this regard. Assessee is directed to provide all necessary information/details to assist Ld.TPO.

9. Maple E- Solutions Ltd., & Triton Corp Ltd

It is submitted that directors of these companies were involved in fraud and money-laundering during the year under consideration. And therefore has been held to be not an appropriate comparables. This view has been expressed by *Hydrabad Tribunal in the case of Market Tools Research Pvt.Ltd vs. ACIT reported in (2013) 32 Taxmann.com 358.*

9.1. Ld. DR do not have any objection in exclusion of this comparable.

9.2. Respectfully following the decisions of Coordinate Bench of this Tribunal, we direct Ld.TPO to exclude these companies from the final list of comparables.

10. In regards to comparables that has been set aside to ld. TPO, we direct the transfer pricing analysis to be carried out on the broad object of benchmarking the international transaction. Comparables must be similar in material aspects and must be compared on the basis of the products/services characteristics, functions undertaken, assets used and risk assumed.

11. Accordingly ground No. 3 raised by assessee stands partly allowed.

12. Ground No. 5 is in respect of incorrect margins adopted by Ld. TPO. It has been submitted that even though correct margins were provided to Ld.TPO after DRP directions, and the same has not been considered. Assessee was also granted forex loss as operative expenses by DRP, which is also not considered by Ld. TPO. Assessee submitted computation of correct margins in respect of comparables.

12.1. Ld. DR submitted that this issue may be set-aside to Ld TPO for recomputing the working.

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

Assessee has referred to and relied upon the computation submitted today wherein margins in respect of the comparables has been mentioned. We direct Ld.TPO to verify the details

provided by assessee and to grant forex loss/gain wherever applicable as operating expenses/income and to adopt the correct margins in order for determination of the correct margin ascertain the arms length price of the transaction.

13.1. Accordingly we set aside this issue back to ld.TPO for recomputing the margins of the comparables as directed above.

13.2. In the result this ground raised by assessee stands allowed for statistical purposes.

14. In the result appeal filed by the assessee stands partly allowed.

Order pronounced in the Open Court on 12/07/2018.

Sd/-

(P.M.JAGTAP)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 12th July, 2018

Manga

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1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

ITA 5339/Del/2011 A.Y. 2007-08
NTT Data Global Delivery Services P Ltd.(Formerly Keane Worldzen (I) Pvt.Ltd.) vs. ITO

S.No.	Details	Date	Initials	Designation
1	Draft dictated on dragon	10.07.18		Sr. PS/PS
2	Draft placed before author	11.07.18		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement	12.07.2018		Sr. PS/PS
7.	Order uploaded on			
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			