

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.1380/Del/2016
(ASSESSMENT YEAR : 2011-12)**

ITO, Ward 19 (1),
New Delhi.

vs. M/s. Omniglobe Information Technologies
(I) Pvt. Ltd.,
E – 11, Rajouri Garden,
New Delhi – 110 027.

(PAN : AAACO6606M)

(APPLICANT)

(RESPONDENT)

ASSESSEE BY : Shri Neeraj Jain, Advocate
Shri Abhishek Agarwal, Advocate
REVENUE BY : Shri H.K. Choudhary, CIT DR
Ms. Nimita Pandey, Senior DR

Date of Hearing : 28.03.2019

Date of Order : 15.04.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, ITO, Ward 19 (1), New Delhi (hereinafter referred to as 'Revenue') by filing the present appeal sought to set aside the impugned order dated 22.01.2016 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 2011-12 on the grounds inter alia that :-

“1. On the facts and circumstances of the case, the Hon’ble DRP-II has erred in allowing the appeal of the assessee by excluding M/s. EClerx Services Ltd. and M/s. Acropetal Technologies Ltd. as a comparable.

2. On the facts and circumstances of the case, the Hon’ble DRP-II has erred in directing the TPO/AO that the Transfer Pricing adjustment, at best, could not exceed the amount of margin retained by the Associated Enterprises.”
”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Omniglobe Information Technologies India Pvt. Ltd., the taxpayer is a wholly owned subsidiary of Omniglobe International LLC, USA (Associated Enterprise/AE). The taxpayer is into the provision of BPO/Data Processing Services to its AE. It is also providing IT Enabled Services (ITES) relating to phone activation and local number portability to various clients for and on behalf of its parent company.

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

<i>Sl. No.</i>	<i>International Transactions</i>	<i>Associated Enterprises</i>	<i>Amount (Rs.) (Receipt)</i>	<i>Method Applied</i>
<i>1.</i>	<i>Provision of BPO/Data Processing services</i>	<i>Omniglobe LLC</i>	<i>33,98,09,045</i>	<i>TNMM</i>

4. The taxpayer in its transfer pricing documentation to benchmark its international transactions applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with Operating Profit/Operating Cost (OP/OC) as Profit Level Indicator (PLI). The taxpayer selected 7 comparables with average OP/OC of 7.56% as against OP/OC of 8% of the taxpayer. However, during the TP proceedings, the taxpayer recomputed the updated margin of the comparables as per TPO's direction at 5.58% and treated its international transactions qua provisions of BPO services with its AE at arm's length.

5. TPO rejected all the 7 comparables taken by the taxpayer selected 7 new comparables with average OP/OC of 32.84% and also recomputed the OP/OC of the taxpayer at 8.63% considering the foreign exchange fluctuation loss of Rs.35,03,198/- as non-operating cost and thereby proposed ALP of international transactions qua ITES at Rs.41,31,49,554/- as against Rs.33,98,09,045/- determined by the taxpayer.

6. The taxpayer carried the matter before the Id. DRP by way of filing objections who has rejected 2 comparables viz. Acropetal Technologies Ltd. and Eclerx Services Ltd. from the final set of comparables and OP/OC of the comparable companies reduced to

26.24%. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

7. 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.

8. Undisputedly, TNMM as the MAM with OP/OC as the PLI applied by the taxpayer has been accepted by the TPO/DRP. Ld. TPO in order to select the comparable companies for benchmarking the international transactions of the taxpayer with its AE applied filters viz. (i) use of current year data; (ii) reject companies where turnover is less than Rs.1 crores; (iii) select companies where the ratio of service income to total income is at least 75%; (iv) select companies where income from exports is at least 75% of total income; (v) companies that have employee cost that is less than 25% of total cost; (vi) reject companies where related party transactions exceed 25% of sales; (vii) companies that are affected by some peculiar economic circumstances.

9. After applying the aforesaid filters, Id. TPO has finally selected the 7 comparables to benchmark the international transactions which are as under :-

<i>Sl. No.</i>	<i>Name of the Company</i>	<i>Working capital adjusted OP/OC</i>
<i>1.</i>	<i>Accentia Technologies Limited</i>	<i>29.12%</i>
<i>2.</i>	<i>Acropetal Technologies Limited (Seg.)</i>	<i>18.12%</i>
<i>3.</i>	<i>E4e Healthcare Business Services Pvt. Ltd.</i>	<i>13.74%</i>
<i>4.</i>	<i>Eclerx Services Limited</i>	<i>58.57%</i>
<i>5.</i>	<i>Infosys BPO Limited</i>	<i>21.56%</i>
<i>6.</i>	<i>Jindal Intellicom Limited</i>	<i>16.76%</i>
<i>7.</i>	<i>T C S E-serve Limited</i>	<i>71.99%</i>
	<i>Average</i>	<i>32.84%</i>

10. Ld. TPO accordingly proposed the ALP of international transactions qua provision of ITES as under :-

<i>Total Revenues Received (A)</i>	<i>339,809,045</i>
<i>Total Operating Cost (B)</i>	<i>311,012,913</i>
<i>Arm's Length Profit (C = 32.84% of B)</i>	<i>102,136,641</i>
<i>Arm's Length Price (D = B+C)</i>	<i>413,149,554</i>
<i>Difference (E = D - A)</i>	<i>7,33,40,509</i>

11. It is also not in dispute that the ld. DRP has allowed working capital adjustment in order to compute the margin of the comparable companies and also ordered to restrict the adjustment, if any, to the margin retained by the AE. The Revenue has challenged the exclusion of *Eclerx Services Ltd.* and *Acropetal Technologies Ltd.* made by the DRP for benchmarking the international transactions. So, we would examine the comparability of aforesaid comparables vis-à-vis the taxpayer qua ITES as under.

GROUND NO.1**ECLERX SERVICES LTD. (ECLERX)**

12. Ld. DR for the Revenue challenging the exclusion of Eclerx by the ld. DRP relied upon the order passed by the ld. TPO. However, on the other hand, ld. AR for the taxpayer by relying upon the order passed by the ld. DRP contended inter alia that Eclerx is functionally not comparable; that it has exceptional year of operation; and relied upon the decision rendered by the Hon'ble Delhi High Court in the case of *Rampgreen Solutions Pvt. Ltd. v. CIT, 377 ITR 533 (Del.)*.

13. Undisputedly, the taxpayer is into providing BPO/Data Processing Services (ITES) to its AE whereas Eclerx is into providing outsourcing KP services as has been held by Hon'ble Delhi High Court in *Rampgreen Solutions Pvt. Ltd.* (supra) by returning following findings :-

“37. Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining the ALP. Vishal and eClerx, both are into KPO Services. In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted that eClerx is engaged in data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition, eClerx also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee. Further, the functions undertaken (i.e. the activities performed) are also not comparable with the

Assessee. In our view, the Tribunal erred in holding that the functions performed by the Assessee were broadly similar to that of eClerx or Vishal. The operating margin of eClerx, thus, could not be included to arrive at an ALP of controlled transactions, which were materially different in its content and value. In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted the same and had, thus, excluded eClerx as a comparable. It is further observed that the comparability of eClerx had also been examined by the Hyderabad Bench of the Tribunal in M/s Capital Iq Information Systems (India) (P.) Ltd. v. Additional Commissioner of Income-tax (supra), wherein, the Tribunal directed the exclusion of eClerx as a comparable for the reason that it was engaged in providing KPO Services and further that it had also returned supernormal profits.”

14. In *Rampgreen Solutions Pvt. Ltd.* (supra), the Hon'ble Delhi High Court has also considered Special Bench decision of the Tribunal in case of Maersk Global Centers (India) Pvt. Ltd. wherein also Eclerx was ordered to be excluded because of KPO services which are high end services involving specialized knowledge and domain expertise. So, we are of the considered view that Eclerx has been rightly excluded by the ld. DRP. Consequently, we do not find any ground to interfere into the findings of the ld. DRP.

ACROPETAL TECHNOLOGIES LTD. (ACROPETAL)

15. Ld. DRP excluded Acropetal on the ground that it is a KPO and as such it is not a good comparables. However, on the other hand, ld. AR for the taxpayer contended that the ld. DRP has rightly excluded the Acropetal because it is functionally dissimilar

and it also fails employee cost filter and relied upon the decision rendered by the coordinate Bench of the Tribunal in case of *ACIT vs. Flextronics Technologies (India) (P.) Ltd. – (2019) 101 taxmann.com 348 (Bangalore – Trib.)*.

16. Coordinate Bench of the Tribunal in *ACIT vs. Flextronics Technologies (India) (P.) Ltd.* (supra) excluded Acropetal on the ground that the engineering design services segment of Acropetal is functionally different and is not a good comparables to a company rendering ITES to its AE by returning following findings:-

“ *Acropetal Technologies Limited*

Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bangalore in IT (TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no.15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO function performed by the assessee. The performance of the engineering design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing (KPO) would do and not a business processing outsourcing (BPO).' Similar View was taken by Hon'ble Bangalore ITAT in the case of -

Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables The above company was directed to be excluded by the Hon'ble ITAT in assessee's own case for AY 2008-09.”

9. *It is the plea of the revenue before us that there is no difference between the KPO and BPO and the reasons given by the DRP for excluding the company cannot be accepted.*

10. *The ld. Counsel for the assessee, on the other hand, submitted that the exclusion of this company by the DRP is fully justified and in this connection drew our attention to the Annual Report of this company which is at page 492 of PB-II filed by the assessee. Perusal of the Annual Report shows that this company has 4 divisions viz., Engineering Design Services, Healthcare, Enterprise Solutions and Infrastructure Solutions. Perusal of the order of TPO at page 25 shows that the TPO has considered engineering design services segment profit margin of this company for the purpose of comparison with the profit margins of the assessee company. The functions performed by the Engineering Design Services of this company are as follows:-*

“Architectural, Structural, Electrical, Plumbing, Steel Detailing, External Utilities, Design Engineering.”

11. *The functions performed by the assessee, as we have already seen is back office services relating to finance and human resource functions, including accounts payable to assessee, remote server access, maintenance and management services, payroll processing, credit analysis, ledger maintenance, etc. for its affiliates worldwide. It is thus clear that the information technology services provided by the assessee cannot be compared with Engineering Design Services provided by Acropetal Technologies Ltd. Therefore, the conclusion that this company is not functionally comparable is found to be correct. We also find that this Tribunal in the case of Novo Nordisk (I) P. Ltd. in ITA 247/Bang/2016 has held that in the case of a company which was rendering similar ITeS as that of assessee it was held that Acropetal Technologies Ltd. cannot be considered as a comparable in ITeS segment. Following were the relevant observations of the Tribunal in this regard.*

“8.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. We find that a co-ordinate bench of this Tribunal in the case of Swiss

Re Shared Services (India) Pvt. Ltd., for asst. year 2011-12 (Supra) has examined in detail the comparability of this company as a comparable to that of a service provider of ITES services to its AE's and at6 para 21 to 24 thereof held as under:-

“21. Arguing exclusion of Acropetal Technologies Ltd, (seg), Ld. AR submitted that Acropetal Technologies Ltd, was rendering service in the field of engineering design fin- health-care enterprise solutions and IT infrastructure solutions. As per the Ld. AR, AO took the engineering design services done by Acropetal Technologies Ltd, as a comparable segment with ITES services of the assessee. Ld. AR pointed out that engineering design services rendered by M/s. Acropetal was entirely different from the type of services done by the assessee. Further according to him Hyderabad bench of the Tribunal in the case of Excellence Data Research P. Ltd v. ITO [17'A.159/I-Iyd12014, dt.31.07.2014 had held that Acropetal Technologies Ltd, was not a good comparable in the BPO segment. As per the Ld. AR M's. Excellence Data Research P. Ltd, was rendering back office data creation, content development and support services which were not comparable to what assessee was doing. Though the decision of the Hyderabad Bench was for A.Y. 2009-10, as per the Ld. AR, M/s. Acropetal Technologies Ltd, was doing the very same business during the relevant previous year also and therefore it could be considered as a good precedent.

22. Per contra, Ld. DR submitted that TPO had considered the argument of the assessee that BPO and KPO had to be distinguished. According to him, Acropetal Technologies Ltd, was giving engineering design services and the assessee was rendering insurance support services. Though these services did not fit in the same mould, the level of expertise required stood more or less on the same pedestal. According to him, applying the yardsticks laid down by Hon'ble Delhi High Court in the judgment of Rampgreen Solutions P. Ltd (supra), Acropetal Technologies Lid. could be taken as a good comparable.

23. We have perused the orders and heard the rival contentions. There is no dispute that M/s.

Acropetal was having at least three segments, namely, engineering design services, IT service and health care. TPO had taken engineering design service as a good comparable with that of the services done by the assessee. Engineering Design Services that were being rendered by Acropetal Technologies Lid, appears at page 8 of its annual report. It comprised of architectural, structural, electrical, plumbing, steel detailing, and utilities designing. Its revenue model appears at page 9 of its annual report. It is mentioned that the said company was providing comprehensive offerings using its deep domain understanding of infrastructural healthcare, engineering design and enterprise solutions. In our opinion, the type of services that was being provided by Acropetal Technologies Ltd, was not at all comparable with the type of services that the assessee was providing. It is also mentioned in the annual report of the said company that it was providing high end services in the engineering design services. No doubt as mentioned by the Ld DR, it may not be feasible to have comparables which fit in the exact mould as that of an assessee in TP analysis. However, when one company is giving sophisticated set of services which involves higher level of skill sets, and the other is doing it on a lower level, we cannot say that the former should be considered as a comparable to the latter. Though for a different year, comparability of Acropetal Technologies Ltd, (seg) had come up &fore Hyderabad bench of the Tribunal in the case of Excellence Data Research P. Ltd (supra). Observations of the Tribunal as it appears at para 18.1 reads as under

18.1 After considering the rival contentions, we agree with the objections raised by assessee. As seen from the Annual Report, this company is involved in engineering design services and has products also, which makes it functionally not comparable. Even at the segmental level, it provides engineering design services, which was considered as high end, by the coordinate bench of the Tribunal in the case of Hyundai 'Motors India Engineering' (supra) in earlier year. Therefore, we are of the opinion that this company cannot be selected as a

comparable. We accordingly direct the Assessing Officer/TPO to exclude this company.

24. Considering all these, we are constrained to take a view that engineering design services segment of M/s. Acropetal Technologies Ltd, (seg.), cannot be considered as a proper comparable for the TP study of the assessee.

8.3.2 Taking into consideration the facts and circumstances of the case and respectfully following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of Swiss Re Shared Services (India) Pvt. Ltd., for asst. year 2011-12 (Supra), we hold that the engineering design services segment of Acropetal Technologies Ltd., is functionally different and hence cannot be considered as a good comparable to the assessee in the case on hand who is providing only ITES services to its AE's. The AO/TPO are, therefore, directed to exclude this company from the list of comparables in the case on hand.”

17. The ld. DR for the Revenue contended that healthcare segment of Acropetal should be taken as a comparable. However, balance sheet of Acropetal, available at pages 182 to 261 of the paper book, shows that its healthcare segment is not a BPO. So, following the decision rendered by the coordinate Bench of the Tribunal in the case of *ACIT vs. Flextronics Technologies (India) (P.) Ltd.* (supra), we are of the considered view that ld. DRP has rightly excluded the Acropetal from the final set of comparables. So, ground no.1 is determined against the Revenue.

GROUND NO.2

18. Ld. DRP reached the conclusion that TP adjustment cannot exceed the amount of margin retained by the AE. Ld. AR for the taxpayer contended that this issue is covered in favour of the taxpayer by the decision rendered by the coordinate Bench of the Tribunal in the case of *HCL Technologies BPO Ltd. vs. ACIT – ITA No.3547/Del/2010* which is confirmed by Hon'ble Delhi High Court and Hon'ble Supreme Court. Operative part of which is as under :-

“11. Without prejudice to the assessee company’s contention that the adjustment made by the TPO is not sustainable, it was submitted that the adjustment at best could be made only to the extent of Rs. 11,960,457, being the amount which has been retained by the associated enterprise.

12. The Ld. CIT(A) in his order restricted the Transfer Pricing adjustment to Rs. 1.19 crores holding as under:

"The Transfer Pricing Officer has computed an adjustment of Rs.17.04 crores while the value of international transactions is Rs.13,00,89,632. The total revenue received by the associated enterprises in respect of BPO services rendered by the appellant amounting to Rs.13,00,89,632 is Rs.14,20,50,089. In other words, the associated enterprise has retained Rs. 1, 19,60,457 out of the total proceeds received from the customers. The adjustment computed by the TPO in the order passed under section 92CA(3) of the Act at best cannot exceed the net amount retained by the associated enterprises in respect 'of international transactions, i.e., gross revenue' received from the end customers less amount paid' to the appellant and, other operating expenses. It is observed that the gross revenue received from the end customers in respect of various contracts, the associated enterprise have retained only Rs. 1,19,60,457 at their end and the balance has been passed on to the appellant.”

12.3 The issue has been considered in the recent decision of Delhi Bench of the Tribunal in the case of DCIT vs. Global Vantage P. Ltd., wherein, the Tribunal held that adjustment on account of arm's length price of international transactions cannot exceed the maximum arm's length price, i.e., the amount received by the associated enterprise from the customer and the actual value of international transactions, i.e., the amount received by the assessee in respect of international transactions.

12.4 In view of the same I am of the considered view that the adjustment to the income of the appellant has to be restricted to Rs.1,19,60,457- being the amount retained by the associated enterprises."

13. Aggrieved with this order, the Revenue had come up in the present appeal. Ld. D.R. placed reliance on the order of Ld. CIT(A) and had prayed for quashing of CIT(A)'s order on this issue. On the other hand, Ld. Sr. Counsel submitted that the appellant could not have expected to receive from the customers of the AEs of the appellant, anything more than the amount paid by some customer to the AE, if the appellant were to obtain the contracts for services from the customers directly, i.e., without the involvement of the AEs of the appellant. Thus, at the most the consideration received by the appellant from the AEs may be replaced by the consideration received by the AEs from its customers, for the services provided by the appellant; the price charged by AEs to the customers being the CUP. Reliance is placed in this regard on the decision of the Hon'ble Delhi High Court in the case of Sony India P. Ltd. vs. CBDT (Delhi) ; 288 ITR 52 has at pages 61-62, observed as under:

"The concept of transfer pricing leading to tax avoidance has been acknowledged in the Act only recently. It is a concomitant of the operations of multinational corporations (MNCs) that set up base by incorporating a local subsidiary in a country where they seek to operate. It is often seen that the MNC transfers goods and services to its local subsidiary at a price not reflective of the market price (or arm's length price as if is referred to in the present context) and in turn the subsidiary is able to avoid, partly or wholly, payment of the local tax, Although the expression "transfer price" has not been defined in the Act,' it is 'understood to mean "that price which is arrived at when two associated or related enterprises deal with each other".

14. Reference was made to the Finance Minister's Budget Speech for the year 2001 that the presence of multinational

enterprises in India and their ability to allocate profits in different jurisdictions by controlling prices in intra-group transactions has made the issue of transfer pricing a matter of serious concern. The purpose of inserting these provisions is therefore to determine the arm's length price (ALP) of an international transaction involving an MNC and its local associate."

15. *Reliance is placed on the decision of Delhi Bench of the Tribunal in the case of DCIT vs Global Vantage P. Ltd., (ITA No. 1432 & 2321/0ell2009 and 116/0eI/2011), wherein, the Hon'ble Tribunal held that adjustment on account of arm's length price of international transactions cannot exceed the amount received by the associated enterprise from the customer and the actual value of international transactions, i.e., the amount received by the assessee in respect of international transactions. The Hon'ble Jurisdictional High Court vide order dated 14-03-2013 (in ITA Nos. 1828/2010, 1829/2010 & 1254/2011) had dismissed the Revenue's appeal against the said order of the Tribunal. The Special Leave Petition (SLP) of the Revenue against the said order has also been dismissed by the Supreme Court vide order dated 02-01-2014 (CC No. 22166 of 2013).*

16. *Further reliance in this regard is placed on the following observation of the Hon'ble Delhi bench of the Tribunal in the case of Li & Fung (India) Pvt. Ltd. vs. DC IT (ITA No 5156/DeI/2010):*

17. *The Hon'ble Delhi High Court recently vide order dated 16-12-2013 (in ITA No.306/2012), while adjudicating on the said decision of the Tribunal, held in paragraph 40 of the order that "the approach of the TPO and the tax authorities in essence imputes notional adjustment / income in the assessee's hands on the basis of a fixed percentage of the free on board value of export made by unrelated party vendors. "*

18. *Reliance in this regard is also placed on the recent decision of Delhi Bench of the Tribunal in the case of Hyper Quality India Pvt. Ltd. vs. ACIT (ITA No. 5630/0ell2011), wherein, it has been held as under:*

"7. Ld. TPO erred in evaluating FAR (Functions performed, Assets. employed and Risk assumed) analysis which has been summarily confirmed by DRP. To support its case, assessee furnished split financials of the appellant and its AE. Whereas the appellant has been able to earn profit in India its counterpart the AE has continuously sustained losses. There being no element of profit in the hands of the AE, there is no case of shifting

of profits, practicable or probable. Invoking a higher ALP on the appellant is only anticipatory and complete ignorance of fact. The facts and figures produced before the Ld. TPO establish that there is no commercial profit available in the hands of the AE. In absence of profit availability, the any enhancement of the ALP results in artificial profit anticipated by the Ld. TPO and not earned by the Appellant. The order of the LD, TPO in enhancing the ALP offered by the appellant is in ignorance of valid FAR and factual considerations and is bad in law and facts."

19. *Reliance in this regard is placed on the recent decision of Delhi High Court in case of Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT III (ITA No. 16/2014) where in it has been held that the arm's length seeks to correct distortion and shifting of profits of tax the actual income earned by a resident. The Hon'ble Delhi High Court held as under:*

'77. As a concept and principle Chapter X does not artificially broaden, expand or deviate from the concept of "real income". "Real income", as held by the Supreme Court in Poona Electricity Supply Company Limited versus CIT, [1965J 57 ITR 521 (SC), means profits arrived at on commercial principles, subject to the provisions of the Act. Profits and gains should be true and correct profits and gains, neither under nor over stated. Arm's length price seeks to correct distortion and shifting of profits to tax the actual income earned by a resident/domestic AE. The profit which would have accrued had arm's length conditions prevailed is brought to tax. Misreporting, if any, on account of non-arm's length conditions resulting in lower profits, is corrected.

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(xii) When segmentation or segregation of a bundled transaction is required, the question of set off and apportionment must be examined realistically and with a pragmatic approach. Transfer pricing is an income allocating exercise to prevent artificial shifting of net incomes of controlled taxpayers and to place them on parity with uncontrolled, unrelated taxpayers. The exercise undertaken should not result in over or double taxation. Thus, the Assessing Officer/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessed, and examining and giving benefit of set off. Section 92(3) does not bar or prohibit set off."

20. *In view of the aforesaid, it is respectfully submitted that the adjustment shall be restricted to Rs. 1.19 crores.*

21. *We have had rival submissions and perused the material on record. Ld. CIT(A) had followed the ratio laid down in the case of Global Ventedge P. Ltd. (supra) (in I.T.A. No. 1432 & 2321 / Del/2009 and 116/Del/2011). This decision was affirmed by both Hon'ble High Court and Hon'ble Supreme Court and his ratio was followed in subsequent decisions as submitted earlier and, therefore, the order of Ld. CIT(A) on this issue is reasonable and we do not find any reason to interfere with this finding of Ld. CIT(A) and hence, the grounds of appeal filed by revenue are dismissed. Accordingly, appeal filed by revenue is dismissed.”*

19. So, following the decision rendered by the coordinate Bench of the Tribunal in *HCL Technologies BPO Ltd. vs. ACIT* (supra, affirmed by Hon'ble Delhi High Court and Hon'ble Supreme Court, we are of the considered view that Id. DRP has rightly held that transfer pricing adjustment should not exceed the amount of margin retained by the AE. Consequently, findings returned by the Id. DRP are hereby confirmed. So, ground no.2 is determined against the Revenue.

20. Resultantly, the appeal filed by the Revenue is dismissed.

Order pronounced in open court on this 15th day of April, 2019.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

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

**Dated the 15th day of March, 2019
TS**

Copy forwarded to:

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

AR, ITAT
NEW DELHI.