



IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.690/Mum./2016
(Assessment Year : 2006-07)

Willis Processing Services India Ltd.
Plant no.6, Godrej & Boyce Compound,
Pirojsha Nagar, LBS Marg, Vikhroli (W)
Mumbai 400 079 PAN – AAAC1796R

..... Appellant

v/s

Dy. Commissioner of Income Tax
Range-2(3)(1), Mumbai

..... Respondent

Assessee by : Shri Rajan Vora
Revenue by : Shri S.K. Singh

Date of Hearing – 03.06.2019

Date of Order – 30.08.2019

ORDER

PER SAKTIJIT DEY. J.M

Captioned appeal by the assessee is directed against the assessment order dated 30th December 2015, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") pertaining to the assessment year 2006-07, in pursuance to the directions of learned Dispute Resolution Panel-2 (DRP), Mumbai.

2. Grounds no.1 and 2, being general in nature, do not require adjudication.

3. Grounds no.3 to 13, are in respect of addition of ₹ 4,46,63,527, made on account of transfer pricing adjustment. Though, in the aforesaid grounds the assessee has raised various issues. However, primary dispute is with regard to selection of certain comparables. In fact, Shri Rajan Vora, learned Counsel for the assessee, confined his arguments objecting to the selection of four comparables. On the very same issue, the assessee has also raised some additional grounds. The comparables disputed by the assessee are as under:-

- i) Vishal Information Technologies Ltd;*
- ii) Datamatics Financial Services Ltd;*
- iii) Maple E-Solutions Ltd;*
- iv) Asit C. Mehta.*

4. Brief facts are, the assessee Company is a wholly owned subsidiary of Willis Europe B.V., a company incorporated in Netherlands. The assessee basically provides services to its Associated Enterprises (AE) relating to processing of insurance claims, premium and data processing which are in the nature of information technology enabled services (ITeS). During the year under consideration, the assessee provided ITeS services to its AE, which the assessee benchmarked in the transfer pricing study report by using Transactional Net Margin Method (TNMM) as the most appropriate method. For comparability analysis, the assessee selected ten

companies as comparables with arithmetic mean of 8.40% as against the margin shown by the assessee @ 10.60%. Thus, it was claimed by the assessee that the transaction with the AE is at arm's length. After perusing the transfer pricing study report as well as other material on record, the Transfer Pricing Officer, though, accepted TNMM as the most appropriate method, however, he did not accept the comparables selected by the assessee as well as certain adjustments made. Out of the ten comparables selected by the assessee, the Transfer Pricing Officer rejected eight comparables. Additionally, he introduced ten fresh comparables. Thus, the Transfer Pricing Officer finally selected twelve comparables with average margin of 22.77% and after working capital adjustment the margin stood reduced to 21.29%. Applying the aforesaid adjusted margin of the comparables to the operating cost, the Transfer Pricing Officer determined the arm's length price of the international transaction at ₹ 50,69,87,072, as against the price charged by the assessee at ₹ 46,23,23,545. The resultant shortfall of ₹ 4,46,63,527, was treated as adjustment to the arm's length price. On the basis of adjustment proposed by the Transfer Pricing Officer, the Assessing Officer framed the draft assessment order adding the adjustment. Though, the assessee objected to the adjustment made by the Transfer Pricing Officer before learned DRP, however, the adjustment made was more or less sustained.

5. As observed earlier, insofar as the transfer pricing adjustment is concerned, learned Counsel for the assessee has restricted his argument to four comparables selected by the Transfer Pricing Officer. Therefore, we proceed to deal with the aforesaid issue at the outset.

6. The first comparable objected by the assessee is **Vishal Information Technologies Ltd.**

7. The learned Counsel for the assessee submitted, this company cannot be treated as comparable only because it was selected as a comparable in assessment year 2007-08. He submitted, while selecting the company, the Transfer Pricing Officer has not at all considered the submissions of the assessee objecting to the selection of this company. He submitted, the company has a completely different business model as it outsources major portion of its work to third party vendors. Drawing our attention to the financial statements of the company, the learned Counsel submitted, the personnel cost of the company as a percentage of its turnover works out to only 1.25% as against 54.45% of the assessee. Further, he submitted, the personnel cost as a percentage of total cost of the company works out to 1.84% as against 59.79% of the assessee. He submitted, the aforesaid facts clearly indicate that this company does not provide service itself but outsources its work to third parties. The learned Counsel submitted, for the aforesaid reason, in case of various other

assesses the Tribunal as well as the Hon'ble High Court has held that this company cannot be a comparable. In support of such contention, he relied upon the following decisions: –

- i) *ACIT v/s Trinity Computer Processing India Pvt. Ltd., ITA no.1832/Mum./2011, dated 29.07.2016;*
- ii) *Willis Processing Services India Pvt. Ltd. v/s ACIT, ITA no.6877/Mum./2012, dated 22.03.1017;*
- iii) *Rampgreen Solutions Pvt. Ltd. v/s CIT, ITA no.102/2015, dated 10.08.2015 (Del.HC);*
- iv) *PCIT v/s v/s IHG IT Services India Pvt. Ltd., ITA no.264/2016 (O&M), dated 05.12.2016 (P&H);*
- v) *CIT v/s PTC Software India Pvt. Ltd., ITA no.732/2014, dated 26.09.2016;*
- vi) *Tata Consultancy Services Ltd. v/s ACIT, ITA no.6648/Mum./2012, etc., dated 18.10.2017;*
- vii) *Maersk Global India Pvt. Ltd., ITA no.2594/Mum./2014, dated 16.01.2015*
- viii) *HSBC Electronic Data Processing India Ltd. v/s ACIT, ITA no.1624/Hyd./2010, dated 28.06.2013;*
- ix) *Cognizant Technology Services Pvt. Ltd. v/s ACIT, 37 CCH 115;*
- x) *Zavata India Pvt. Ltd. v/s DCIT, ITA no.1781/Hyd./2011, dated 07.06.2013;*
- xi) *M/s. Exxonmobil Co. India Pvt. Ltd. v/s ACIT, ITA no.2/Pnj./2013; and*
- xii) *M/s. Pentair Water India Pvt. Ltd. v/s ACIT, ITA no.2/Pnj./2013.*

8. The learned Counsel for the assessee further submitted, in assessee's own case for the assessment years 2005–06 and 2008–09,

the company has been rejected as a comparable for the very same reason. Thus, he submitted, the company cannot be treated as comparable to the assessee.

9. Shri S.K. Singh, the learned Departmental Representative, strongly relying upon the observations of the Transfer Pricing Officer and learned DRP submitted, the company cannot be rejected as a comparable as it is functionally similar to the assessee. Drawing our attention to the financial statements of the company placed in the paper book, he submitted, the contention of the assessee that the company outsources its work has to be verified as the financial statement shows that the company owns many computers which pre-supposes that it is doing ITeS itself. Thus, he submitted, the company cannot be rejected as comparable.

10. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. It is relevant to observe, before the Transfer Pricing Officer and learned DRP, though, the assessee had objected to selection of this company as a comparable, however, assessee's objections have not been properly considered or appreciated. On a perusal of the financial statements of this company, we have noticed that the employee/personnel cost of this company, as a percentage of the total cost and sales, is negligible compared to the personnel cost of the

assessee as a percentage of total cost and sales turnover. The aforesaid facts do establish that the company does not undertake the provision of services itself but outsources major part of the work to third parties. In contrast, the assessee provided ITeS on its own without outsourcing. That being the case, the business model of this company is totally different from the assessee. Due to the distinct business model of outsourcing of work followed by this company, it has been rejected as a comparable in case of various other assessees. In this context, we may refer to the decisions cited before us by the learned Counsel. In fact, different High Courts, including the Hon'ble Jurisdictional High Court, have excluded this company as a comparable due to its distinct and different business model. It is relevant to observe, in assessee's own case in assessment year 2005-06 and 2008-09, this company has been rejected as a comparable due to its different business model. As regards the contention of the Revenue that the company was selected as comparable in assessment year 2007-08, on careful analysis it is found that in assessment year 2007-08, the difference in the business model of the assessee and this company was not brought to the notice of the Tribunal. Thus, in view of the relevant facts and the ratio laid down in the decisions cited before us, we hold that **Vishal Information Technologies Ltd.**, cannot be treated as a comparable to the assessee.

11. The next comparable disputed by the assessee is **Datamatics Financial Services Ltd.**

12. Objecting to the selection of this company, the learned Counsel for the assessee submitted, the only reason the Transfer Pricing Officer selected this company as a comparable is, it was accepted as a comparable in assessment year 2007-08. The learned Counsel submitted, the annual report of the company reveals that it is engaged in processing and printing as well as ITeS. Whereas, the segmental break-up is only available in respect of revenue and no segmental break-up of expenses incurred or profits earned is available. He submitted, while the company has earned revenue from processing and printing amounting to ₹ 5.93 crore, revenue earned from export of ITeS is ₹ 2.31 crore and other income is of ₹ 2 crore. Therefore, income from ITeS constitutes only 22% of the total income of the company. He submitted, since the Transfer Pricing Officer has applied ITeS revenue filter of more than 75%, which is not satisfied by this company, it cannot be treated as a comparable. Without prejudice, the learned Counsel submitted, it also fails related party transaction (RPT) filter of more than 25% on sales applied by the Transfer Pricing Officer. Drawing our attention to the annual report of the company, he submitted, income from ITeS is ₹ 2.31 core, whereas, the total transaction with AE is ₹ 1.13 crore. Therefore, the RPT works out to

49% on sales. Further, he submitted, the business model of the company is also different from the assessee. The learned Counsel submitted, the decision of the Tribunal in assessment year 2007-08 will have no effect on the issue of acceptability of this company as a comparable in the impugned assessment year since all these aspects were not raised before the Tribunal in the said assessment year. In support of his contention, the learned Counsel relied upon the following decisions:-

- i) *M/s. Stream International Services Pvt. Ltd. v/s ADIT, ITA no. 8997/Mum./2010, dated 11.01.2013;*
- ii) *Goldman Sachs Services Pvt. Ltd. v/s DCIT, IT(TP)A no.1423/Bang./2010, dated 11.01.2013;*
- iii) *Deutsche Networking Services Pvt. Ltd. v/s DCIT, ITA no.8972/ Mum./2010, dated 14.09.2018;*
- iv) *M/s. Exxon mobil Co. India Pvt. Ltd. v/s ACIT, ITA no.6708/ Mum./2011, dated 21.02.2018; and*
- v) *Akamai Technologies India Pvt. Ltd. v/s DCIT, ITA no.6708/ Mum./2011, dated 21.02.2018.*

13. The learned Departmental Representative relying upon the observations of the Transfer Pricing Officer and learned DRP submitted, the company is functionally similar to the assessee. However, he submitted, assessee's contention regarding non-fulfillment of RPT and ITeS revenue filter criteria adopted by the Transfer Pricing Officer can be re-examined.

14. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. As could be seen from the impugned order of the Transfer Pricing Officer, while selecting comparables he had applied certain filters which included more than 75% service income filter and less than 25% related party transaction filter. It is the specific contention of the learned Counsel for the assessee that total revenue from ITeS works out to 22% only. Further, it is the contention of the learned Counsel for the assessee that the related party transaction as a percentage of the sales of the company works out to 49%. Thus, according to the assessee, the company fails the aforesaid two filters applied by the Transfer Pricing Officer himself. It is relevant to observe, due to substantial related party transaction this company has been excluded as a comparable in case of various other assessees concerning the very same assessment year. In this context, we may refer to the following decision of the Tribunal, Mumbai Bench:—

- i) M/s. Stream International Services Pvt. Ltd. v/s ADIT, ITA no. 8997/Mum./2010, dated 11.01.2013;*
- ii) Deutsche Networking Services Pvt. Ltd. v/s DCIT, ITA no. 8972/Mum./2010, dated 14.09.2018; and*
- iii) Goldman Sachs Services Pvt. Ltd. v/s DCIT, IT(TP)A no.1423/Bang./2010, dated 07.09.2015.*

15. The other decisions cited by the learned Counsel for the assessee also support the aforesaid view. Thus, prima facie, we are of the opinion that this company cannot be selected as a comparable since it does not satisfy certain filters applied by the Transfer Pricing Officer himself. Accordingly, we direct the Assessing Officer to factually verify this aspect and excluded this company as a comparable.

16. The next comparable disputed by the assessee is **Maple E-Solutions Ltd.**

17. The learned Counsel for the assessee submitted, this company cannot be selected as comparable due to unreliability of its financial statements. He submitted, this company is a wholly owned subsidiary of Haryana Fibre Ltd. which is a Rastogi Group Company. He submitted, as per CBI investigation report, company's promoters were involved in fraud in the late 1980s and early 1990s. Thus, the financials of the company being unreliable, it cannot be considered as a comparable. He submitted, the unreliability of the financial statements of the company is further evident from the abnormal variation in company's profit margin over the years. In this context, he drew our attention to the materials placed in the paper book. Further, he submitted, learned DRP has accepted it as a comparable only for the reason that it was accepted as a comparable in assessee's own case in assessment year 2007-08. The learned Counsel submitted, the

Hon'ble Jurisdictional High Court in Cummins Turbo Technologies Ltd., dated 28th February 2018, has rejected this company as a comparable accepting the reasoning of the Tribunal that the financials of the company are unreliable due to fraud committed by the directors of the company. Accordingly, the company was rejected. He submitted, in view of the aforesaid decision of the Hon'ble Jurisdictional High Court, which is also for the assessment year 2007-08, the decision of the Tribunal in assessee's own case for the assessment year 2007-08, would not be applicable. In this context, he also relied upon the following decisions:-

- i) *CIT v/s Cummins Turbo Technologies Ltd., ITA no.1099/2015, dated 28.02.2018; (Bom. HC);*
- ii) *CIT(IT) v/s U.T. Starcom Inc., ITA no.767/2017, dated 25.09.2017;*
- iii) *Tata Consultancy Services Ltd. v/s ACIT, ITA no.6648/Mum./2012, etc., dated 18.10.2017;*
- iv) *M/s. Stream International Services Pvt. Ltd. v/s ADIT, ITA no. 8997/Mum./2010, dated 11.01.2013;*
- v) *CRM Services India Pvt. Ltd. v/s CIT, ITA no.618/2012, dated 29.08.2014;*
- vi) *Franklin Templeton International Services India Pvt. Ltd. v/s DCIT, ITA no.7472/Mum./2010; dated 10.01.2018;*
- vii) *Cummins Turbo Technologies Ltd. v/s DCIT, ITA no.269/Pn./2013, dated 29.09.2014;*
- viii) *Deutsche Networking Services Pvt. Ltd. v/s DCIT, ITA no. 8972/Mum./2010, dated 14.09.2018;*
- ix) *Flextronics Technologics India Pvt. Ltd. v/s DCIT, ITA no.1219/Bang./2011, dated 23.11.2015;*

- x) U.T. Starcom Inc., ITA no.5848/Del./2011; and*
- xi) Capital IQ India Pvt. Ltd. v/s DCIT ITA no.1961/Hyd./2011.*

18. The learned Counsel for the assessee submitted, for the purpose of specifically bringing this issue before the Tribunal, the assessee has raised the additional ground.

19. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and learned DRP.

20. We have considered rival submissions and perused the material on record. At the outset, we must observe, in the main ground itself, the assessee has objected to selection of this company as a comparable. The issue raised in the additional ground concerning the aforesaid comparable is only an off-shoot of the main ground. Therefore, we admit the additional ground for adjudication. Reverting back to the issue of comparability of this company, we may observe that the material on record clearly reveal that the directors/promoters of this company were involved in serious fraud earlier. Therefore, different Benches of the Tribunal as well as different High Courts including the Hon'ble Jurisdictional High Court have held that this company cannot be treated as comparable due to unreliability of its financials. The decision of the Hon'ble Jurisdictional High Court in Cummins Turbo Technologies Ltd., ITA no.1099/2015, dated 28th

February 2018, has expressed the aforesaid view. Even the Hon'ble Delhi High Court in CIT v/s U.T. Starcom Inc., ITA no.767/2017, dated 25th September 2017, has expressed similar view. The other decisions cited by the learned Counsel for the assessee also support this view. Therefore, in view of the decisions of the Hon'ble Jurisdictional High Court as well as Hon'ble Delhi High Court and other decisions referred to above, we hold that this company cannot be treated as comparable to the assessee.

21. The next comparable disputed by the assessee is **Asit C. Mehta**.

22. The learned Counsel for the assessee drawing our attention to the annual report of the company submitted, it has three segments i.e., ITeS, Portfolio Management Services and Investment Activities. He submitted, ITeS segment includes revenue from ITeS as well as software development services. Whereas, no further segmental break up is available. Further, he submitted, even the ITeS provided by the company is in the nature of Geographical Information System (GIS) which is a high end Knowledge Process Outsourcing (KPO) services. Therefore, the company being functionally different from the assessee cannot be treated as comparable. He submitted, in assessee's own case in assessment years 2009-10 and 2010-11, the company has been rejected as a comparable as it is a KPO company. He submitted, even learned DRP also rejected this company in assessment year

2011–12, as it provides KPO services. The learned Counsel submitted, during the year under consideration, the company has also acquired another company i.e., Nucleus Netsoft and GIS India Ltd. Therefore, due to such extra ordinary event happening during the year, the company cannot be treated as comparable. The learned Counsel submitted, learned DRP was not justified in upholding selection of this company as a comparable simply relying upon the decision of the Tribunal in assessment year 2007–08. In support of his contention, he relied upon the following decisions:–

- i) M/s. Pentair Water India Pvt. Ltd. v/s ACIT, ITA no.2/Pnj./2013;*
- ii) M/s. Akamai Technologies India Pvt. Ltd. v/s DCIT, IT(TP)A no.1227/Bang./2010, dated 11.08.2016;*
- iii) HSBC Electronics Data Processing India Ltd. v/s ACIT, ITA no.1624/Hyd./2010;*
- iv) Stream International Services, ITA no.1624/Hyd./2010;*
- v) Goldman Sachs Services Pvt. Ltd. v/s DCIT, ITA no.1423/Bang./2010, dated 07.09.2015; and*
- vi) M/s. Deutsche Networking Services Pvt. Ltd. v/sDCIT, ITA no.8972/Mum./2010, dated 14.09.2018.*

23. We have considered rival submissions and perused material on record. On examining the annual report of the company as well as other materials placed on record, we find that the company has various segments and the ITeS segment does not provide ITeS alone. It appears from the annual report, the ITeS segment also includes

income from software development services. However, segmental details relating to the aforesaid services are not available. Even otherwise also, the nature of services provided by this company is relating to GIS which is considered to be KPO services. Therefore, the company is functionally different from the assessee. It is also noticed from the judicial precedents cited before us that the company has been rejected as a comparable due to various other factors such as extra ordinary business activity due to merger, low employee cost, etc. Therefore, keeping in view the judicial precedents cited before us which are for the very same assessment year, we hold that this company cannot be treated as comparable to the assessee. Accordingly, we direct the Assessing Officer to determine the arm's length price of the transactions relating to provision of ITeS in accordance with our observations herein above. While doing so, the Assessing Officer is directed to consider assessee's claim of risk adjustment in accordance with law. Grounds are allowed to the extent indicated above.

24. Before parting, we must make it clear that we have confined our decision in respect of Transfer pricing adjustment on the specific issue/argument raised before us at the time of hearing of the appeal. Therefore, all other issues relating to the transfer pricing adjustment

are deemed as not pressed, hence, not adjudicated. Grounds are allowed to the extent indicated above.

25. As submitted by the learned Counsel for the assessee, grounds no.14 and 17, have become infructuous by virtue of rectification orders passed by the Assessing Officer. Hence, these grounds are dismissed.

26. Grounds no.15 and 16, are on the issue of levy of interest under section 234B and 234D of the Act.

27. Since the levy of interest under the aforesaid provisions is consequential in nature, the Assessing Officer is directed to apply the provisions in accordance with law.

28. In ground no.18, the assessee has challenged initiation of penalty proceedings under section 271(1)(c) of the Act. This ground being pre-mature at this stage is dismissed.

29. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 30.08.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 30.08.2019

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

Assistant Registrar
ITAT, Mumbai