

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI I-2 BENCH, NEW DELHI
[Coram: Pramod Kumar AM and Sudhanshu Srivastava JM]**

ITA No. 2093/Del/2014
Assessment year 2007-08

Global Vantedge Pvt LtdAppellant
103, Ashoka Estate, Barakhamba Road, New Delhi 110 001
[PAN: AABCG8076E]

Vs

Assistant Commissioner of Income Tax
Circle 12(1), New DelhiRespondent

ITA No. 2386/Del/2014
Assessment year 2007-08

Deputy Commissioner of Income Tax
Circle 12(1), New DelhiAppellant

Vs

Global Vantedge Pvt Ltd
103, Ashoka Estate, Barakhamba Road, New Delhi 110 001
[PAN: AABCG8076E]Respondent

Appearances by

Sumit Mangal and Rashmi Gupta *the assessee*
Sanjay Kumar Yadav *for the revenue*

Date of concluding the hearing : May 23, 2018
Date of pronouncement : August 23, 2018

O R D E R

Per Pramod Kumar, AM:

1. These cross appeals challenge correctness of the order dated 31st January 2014 passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 144C of the Income Tax Act, 1961, for the assessment year 2007-08. As both of these appeals were heard together, pertain to the same assessee and involve some interrelated issues, both of these appeals are being taken up, and disposed of, by way of this consolidated order.

2. The assessee before us is a subsidiary of Global Vantedge (Mauritius) Ltd and is engaged mainly in the business of debt collection services and telemarketing for its associated enterprises Global Vantedge Inc (GV Inc.), a US based company. This GV Inc

USA acts as front end service provider, owning less than 5% assets and working with just a few employees of its own, to its customers but all the work is actually performed by the assessee under an arrangement with GV Inc. The assessee owns full capacity to work for the clients of GV Inc and is stated to own over 90% of the group assets. The compensation for services rendered to the client is determined on the basis of debts collected or the actual time spent on the work. GV Inc retains 9.40% of the end billing and the assessee gets 90.6% of the billing done by GV Inc to the end customers. In substance thus, the role of GV Inc in the scheme of things is no more than that of marketing and business development. So far as the present assessment year is concerned, the assessee filed a NIL income tax return, after claiming deduction under section 10A amounting to Rs 11,08,18,877 and adjusting unabsorbed depreciation of Rs 43,842. During the relevant previous year, the assessee had received a consideration of Rs 61,67,89,191 for services rendered to its AE. In the transfer pricing study filed by the assessee, GV Inc was adopted as the tested party and its margin of -5.40% was found to be comparable with average margin of 7.64% for eleven comparables for GV Inc. All these comparables were from outside India. It appears that when matter came up for examination by the Transfer Pricing Officer, he summarily rejected this approach and asked the assessee to treat the assessee as a tested party and comparables from within India. The original transfer pricing study was thus summarily rejected by the TPO. The assessee raised grievance against the approach so adopted by the TPO and raised following specific grievance before the CIT(A):

5. The learned AO/TPO has ignored the factual position the associated enterprise of the appellant, i.e. Global Vantedge Inc (GV Inc) has incurred losses and, as such, there is no transfer of profits by the appellant to its associated enterprises.

6. That the learned AO/TPO has erred in determining the ALP by taking the appellant as the tested party and by rejecting submission of the appellant that GV Inc has to be considered as a tested party.

3. Learned CIT(A), however, simply brushed aside the above grounds of appeal and justified the rejection of TP study on factors not relevant to the above grievance, such as inappropriate filters etc. The assessee is not satisfied and is in further appeal before us. So far as this aspect of the matter is concerned, the assessee has raised the following grounds of appeal:

5. The learned AO/TPO/ CIT(A) has ignored the factual position the associated enterprise of the appellant, i.e. Global Vantedge Inc (GV Inc) has incurred losses and, as such, there is no transfer of profits by the appellant to its associated enterprises.

6. That the learned AO/TPO/CIT(A) has erred in determining the ALP by taking the appellant as the tested party and by rejecting submission of the appellant that GV Inc has to be considered as a tested party.

4. We have heard the rival contentions on this aspect of the matter, perused the written submissions filed before us and duly considered facts of the case in the light of applicable legal position. We also consider it appropriate to reproduce the following extracts from the written submissions filed by the assessee:

“The TPO has incorrectly selected GVPL as the tested party. Adoption of appellant as tested party is cardinaly incorrect and against the commonly accepted practice of selecting least complex entity as the tested party for the purpose of Arm's length analysis.

The reasons for testing the margins of a less complex party is that the simpler party requires fewer and more reliable adjustments to be made to its operating profit margins.

The complexity of an entity is evaluated on the basis of FAR analysis i.e. the entity which performs least number of functions, utilizes least amount of assets and bears least risk is selected as the tested party.

*The fact that as per the transfer pricing regulations a less complex entity is generally selected as tested party is also supported by Para 3.43 of the **OECD transfer pricing guidelines for Multinational Enterprises and Tax Administration 1995** which states as following:*

“The associated enterprise to which the transactional net margin method is applied should be enterprise for which reliable data on the most closely comparable transaction can be identified. This often entails selecting the enterprise that is the least complex of the enterprises involved in the controlled transaction and that does own valuable intangible property or unique assets.”

*The above concept of selecting least complex entity as the tested party has also been confirmed by the Hon'ble Kolkata tribunal in the case of **Development Consultants Pvt. Ltd. Vs. DCIT** (2008-TIOL-150-ITAT-KOL). It would also be relevant to note here that in this case the foreign associated enterprise (DCIL) of the assessee was selected by the assessee for the purpose of Arm's length analysis which has been upheld by the Hon'ble ITAT. The relevant extracts of the judgment are reproduced hereunder:*

“We agree with the view that in order to determine the most appropriate method for determining the arm's length price, it is first necessary to select the ‘tested party’ and the tested party will be the least complex of the controlled taxpayer and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables”

“After due consideration of all the facts, we agree with the view that gross margins of DCIL need to be compared with gross margins of comparable uncontrolled transactions or unrelated enterprises entering into such transactions.”

*Further the jurisdictional ITAT in the case of **Ranbaxy Laboratories Limited Vs. ACIT** (2008-TIOL-75-ITAT-DEL) has held that depending on the circumstances of the case foreign comparables may be used for the purpose of Arm's Length Analysis. It may be relevant to note here that though in this case ITAT rejected the foreign comparables selected by the assessee however such rejection was based on inappropriate aggregation of different transactions entered into by the assessee with various associated enterprises operating in different countries. The ITAT did not reject the foreign comparable due the reason that they were operating in a foreign country.*

The relevant extract from the judgment, where ITAT has supported the use of foreign comparables, are reproduced hereunder:

“It is no doubt true that under certain circumstances, foreign AE can be taken as a tested party for comparison. It will depend on facts and circumstances of each case.”

In the present case, it is GV Inc which is the less complex vis-a-vis the appellant hence it should be selected as the tested party. In support of the fact that GV Inc is a less complex entity we would like to submit as below:

- *Almost entire infrastructure and operating assets are owned by the appellant and GV Inc owns an insignificant amount of infrastructure and administrative assets. Asset matrix given at page 168 of the paper book.*
- *Majority of risk for performance of services and risk of quality and timeliness of services lies with the appellant.*
- *Whereas GVI is involved in marketing activities the actual business operations of debt collection are performed by the appellant in India.*

5. The plea of the assessee is indeed well taken. The law is by and large well settled on this issue. There is no dispute that, in principle, the least complex party is to be taken as the tested party but the trouble usually arises on account of lack of data with respect to the foreign tested party and it is for this reason that the foreign enterprise is, more often than not, not really taken as a tested party. That does not mean however that the use of a foreign enterprise as a tested party can be rejected summarily without assigning any reason- as has been done by the TPO and approved by the CIT(A). Learned CIT(A) has also not discussed the matter on merits and summarily dismissed the plea of the assessee. That course of action cannot be approved. We have also noted that on the peculiar facts of this case and looking to the nature of functional relationship between the assessee and GV Inc, there can indeed be little dispute that least complex of the party is GV Inc. While the core business function is performed by the assessee company, and entire infrastructure and operating assets are owned by the assessee company, the foreign AE, i.e. GV Inc, is primarily responsible for procuring the work and owns relatively much less assets, employees and operating assets. On these facts, therefore, the claim of the assessee that the foreign AE was the least complex entity could hardly be summarily rejected. Of course, the next question is the availability of data and the onus to furnish the same is on the assessee, but the authorities below have not at all addressed themselves to this aspect of the matter. In view of these discussions, as also bearing in mind entirety of the case- particularly peculiar business model and functional relationship between the assessee and GV Inc, its foreign AE, we deem it fit and proper to remit the matter, with respect to determination of ALP on the basis of adopting the foreign AE as the tested party, for fresh determination at the assessment stage. The matter will be decided afresh by the TPO/AO after giving a fair and reasonable opportunity of hearing to the assessee, in accordance with the law and by way of a speaking order dealing with contentions of the parties. Ordered, accordingly.

6. We have also noted that even with respect to the assessee being adopted as the tested party, the assessee has raised several legal and factual arguments with respect to the comparables adopted by the authorities below. The only other grounds pressed before us, apart from challenging rejection of GV Inc as tested party, are with respect to the comparables but as the matter is being remitted to the assessment stage, it would not be appropriate for us to deal with that aspect of the matter, which is, strictly speaking, somewhat academic at this stage. We, however, make it clear that the assessee will be at liberty to take

up all such issues, as he may deem appropriate, and the same will be decided on merits, if at all required, by way of a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee. In effect thus all the issues are open and all other grievances raised in both the cross appeals are, as on now, academic.

7. In the result, both the appeals are allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 23rd day of August, 2018.

Sd/xx

Sudhanshu Srivastava
(Judicial Member)

Sd/xx

Pramod Kumar
(Accountant Member)

New Delhi, Dated the 23rd day of August, 2018

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi