

IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

|                          |
|--------------------------|
| IT(TP)A No.879/Bang/2018 |
| Assessment year: 2007-08 |

|   |     |  |
|---|-----|--|
| M/s. Dell International Services<br>India Private Limited,<br>No.12/1, 12/2A, 13/1A,<br>Divyashree Greens, Challaghatta<br>Village, Varthur Hobli,<br>Bangalore – 560 071.<br><b>PAN: AAACH 1925Q</b> | Vs. | The Deputy Commissioner<br>of Income Tax, LTU,<br>Bangalore. |
| APPELLANT   |     | RESPONDENT   |

|               |   |   |
|---------------|---|---|
| Appellant by  | : | Shri T. Suryanarayana, Advocate                   |
| Respondent by | : | Shri Muzzaffar Hussain, CIT(DR)(ITAT), Bengaluru. |

|                       |   |            |
|-----------------------|---|------------|
| Date of hearing       | : | 17.06.2020 |
| Date of Pronouncement | : | 24.06.2020 |

**ORDER**

*Per N.V. Vasudevan, Vice President*

This is an appeal against the order of the CIT(Appeals)-V, Bengaluru dated 27.11.2017 relating to assessment year 2007-08.

2. The issues projected by the assessee in ground Nos. 1 to 15 under the head ‘I – Transfer Pricing’ relates to the grievance of the assessee in determination of Arm’s Length Price [ALP] in respect of an international transaction entered into by the assessee with its Associated Enterprise [AE] u/s. 92 of the Income-tax Act, 1961 [the Act] and the consequent addition to the total income.

3. The Assessee is a wholly owned subsidiary of Dell International Inc. The Assessee provides support services to its group entities. The services provided by the Assessee are Call Centre, Shared services and Offshore development Centre (testing and support).

4. During the financial year 2006-07 relevant to the assessment year 2007-08, three of the international transactions that took place between the Assessee and its AEs were Call centre services and Back office support services at a price of Rs. 6,29,43,81,078/- and Rs. 14,96,917,786/- respectively (which were together classified as Information Technology Enabled Services ["ITES"]) and Software Development Services ("SWD") at a price of Rs. 3,32,95,71,655/- for which a Transfer Pricing [TP] adjustment aggregating to Rs. 177,54,56,095/- was made (Rs. 1,54,56,23,611/- towards ITES and Rs. 22,98,32,484/- towards SWD services).

5. The additions suggested by the TPO as above were incorporated by the AO in the draft assessment order. The assessee did not opt to file any objections to the draft assessment order u/s. 144C of the Act and therefore the AO passed the final assessment order dated 21.2.2011 incorporating the additions suggested by the TPO in his order. Against the said order of assessment, the Assessee preferred appeal before the CIT(A), who confirmed the order of the AO. Hence this appeal by the Assessee before the Tribunal.

6. As far as the issue before the Tribunal is concerned, the dispute is only with regard to the addition made to the total income on account of determination of ALP in respect of international transaction of rendering SWD services. As far as rendering of SWD services are concerned, the assessee received a consideration of Rs.332,95,71,655 for rendering SWD services to its AE. In support of its claim that the price received in the

international transaction was at arm's length, the assessee filed a TP study in which it adopted Transactional Net Margin Method [TNMM] as the Most Appropriate Method [MAM] for determining the ALP. The Profit Level Indicator [PLI] chosen for the purpose of comparing the assessee's margin with that of the comparable companies was Operating Profit to Total Cost [OP/TC]. The assessee's OP/TC was as follows:-

|  |                         |
|--|-------------------------|
| Operating Income                             | Rs.<br>3,32,95,71,655/- |
| Operating Expenses                           | Rs.<br>2,86,74,80,979/- |
| Operating Profit (Op. Income – Op. Expenses) | Rs. 46,20,90,676/-      |
| <b>Operating/Net margin (OP/TC)</b>          | <b>16.11%</b>           |

7. The assessee had chosen 17 comparable companies the average arithmetic mean profit of those 17 companies was 10.86%. Since the assessee's profit margin was much more than the average arithmetic mean profit margin of the comparable companies, the assessee claimed that the international transaction has been carried out at arm's length.

8. The TPO, to whom the question of determination of ALP of income arising from the international transaction u/s. 92CA of the Act was referred, accepted 3 of the 17 comparables chosen by the assessee and on his own chose 23 other comparable and determined the ALP of the international transactions as follows:-

| Sl. No. | Name of the Company            | Mark up (%)   |             |
|---------|--------------------------------|---------------|-------------|
|         |                                | WC unadjusted | WC adjusted |
| 1.      | Accel Transmatic Ltd. (Seg)    | 21.11         | 21.08       |
| 2.      | Avani Cimcon Technologies Ltd. | 52.59         | 52.33       |
| 3.      | Celestial Labs Ltd.            | 58.35         | 55.44       |
| 4.      | Datamatics Ltd.                | 1.38          | 0.20        |
| 5.      | e-Zest Solutions Ltd.          | 36.12         | 37.10       |

|                        |   |              |              |
|------------------------|---|--------------|--------------|
| 6.                     | Flextronics Software Systems Ltd. (Seg) | 25.31        | 26.04        |
| 7.                     | Geometric Ltd. (Seg)                    | 10.71        | 10.50        |
| 8.                     | Helios & Matheson Information Ltd.      | 36.63        | 35.48        |
| 9.                     | iGate Global Solutions Ltd.             | 7.49         | 6.47         |
| 10.                    | Infosys Technologies Ltd.               | 40.30        | 40.05        |
| 11.                    | Ishir Infotech Ltd.                     | 30.12        | 31.43        |
| 12.                    | KALS Information Systems Ltd. (Seg)     | 30.55        | 24.40        |
| 13.                    | LGS Global Ltd.                         | 15.75        | 16.09        |
| 14.                    | Lucid Software Ltd.                     | 19.37        | 17.98        |
| 15.                    | Mediasoft Solutions Ltd.                | 3.66         | 2.41         |
| 16.                    | Megasoft Ltd.                           | 60.23        | 52.47        |
| 17.                    | Mindtree Ltd.                           | 16.90        | 16.28        |
| 18.                    | Persistent Systems Ltd.                 | 24.52        | 24.40        |
| 19.                    | Quintegra Solutions Ltd.                | 12.56        | 10.11        |
| 20.                    | R S Software (India) Ltd                | 13.47        | 14.04        |
| 21.                    | R Systems International Ltd. (Seg)      | 15.07        | 14.16        |
| 22.                    | Sasken Communication Ltd. (Seg)         | 22.16        | 22.04        |
| 23.                    | SIP Technologies & Exports Ltd.         | 13.90        | 11.60        |
| 24.                    | Tata Elxsi Ltd. (Seg)                   | 26.51        | 27.17        |
| 25.                    | Thirdware Solutions Ltd.                | 25.12        | 22.48        |
| 26.                    | Wipro Ltd. (Seg)                        | 33.65        | 35.56        |
| <b>ARITHMETIC MEAN</b> |   | <b>25.14</b> | <b>24.13</b> |

9. Aggrieved by the aforesaid addition of the shortfall in ALP to the total income by the AO, the assessee preferred appeal before the CIT(Appeals). The CIT(Appeals) upheld the order of the AO.

10. Aggrieved by the order of CIT(Appeals), the assessee has preferred the present appeal before the Tribunal. The Id. counsel for the assessee submitted that 14 out of 26 comparable companies which was ultimately chosen by the TPO have to be excluded and in this regard filed before us a copy of the decision of the ITAT Bangalore Bench in the case of *NXP Semiconductors Pvt. Ltd. v. ACIT*, order dated 14.11.2014 for the AY 2007-08 in IT(TP)A No.1174/Bang/2011.

11. The Id. DR relied on the orders of the revenue authorities.

12. We have considered the rival submissions. It is not in dispute that the functional profile of the assessee in the present appeal and that of the assessee in the case decided by the Tribunal in *NXP Semiconductors Pvt. Ltd. (supra)* are identical. In the aforesaid decision, the Tribunal excluded the following 14 out of 26 comparable companies viz.,:-

- i. Accel Transmatic Ltd.
- ii. Avani Cimcon Ltd.
- iii. Celestial Labs Ltd.
- iv. E-Zest Solutions Ltd.
- v. Helios & Matheson Information Technology Ltd.
- vi. Infosys Technologies Ltd
- vii. Ishir Infotech Ltd.
- viii. Kals Information Systems Ltd.
- ix. Lucid Software Ltd.
- x. Megasoft Ltd
- xi. Persistent Systems Ltd.
- xii. Tata Elxsi Ltd
- xiii. Thirdware Solutions Ltd.
- xiv. Wipro Ltd

13. The Tribunal in the aforesaid case excluded the 14 comparable companies set out above, for the following reasons:-

“18. As far as comparable companies listed at Sl.No.2,3 and 12 of the final list of comparable companies chosen by the TPO viz., **Avani Cincom Technologies Ltd., Celestial labs Limited and KALS Infosystems Ltd.,** are concerned, this Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. Vs. DCIT IT (TP) No.1086/Bang/2011 for AY 07-08 held that the aforesaid companies are not comparable companies in the case of software development services provider. The nature of services rendered by the Assessee in this appeal and the Assessee in the case of First Advantage Offshore Services Pvt.Ltd.(supra) are one and the same. This fact would be clear from the fact that the very same 26 companies were chosen as comparable in the case of the Assessee as well as in the case of First Advantage Offshore Services Pvt.Ltd.(supra). In coming to the

aforesaid conclusion, the Tribunal in the case of First Advantage Offshore Services Pvt.Ltd.(supra) followed the decision rendered in the case of Trilogy E-Business Software India Pvt. Ltd. Vs. DCIT ITA No.1064/Bang/2011 for AY 07-08 order dated 23.11.2012. The following were the relevant observations in the case of First Advantage Offshore Services Pvt.Ltd.(supra):

“18. As regards the group 2 companies which are to be excluded as functionally different based on the Tribunal’s order in the case of Trilogy E-Business Software India Pvt.Ltd., we find that these companies are-

- 1) Accel Transmatic
- 2) Avani Cimcon Technologies Ltd.
- 3) Celestial Labs Ltd.
- 4) KALS Information Systems Ltd.

19. The Tribunal in the case of Trilogy E-Business Software India Pvt.Ltd., while considering the issue of improper selection of comparables has held as under:-

(b) **Avani Cimcon Technologies Ltd.**

39. As far as this company is concerned, the plea of the Assessee has been that this company is functionally different from the assessee. Based on the information available in the company’s website, which reveals that this company has developed a software product by name “DXchange”, it was submitted that this company would have revenue from software product sales apart from rendering of software services and therefore is functionally different from the assessee. It was further submitted that the Mumbai Bench of the Tribunal to the decision in the case of *Telcordia Technologies Pvt. Ltd. v. ACIT – ITA No.7821/Mum/2011* wherein the Tribunal accepted the assessee’s contention that this company has revenue from software product and observed that in the absence of segmental details, Avani Cincom cannot be considered as comparable to the assessee who was rendering software development services only and it was held as follows:-

“7.8 Avani Cincom Technologies Ltd. (‘Avani Cincom’):

Here in this case also the segmental details of operating income of IT services and sale of software products have not been provided so as to see whether the profit ratio of this company can be taken into consideration for comparing the case that of assessee. In absence of any kind of details provided by the TPO, we are unable to persuade ourselves to include it as comparable party. Learned CIT DR has provided a copy of profit loss account which shows that mainly its earning is from software exports, however, the details of percentage of export of products or services have not been given. We, therefore, reject this company also from taking into consideration for comparability analysis.”

It was also highlighted that the margin of this company at 52.59% which represents abnormal circumstances and profits. The following figures were placed before us:-

| Particulars       | FYs 05-06 | 06-07    | 07-08    | 08-09     |
|-------------------|-----------|----------|----------|-----------|
| Operating Revenue | 21761611  | 35477523 | 29342809 | 28039851  |
| Operating Expsn.  | 16417661  | 23249646 | 23359186 | 31108949  |
| Operating Profit  | 5343950   | 12227877 | 5983623  | (3069098) |
| Operating Margin  | 32.55%    | 52.59%   | 25.62%   | - 9.87%   |

40. It was submitted that this company has made unusually high profit during the financial year 06-07. The operating revenues increased 63.03% which indicates that it was an extraordinary year for this company. Even the growth of software industry for the previous year as per NASSCOM was 32%. The growth rate of this company was double the industry average. In view of the above, it was argued that this company ought to have been rejected as a comparable.

41. We have given a careful consideration to the submissions made on behalf of the Assessee and are of the view that the same deserves to be accepted. The reasons given by the Assessee for excluding this company as comparable are found to be acceptable. The

decision of ITAT (Mumbai) in the case of *Telcordia Technologies Pvt. Ltd. v. ACIT (supra)* also supports the plea of the assessee. We therefore accept the plea of the Assessee to reject this company as a comparable.

**(c) Celestial Labs Ltd.**

42. As far as this company is concerned, the stand of the assessee is that it is absolutely a research & development company. In this regard, the following submissions were made:-

- i. In the Director's Report (page 20 of PB-II), it is stated that "the company has applied for Income Tax concession for in-house R&D centre expenditure at Hyderabad under section 35(2AB) of the Income Tax Act."
- ii. As per the Notes to Accounts - Schedule 15, under "Deferred Revenue Expenditure" (page 31 of PB-II), it is mentioned that, "Expenditure incurred on research and development of new products has been treated as deferred revenue expenditure and the same has been written off in 10 years equally yearly installments from the year in which it is incurred."

An amount of Rs. 11,692,020/- has been debited to the Profit and Loss Account as "Deferred Revenue Expenditure" (page 30 of PB-II). This amounts to nearly **8.28 percent** of the sales of this company.

It was therefore submitted that the acceptance of this company as a comparable for the reason that it is into pure software development activities and is not engaged in R&D activities is bad in law.

43. Further reference was also made to the decision of the Mumbai Bench of the Tribunal in the case of *Teva Pharma Private Ltd. v. Addl. CIT - ITA No.6623/Mum/2011 (for AY 2007-08)* in which the comparability of this company for clinical trial research segment. The relevant extract of discussion regarding this company is as follows:

“The learned D.R. however drew our attention to page-389 of the paper book which is an extract from the Directors report which reads as follows:

‘The Company has developed a *de novo* drug design tool “CELSUITE” to drug discovery in, finding the lead molecules for drug discovery and protected the IPR by filing under the copy if sic (of) right/patent act. (Apprised and funded by Department of Science and Technology New Delhi) based on our insilico expertise (applying bio-informatics tools). The Company has developed a molecule to treat *Leucoderma and multiple cancer* and protected the IPR by filing the patent. The patent details have been discussed with Patent officials and the response is very favorable. The cloning and purification under wet lab procedures are under progress with our collaborative Institute, Department of Microbiology, Osmania University, Hyderabad. In the industrial biotechnology area, the company has signed the Technology transfer agreement with IMTECH CHANDIGARH (a very reputed CSIR organization) to manufacture and market initially two Enzymes, Alpha Amylase and Alkaline Protease in India and overseas. The company is planning to set up a biotechnology facility to manufacture industrial enzymes. This facility would also include the research laboratories for carrying out further R & D activities to develop new candidates’ drug molecules and license them to Interested Pharma and Bio Companies across the GLOBE. The proposed Facility will be set up in Genome Valley at Hyderabad in Andhra Pradesh.’

According to the learned D.R. celestial labs is also in the field of research in pharmaceutical products and should be considered as comparable. As rightly submitted by the learned counsel for the Assessee, the discovery is in relation to a software discovery of new drugs. Moreover the company also is owner of the IPR. There is however a reference to development of a molecule to treat cancer using bio-informatics

tools for which patenting process was also being pursued. As explained earlier it is a diversified company and therefore cannot be considered as comparable functionally with that of the Assessee. There has been no attempt made to identify and eliminate and make adjustment of the profit margins so that the difference in functional comparability can be eliminated. By not resorting to such a process of making adjustment, the TPO has rendered this company as not qualifying for comparability. We therefore accept the plea of the Assessee in this regard.' "

44. It was submitted that the learned DR in the above case vehemently argued that this company is into research in pharmaceutical products. The ITAT concluded that this company is owner of IPR, it has software for discovery of new drugs and has developed molecule to treat cancer. In the ultimate analysis, the ITAT did not consider this company as a comparable in clinical trial segment, for the reason that this company has diverse business. It was submitted that, however, from the above extracts it is clear that this company is not into software development activities, accordingly, this company should be rejected as a comparable being functionally different.

45. From the material available on record, it transpires that the TPO has accepted that up to AY 06-07 this company was classified as a Research and Development company. According to the TPO in AY 07-08 this company has been classified as software development service provider in the Capitaline/Prowess database as well as in the annual report of this company. The TPO has relied on the response from this company to a notice u/s.133(6) of the Act in which it has said that it is in the business of providing software development services. The Assessee in reply to the proposal of the AO to treat this as a comparable has pointed out that this company provides software products/services as well as bioinformatics services and that the segmental data for each activity is not available and therefore this company should not be treated as comparable. Besides the above, the Assessee has point out to several references in the annual report for 31.3.2007 highlighting the fact that this company was develops biotechnology products and

provides related software development services. The TPO called for segmental data at the entity level from this company. The TPO also called for description of software development process. In response to the request of the TPO this company in its reply dated 29.3.2010 has given details of employees working in software development but it is not clear as to whether any segmental data was given or not. Besides the above there is no other detail in the TPO's order as to the nature of software development services performed by the Assessee. Celestial labs had come out with a public issue of shares and in that connection issued Draft Red Herring Prospectus (DRHP) in which the business of this company was explained as to clinical research. The TPO wanted to know as to whether the primary business of this company is software development services as indicated in the annual report for FY 06-07 or clinical research and manufacture of bio products and other products as stated in the DRHP. There is no reference to any reply by Celestial labs to the above clarification of the TPO. The TPO without any basis has however concluded that the business mentioned in the DRHP are the services or businesses that would be started by utilizing the funds garnered through the Initial Public Offer (IPO) and thus in no way connected with business operations of the company during FY 06-07. We are of the view that in the light of the submissions made by the Assessee and the fact that this company was basically/admittedly in clinical research and manufacture of bio products and other products, there is no clear basis on which the TPO concluded that this company was mainly in the business of providing software development services. We therefore accept the plea of the Assessee that this company ought not to have been considered as comparable.

**(d) KALS Information Systems Ltd.**

46. As far as this company is concerned, the contention of the assessee is that the aforesaid company has revenues from both software development and software products. Besides the above, it was also pointed out that this company is engaged in providing training. It was also submitted that as per the annual report, the salary cost debited under the software development expenditure was Q 45,93,351. The same was less than 25% of the

software services revenue and therefore the salary cost filter test fails in this case. Reference was made to the Pune Bench Tribunal's decision of the ITAT in the case of *Bindview India Private Limited Vs. DCI*, ITA No. ITA No 1386/PN/10 wherein KALS as comparable was rejected for AY 2006-07 on account of it being functionally different from software companies. The relevant extract are as follows:

"16. Another issue relating to selection of comparables by the TPO is regarding inclusion of Kals Information System Ltd. The assessee has objected to its inclusion on the basis that functionally the company is not comparable. With reference to pages 185-186 of the Paper Book, it is explained that the said company is engaged in development of software products and services and is not comparable to software development services provided by the assessee. The appellant has submitted an extract on pages 185-186 of the Paper Book from the website of the company to establish that it is engaged in providing of I T enabled services and that the said company is into development of software products, etc. All these aspects have not been factually rebutted and, in our view, the said concern is liable to be excluded from the final set of comparables, and thus on this aspect, assessee succeeds."

Based on all the above, it was submitted on behalf of the assessee that KALS Information Systems Limited should be rejected as a comparable.

47. We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly

software development service provider. We therefore accept the plea of the Assessee that this company is not comparable.

(e) **Accel Transmatic Ltd.**

48. With regard to this company, the complaint of the assessee is that this company is not a pure software development company. It is further submitted that in a Mumbai Tribunal Decision of *Capgemini India (P) Ltd. v. Ad.CIT 12 Taxman.com 51*, the DRP accepted the contention of the assessee that Accel Transmatic should be rejected as comparable. The relevant observations of DRP as extracted by the ITAT in its order are as follows:

“In regard to Accel Transmatics Ltd. the assessee submitted the company profile and its annual report for financial year 2005-06 from which the DRP noted that the business activities of the company were as under.

(i) Transmatic system - design, development and manufacture of multi function kiosks Queue management system, ticket vending system

(ii) Ushus Technologies - offshore development centre for embedded software, net work system, imaging technologies, outsourced product development

(iii) Accel IT Academy (the net stop for engineers)-training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CAD/CAM/BPO

(iv) Accel Animation Studies software services for 2D/3D animation, special effect, erection, game asset development.

4.3 On careful perusal of the business activities of Accel Transmatic Ltd. DRP agreed with the assessee that the company was functionally different from the assessee company as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore assessee's claim that this company was functionally different was accepted. DRP therefore directed the Assessing Officer to exclude

ACCEL Transmatic Ltd. from the final list of comparables for the purpose of determining TNMM margin.

49. Besides the above, it was pointed out that this company has related party transactions which is more than the permitted level and therefore should not be taken for comparability purposes. The submission of the Id. counsel for the assessee was that if the above company should not be considered as comparable. The Id. DR, on the other hand, relied on the order of the TPO.

50. We have considered the submissions and are of the view that the plea of the assessee that the aforesaid company should not be treated as comparables was considered by the Tribunal in *Capegemini India Ltd. (supra)* where the assessee was software developer. The Tribunal, in the said decision referred to by the Id. counsel for the assessee, has accepted that this company was not comparable in the case of assessee engaged in software development services business. Accepting the argument of the Id. counsel for the assessee, we hold that the aforesaid company should be excluded as comparables.”

20. Respectfully following the decision of the Tribunal in similar set of facts, these companies are directed to be excluded from the list of comparables.”

19. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

20. As far as comparable companies listed at Sl.No.11 & 14 of the final list of comparable companies chosen by the TPO viz., **M/S.Ishir Infotech Ltd. And Lucid Software Ltd.**, is concerned, this Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. Vs. DCIT IT (TP) No.1086/Bang/2011 for AY 07-08 held that the aforesaid companies are not comparable companies in the case of software development services provider. The nature of services rendered by the Assessee in this appeal and the Assessee in the case of First Advantage Offshore Services Pvt.Ltd.(supra) are one and the same. This fact would be clear from the fact that the very same 26 companies were chosen as comparable in the case of the Assessee as well as in the case of First Advantage Offshore Services Pvt.Ltd.(supra). The following were the relevant observations in the case of First Advantage Offshore Services Pvt.Ltd.(supra):-

“22. The learned counsel for the assessee submitted that these two companies are also to be excluded from the list of comparables on the basis of the finding of this Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. dt 22.2.2013, wherein at pages 17 and 22 of its order the distinctions as to why these companies should be excluded are brought out. He submitted that the facts of the case before us are similar and, therefore, the said decision is applicable to the assessee's case also.

23. The learned DR however objected to the exclusion of these two companies from the list of comparables. On a careful perusal of the material on record, we find that the Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. (cited supra) has taken a note of dissimilarities between the assessee therein and Lucid Software Ltd. As observed therein Lucid Software Ltd. company is also involved in the development of software as compared to the assessee, which is only into software services. Similarly, as regards Ishir Infotech Ltd., the Tribunal has considered the decision of the Tribunal in the case of 24/7 Co. Pvt. Ltd to hold that Ishir Infotech is also out-sourcing its work and, therefore, has not satisfied the 25% employee cost filter and thus has to be excluded from the list of comparables. As the facts of the case before us are similar, respectfully following the decision of the co-ordinate bench, we hold that these two companies are also to be excluded.”

21. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

22. As far as comparable companies listed at Sl.No.16 of the final list of comparable companies chosen by the TPO viz., **M/S.Megasoft Limited** is concerned, this Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. Vs. DCIT IT (TP) No.1086/Bang/2011 for AY 07-08 held that the aforesaid companies are not comparable companies in the case of software development services provider. The nature of services rendered by the Assessee in this appeal and the Assessee in the case of First Advantage Offshore

Services Pvt.Ltd.(supra) are one and the same. This fact would be clear from the fact that the very same 26 companies were chosen as comparable in the case of the Assessee as well as in the case of First Advantage Offshore Services Pvt.Ltd.(supra). In coming to the aforesaid conclusion, the Tribunal in the case of First Advantage Offshore Services Pvt.Ltd.(supra) followed the decision rendered in the case of Trilogy E-Business Software India Pvt.Ltd. Vs. DCIT ITA No.1064/Bang/2011 for AY 07-08 order dated 23.11.2012. The following were the relevant observations in the case of First Advantage Offshore Services Pvt.Ltd.(supra):

“27. As far as adoption of Mega Soft Ltd., as one of comparables, the learned counsel for the assessee submitted that there is an error in computing its net margin. He has drawn our attention to the order of the Tribunal in the case of Trilogy E-Business Software India Pvt.Ltd., at para 24 to 27 at page 18, wherein the error in computing the net margin of this company has been taken note of and it has been directed as under:

“(a) Megasoft Ltd. :

24. This company was chosen as a comparable by the TPO. The objection of the assessee is that there are two segments in this company viz., (i) software development segment, and (ii) software product segment. The Assessee is a pure software services provider and not a software product developer. According to the Assessee there is no break up of revenue between software products and software services business on a standalone basis of this comparable. The TPO relied on information which was given by this company in which this company had explained that it has two divisions viz., BLUEALLY DIVISION and XIUS-BCGI DIVISION. Xius-BCGI Division does the business of product software. This company develops packaged products for the wireless and convergent telecom industry. These products are sold as packaged products to customers. While implementing these standardized products, customers may request the

company to customize products or reconfigure products to fit into their business environment. Thereupon the company takes up the job of customizing the packaged software. The company also explained that 30 to 40% of the product software would constitute packaged product and around 50% to 60% would constitute customized capabilities and expenses related to travelling, boarding and lodging expense. Based on the above reply, the TPO proceeded to hold that the comparable company was mainly into customization of software products developed (which was akin to product software) internally and that the portion of the revenue from development of software sold and used for customization was less than 25% of the overall revenues. The TPO therefore held that less than 25% of the revenues of the comparable are from software products and therefore the comparable satisfied TPO's filter of more than 75% of revenues from software development services. The basis on which the TPO arrived at the PLI of 60.23% is given at page-115 and 116 of the order of the TPO. It is clear from the perusal of the same that the TPO has proceeded to determine the PLI at the entity level and not on the basis of segmental data.

25. In the order of the TPO, operating margin was computed for this company at 60.23%. It is the complaint of the assessee that the operating margins have been computed at entity level combining software services and software product segments. It was submitted that the product segment of Megasoft is substantially different from its software service segment. The product segment has employee cost of 27.65% whereas the software service segment has employee cost of 50%. Similarly, the profit margin on cost in product segment is 117.95% and in case of software service segment it is 23.11%. Both the segments are substantially different and therefore comparison at entity level is without basis and would vitiate the comparability (submissions on page 381 to 383

of the PB-I). It was further submitted that Megasoft Limited has provided segmental break-up between the software services segment and software product segment (page 68 of PB-II), which was also adopted by the TPO in his show cause notice (Page 84 of PB-I). The segmental results i.e., results pertaining to software services segment of this company was:

|                              |                 |
|------------------------------|-----------------|
| Segmental Operating Revenues | Rs.63,71,32,544 |
| Segmental Operating Expenses | Rs.51,75,13,211 |
| Operating Profit             | Rs.11,96,19,333 |
| OP/TC (PLI)                  | 23.11%          |

26. It was reiterated that in the given circumstances only PLI of software service segment viz., 23.11% ought to have been selected for comparison.

27. It was further submitted that the learned TPO in case of other comparable, similarly placed, had adopted the margins of only the software service segment for comparability purposes. Consistent with such stand, it was submitted that the margins of the software segment only should be adopted in the case of Megasoft also, in contrast to the entity level margins.

28. Computation of the net margin for Mega Soft Ltd. Is therefore remitted to the file of the TPO to compute the correct margin by following the direction of the Tribunal in the case of Trilogy E-Business Software India Pvt.Ltd.”

23. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to compute the correct margin of Mega Soft Ltd., as directed by the Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. (supra).

24. As far as comparable companies listed at Sl.No.10, 24 & 26 of the final list of comparable companies chosen by the TPO viz., **M/S.Infosys Technologies Limited, Tata Elxsi Ltd. (Seq.) & Wipro Limited** are concerned, this Tribunal in the case of M/S.Curam Software International Pvt.Ltd. Vs. ITO ITA No.1280/Bang/2012 for AY 08-09 order dated 31.7.2013 has held that the aforesaid companies are not comparable companies in the case of software development services provider. The following were the relevant observations in the case of M/S.Curam Software International Pvt.Ltd.(supra):

**“12. (4) Infosys Technologies Ltd.**

12.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.

12.2 Before us, the assessee contended that this company is not functionally comparable to the assessee and in this context has cited various portions of the Annual Report of this company to this effect which is as under :-

(i) The company has an Intellectual Property (IP) Cell to guide its employees to leverage the power of IP for their growth. In 2008, this company generated over 102 invention disclosures and filed an aggregate 10 patents in India and the USA. Till date this company has filed an aggregate of 119 patent applications (pending) in India and USA out of which 2 have been granted in the US.

(ii) This company has substantial revenues from software products and the break-up of the software product revenues is not available.

(iii) This company has incurred huge research and development expenditure to the tune of approximately Rs.200 Crores.

(iv) This company has a revenue sharing agreement towards acquisition of IPR in AUTOLAY, a commercial software product used in designing high performance structural systems.

(v) The assessee also placed reliance on the following judicial decisions :-

(a) ITAT, Delhi Bench decision in the case of Agnity India Technologies India Pvt. Ltd. (ITA No.3856/Del/2010) and

(b) Trilogy E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011)

12.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that

comparability cannot be decided merely on the basis of scale of operations and the operating margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

12.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. The argument put forth by assessee's is that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.

### 13.0 **(5) Wipro Limited**

13.1 This company was selected as a comparable by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables on several grounds like functional dis-similarity, brand value, size, etc. The TPO, however, brushed aside the objections of the assessee and included this company in the set of comparables.

13.2 Before us, the assessee contended that this company is functionally not comparable to the assessee for several reasons, which are as under :

(i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles and quoted extracts from the Annual Report of this company in the submissions made.

(ii) The TPO had adopted the consolidated financial statements for comparability purposes and for computing the margins, which contradicts the TPO's own filter of rejecting companies with consolidated financial statements.

13.3. Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the set of comparables.

13.4.1 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison.

13.4.2 We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents. In this regard, the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010) has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any such intangible and hence does not have an additional advantage in the market. As the assessee in the case on hand does not own any intangibles, following the aforesaid decision of the co-ordinate bench of the Tribunal i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee. We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies in the case on hand for the year under consideration.

#### 14.0 **(6) Tata Elxsi Ltd.**

14.1 This company was a comparable selected by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the set of comparables on several counts like, functional dis-similarity, significant R&D activity, brand value, size, etc. The TPO, however, rejected the contention put forth by the assessee and included this company in the set of comparables.

14.2 Before us, it was reiterated that this company is not functionally comparable to the assessee as it performs a variety of functions under the software development and services segment namely

- (a) Product design services
- (b) Innovation design engineering and
- (c) visual computing labs.

In the submissions made the assessee had quoted relevant portions from the Annual Report of the company to this effect. In view of this, the learned Authorised Representative pleaded that this company be excluded from the list of comparables.

14.3 Per contra, the learned Departmental Representative supported the stand of the TPO in including this company in the list of comparables.

14.4.1 We have heard both parties and carefully perused and considered the material on record. From the details on record, we find that this company is predominantly engaged in product designing services and not purely software development services. The details in the Annual Report show that the segment "software development services" relates to design services and are not similar to software development services performed by the assessee.

14.4.2 The Hon'ble Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. V ACIT (ITA No.7821/Mum/2011) has held that Tata Elxsi Ltd. is not a software development service provider and therefore it is not functionally comparable. In this context the relevant portion of this order is extracted and reproduced below :-

" .... Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned Authorised Representative that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's

length price for the assessee, hence, should be excluded from the list of comparable portion.”

As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.”

25. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

26. As far as comparable companies at Sl.No.5, 18, 19 and 25 of the final list of comparable companies chosen by the TPO are concerned, viz., **M/S. E-Zest Solutions Ltd., Persistent Systems Ltd., Quintegra Solutions Limited and Third ware Solutions Ltd.**, this Tribunal in the case of 3DPLM Software Solutions Ltd. I.T (T.P) A. No.1303/Bang/2012 (Assessment Year : 2008-09) order dated 28.11.2013 was pleased to hold that the aforesaid companies are not comparable with a company engaged in Software Development Services such as the Assessee. The following were the relevant observations of the Tribunal:-

**“14. E-Zest Solutions Ltd.**

14.1 This company was selected by the TPO as a comparable. Before the TPO, the assessee had objected to the inclusion of this company as a comparable on the ground that it was functionally different from the assessee. The TPO had rejected the objections raised by the assessee on the ground that as per the information received in response to notice under section 133(6) of the Act, this company is engaged in software development services and satisfies all the filters.

14.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables on the ground that it is functionally different to the assessee. It is submitted by the learned Authorised Representative that this company is engaged in ‘e-Business Consulting Services’, consisting of Web

Strategy Services, I T design services and in Technology Consulting Services including product development consulting services. These services, the learned Authorised Representative contends, are high end ITES normally categorised as knowledge process Outsourcing ('KPO') services. It is further submitted that this company has not provided segmental data in its Annual Report. The learned Authorised Representative submits that since the Annual Report of the company does not contain detailed descriptive information on the business of the company, the assessee places reliance on the details available on the company's website which should be considered while evaluating the company's functional profile. It is also submitted by the learned Authorised Representative that KPO services are not comparable to software development services and therefore companies rendering KPO services ought not to be considered as comparable to software development companies and relied on the decision of the co-ordinate bench in the case of Capital IQ Information Systems (India) (P) Ltd. in ITA No.1961(Hyd)/2011 dt.23.11.2012 and prayed that in view of the above reasons, this company i.e. e-Zest Solutions Ltd., ought to be omitted from the list of comparables.

14.3 Per contra, the learned Departmental Representative supported the inclusion of this company in the list of comparables by the TPO.

14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133(6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q Information Systems (India) (P) Ltd. Supra) that KPO services are not

comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The A.O. /TPO is accordingly directed.

#### **15. Thirdware Solutions Ltd. (Segment)**

15.1 This company was proposed for inclusion in the list of comparables by the TPO. Before the TPO, the assessee objected to the inclusion of this company in the list of comparables on the ground that its turnover was in excess of Rs.500 Crores. Before us, the assessee has objected to the inclusion of this company as a comparable for the reason that apart from software development services, it is in the business of product development and trading in software and giving licenses for use of software. In this regard, the learned Authorised Representative submitted that :-

(i) This company is engaged in product development and earns revenue from sale of licences and subscription. It has been pointed out from the Annual Report that the company has not provided any separate segmental profit and loss account for software development services and product development services.

(ii) In the case of E-Gain communications Pvt. Ltd. (2008-TII-04-ITAT-PUNE-TP), the Tribunal has directed that this company be omitted as a comparable for software service providers, as its income includes income from sale of licences which has increased the margins of the company.

The learned A.R. prayed that in the light of the above facts and in view of the afore cited decision of the Tribunal (supra), this company ought to be omitted from the list of comparables.

15.2 Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the list of comparables.

15.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the material on record that the company is engaged in product

development and earns revenue from sale of licenses and subscription. However, the segmental profit and loss accounts for software development services and product development are not given separately. Further, as pointed out by the learned Authorised Representative, the Pune Bench of the Tribunal in the case of E-Gain Communications Pvt. Ltd. (supra) has directed that since the income of this company includes income from sale of licenses, it ought to be rejected as a comparable for software development services.

In the case on hand, the assessee is rendering software development services. In this factual view of the matter and following the afore cited decision of the Pune Tribunal (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.”

“17. Persistent Systems Ltd.

17.1.1 This company was selected by the TPO as a comparable. The assessee objected to the inclusion of this company as a comparable for the reasons that this company being engaged in software product designing and analytic services, it is functionally different and further that segmental results are not available. The TPO rejected the assessee's objections on the ground that as per the Annual Report for the company for Financial Year 2007-08, it is mainly a software development company and as per the details furnished in reply to the notice under section 133(6) of the Act, software development constitutes 96% of its revenues. In this view of the matter, the Assessing Officer included this company i.e. Persistent Systems Ltd., in the list of comparables as it qualified the functionality criterion.

17.1.2 Before us, the assessee objected to the inclusion of this company as a comparable submitting that this company is functionally different and also that there are several other factors on which this company cannot be taken as a comparable. In this regard, the learned Authorised Representative submitted that :

(i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.

(ii) Page 60 of the Annual Report of the company for F.Y. 2007-08 indicates that this company, is predominantly engaged in 'Outsourced Software Product Development Services' for independent software vendors and enterprises.

(iii) Website extracts indicate that this company is in the business of product design services.

(iv) The ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd.(supra) while discussing the comparability of another company, namely Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available.

The learned Authorised Representative prays that in view of the above, this company i.e. Persistent Systems Ltd. be omitted from the list of comparables.

17.2 Per contra, the learned Departmental Representative support the action of the TPO in including this company in the list of comparables.

17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.

27. As far as comparable chosen by the TPO at Sl.No.8 of the final list of comparable viz., M/S.Helios & Matheson Information Technology Ltd., we find that the said company has been held to be not comparable with a software service provider

like the Assessee by the ITAT Pune Bench in the case of PTC Software (India) Pvt. Ltd. ITA.No.1605/PN/2011 (Asstt. Year : 2007-08) order dated 30.4.2013. The following were the relevant observations of the Tribunal:-

“16. The next point made out by the assessee is with regard to the inclusion of items at (9) and (11) namely Helios & Matheson Information Technology Ltd., and KALS Information Solutions Ltd. (Seg). The primary plea raised by the assessee to assail the inclusion of the aforesaid two companies from the list of comparables is to be effect that they are functionally incomparable and therefore, are liable to be excluded. In sum and substance, the plea set up by the assessee is that both the aforesaid concerns are engaged in development and sale of software products which is functionally different from the services undertaken by the assessee in its IT-services segment.

17. As per the discussion in para 6.3.2. of the order of the TPO, the reason advanced for including KALS Information Systems Ltd., is to the effect that the said concern's application software segment is engaged in the development of software which can be considered as comparable to the assessee company. The said concern is engaged in two segments namely application software segment and Training. As per the TPO, the application software segment is functionally comparable to the assessee as the said concern is engaged in software services. The stand of the assessee is that a perusal of the Annual Report of the said concern for F.Y. 2006-07 reveals that the application software segment is engaged in the business of sale of software products and software services. The assessee pointed out this to the TPO in its written submissions, copy of which is placed in the Paper book at page 420.3 to 420.4. The assessee further pointed out that there was no bifurcation available between the business of sale of software products and the business of software services, and therefore, it was not appropriate to adopt the application software segment of the said concern for the purposes of comparability with the assessee's IT-Services Segment. The TPO however, noticed that though the application software segment of the said concern may be engaged in selling of some of the software products which are developed by it, however, the said concern was not into trading of software products as there were no cost of purchases debited in the Profit & Loss Account. Though the TPO agreed that the quantum of revenue from sale of products was not available as per the financial statements of the said concern, but as the basic

function of the said concern was software development, it was includible as it was functionally comparable to the assessee's segment of IT-Services.

18. Before us, apart from reiterating the points raised before the TPO and the DRP, the Ld. Counsel submitted that in the immediately preceding assessment year of 2006-07, the said concern was evaluated by the assessee and was found functionally incomparable. For the said purpose, our reference has been invited to pages 421 to 542 of the Paper book, which is the copy of the Transfer Pricing study undertaken by the assessee for the A.Y. 2006-07, and in particular, attention was invited to page 454 where the accept reject matrix undertaken by the assessee reflected KALS Information Solutions Ltd. (Seg) as functionally incomparable. The Ld. Counsel pointed out that the aforesaid position has been accepted by the TPO in the earlier A.Y. 2006-07 and therefore, there was no justification for the TPO to consider the said concern as functionally comparable in the instant assessment year.

19. In our considered opinion, the point raised by the assessee is potent in as much as it is quite evident that the said concern has not been found to be functionally comparable with the assessee in the immediately preceding assessment year and in the present year also, on the basis of the Annual Report, referred to in the written submissions addressed to the lower authorities, the assessee has correctly asserted out that the said concern was inter alia engaged in sale of software products, which was quite distinct from the activity undertaken by the assessee in the IT Services segment. At the time of hearing, neither is there any argument put forth by the Revenue and nor is there any discussion emerging from the orders of the lower authorities as to in what manner the functional profile of the said concern has undergone a change from that in the immediately preceding year. Therefore, having regard to the factual aspects brought out by the assessee, it is correctly asserted that the application software segment of the said concern is not comparable to the assessee's segment of IT services.

20. With regard to the inclusion of Helios & Matheson Information Technology Ltd., the assessee has raised similar arguments as in the case of KALS Information Solutions Ltd. (Seg). We have perused the relevant para of the order of the TPO i.e., 6.3.21, in terms of which the said concern has been included as a comparable concern. The assessee pointed out

that as in the case of KALS Information Solutions Ltd. (Seg), in the instant case also for A.Y. 2006-07 the said concern was found functionally incomparable by the assessee in its Transfer pricing study and the said position was not disturbed by the TPO. The relevant portion of the Transfer pricing study, placed at page 432 of the Paper book has been pointed out in support. Considered in the aforesaid light, on the basis of the discussion in relation to KALS Information Solutions Ltd. (Seg), in the instant case also we find that the said concern is liable to be excluded from the list of comparables.”

.....

28. As far as comparable chosen by the TPO at Sl.No.8 of the final list of comparable viz., M/S.Helios & Matheson Information Technology Ltd., we find that the said company has been held to be not comparable with a software service provider like the Assessee by the ITAT Pune Bench in the case of PTC Software (India)Pvt.Ltd. ITA.No.1605/PN/2011 (Asstt. Year : 2007-08) order dated 30.4.2013. The following were the relevant observations of the Tribunal:-

“16. The next point made out by the assessee is with regard to the inclusion of items at (9) and (11) namely Helios & Matheson Information Technology Ltd., and KALS Information Solutions Ltd. (Seg). The primary plea raised by the assessee to assail the inclusion of the aforesaid two companies from the list of comparables is to be effect that they are functionally incomparable and therefore, are liable to be excluded. In sum and substance, the plea set up by the assessee is that both the aforesaid concerns are engaged in development and sale of software products which is functionally different from the services undertaken by the assessee in its IT-services segment.

17. As per the discussion in para 6.3.2. of the order of the TPO, the reason advanced for including KALS Information Systems Ltd., is to the effect that the said concern's application software segment is engaged in the development of software which can be considered as comparable to the assessee company. The said concern is engaged in two segments namely application software segment and Training. As per the TPO, the application software segment is functionally comparable to the

assessee as the said concern is engaged in software services. The stand of the assessee is that a perusal of the Annual Report of the said concern for F.Y. 2006-07 reveals that the application software segment is engaged in the business of sale of software products and software services. The assessee pointed out this to the TPO in its written submissions, copy of which is placed in the Paper book at page 420.3 to 420.4. The assessee further pointed out that there was no bifurcation available between the business of sale of software products and the business of software services, and therefore, it was not appropriate to adopt the application software segment of the said concern for the purposes of comparability with the assessee's IT-Services Segment. The TPO however, noticed that though the application software segment of the said concern may be engaged in selling of some of the software products which are developed by it, however, the said concern was not into trading of software products as there were no cost of purchases debited in the Profit & Loss Account. Though the TPO agreed that the quantum of revenue from sale of products was not available as per the financial statements of the said concern, but as the basic function of the said concern was software development, it was includible as it was functionally comparable to the assessee's segment of IT-Services.

18. Before us, apart from reiterating the points raised before the TPO and the DRP, the Ld. Counsel submitted that in the immediately preceeding assessment year of 2006-07, the said concern was evaluated by the assessee and was found functionally incomparable. For the said purpose, our reference has been invited to pages 421 to 542 of the Paper book, which is the copy of the Transfer Pricing study undertaken by the assessee for the A.Y. 2006-07, and in particular, attention was invited to page 454 where the accept reject matrix undertaken by the assessee reflected KALS Information Solutions Ltd. (Seg) as functionally incomparable. The Ld. Counsel pointed out that the aforesaid position has been accepted by the TPO in the earlier A.Y. 2006-07 and therefore, there was no justification for the TPO to consider the said concern as functionally comparable in the instant assessment year.

19. In our considered opinion, the point raised by the assessee is potent in as much as it is quite evident that the

said concern has not been found to be functionally comparable with the assessee in the immediately preceding assessment year and in the present year also, on the basis of the Annual Report, referred to in the written submissions addressed to the lower authorities, the assessee has correctly asserted out that the said concern was inter alia engaged in sale of software products, which was quite distinct from the activity undertaken by the assessee in the IT Services segment. At the time of hearing, neither is there any argument put forth by the Revenue and nor is there any discussion emerging from the orders of the lower authorities as to in what manner the functional profile of the said concern has undergone a change from that in the immediately preceding year. Therefore, having regard to the factual aspects brought out by the assessee, it is correctly asserted that the application software segment of the said concern is not comparable to the assessee's segment of IT services.

20. With regard to the inclusion of Helios & Matheson Information Technology Ltd., the assessee has raised similar arguments as in the case of KALS Information Solutions Ltd. (Seg). We have perused the relevant para of the order of the TPO i.e., 6.3.21, in terms of which the said concern has been included as a comparable concern. The assessee pointed out that as in the case of KALS Information Solutions Ltd. (Seg), in the instant case also for A.Y. 2006-07 the said concern was found functionally incomparable by the assessee in its Transfer pricing study and the said position was not disturbed by the TPO. The relevant portion of the Transfer pricing study, placed at page 432 of the Paper book has been pointed out in support. Considered in the aforesaid light, on the basis of the discussion in relation to KALS Information Solutions Ltd. (Seg), in the instant case also we find that the said concern is liable to be excluded from the list of comparables.”

29. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

30. After excluding the aforesaid comparable from the list of comparable chosen by the TPO, the arithmetic mean of profit

margin of the remaining comparable is directed to be reworked by the TPO/AO.”

14. Following the aforesaid decision of the Tribunal, we direct the exclusion of the aforesaid 14 companies from the list of comparables and direct the TPO to compute the ALP after affording opportunity of being heard to the assessee.

15. No other ground relating to TP adjustment was pressed for adjudication before us.

### **Corporate Tax Issues**

16. The other issue that remains for consideration in this appeal is ground II raised by the assessee in the grounds of appeal which reads as follows:-

“II. Corporate Tax

#### **1. Non-grant of deduction under section 10A of the Act on the income determined as per Mutual Agreement between Competent Authorities of India and USA**

1.1 The Hon'ble CIT(A) has erred in not allowing deduction under section 10A of the Act on the enhanced export income amounting to Rs. 310,517,297 determined as per Mutual Agreement between the Competent Authorities of India and USA and as accepted by the Appellant.

1.2 The Hon'ble CIT(A) has erred in considering the entire upward adjustment done as per Mutual Agreement between Competent Authorities as undisclosed income.

1.3 The Hon'ble CIT(A) ought to have appreciated that the appellant could not have accounted the additional billing in the assessment year under consideration, as the Mutual Agreement Procedure order was passed only on 28 October 2015.

The Appellant craves leave to add, alter, rescind and modify the grounds provided herein above or produce further documents,

facts and evidence before or during the course of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

17. As far as the aforesaid grounds raised by the assessee are concerned, the facts are that the assessee was rendering SWD services as well as ITES to its AE. As far as international transaction of rendering ITES services is concerned, the assessee received a consideration of Rs.629,43,81,078 towards call centre services and Rs.149,59,17,786 towards back-office support services. Both the aforesaid services were classified as ITES.

18. As regards the ITES segment, the TPO found that there was a shortfall in the price received by the assessee from AE and the shortfall was added to the total income of the assessee as an adjustment u/s. 92 of the Act. Against the aforesaid addition, the assessee preferred an appeal before the CIT(Appeals).

19. As stated above, during the pendency of the Assessee's appeal before the CIT(A), the Assessee's AE in the USA had approached the Competent Authority under Article 27 of the Double Taxation Avoidance Agreement ('DTAA') between India and the USA seeking resolution as per Mutual Agreement Procedure [MAP] for determining the Arm's Length Price in relation to the transaction between the Company and its Associated Enterprises in USA. The competent authorities of the USA and India mutually arrived at terms with respect to the mark up on cost to be earned by the Assessee for the ITE services rendered to US tax residents.

20. As per the resolution dated 28.10.2015, the export income of the Assessee was enhanced by Rs. 31,05,17,297/-. In terms of the agreement, the AO passed an order under Rule 44H (4) of the Rules dated 25.01.2016

giving effect to the MAP resolution. While passing the said order, the AO allowed the deduction under section 10A of the Act only to the extent of Rs. 132,97,49,723/- based on the assessment order under section 143(3) of the Act dated 21.02.2011 without considering the enhanced income arrived at in the MAP. The AO refused to give the benefit of deduction u/s.10A of the Act on the sum enhanced as income of the Assessee pursuant to the agreement under MAP i.e., a sum of Rs.31,05,17,297 because he was of the view as per the 1<sup>st</sup> proviso to 92CA(4), the Assessee would not be entitled to claim deduction u/s.10A of the Act. The relevant provisions of Sec.10A(4) and 1<sup>st</sup> proviso thereto reads as follows:-

“(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

**Provided** that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :”

21. The Assessee raised an additional ground before the CIT(A) for allowance of deduction under section 10A of the Act for income determined as per Mutual Agreement between competent authorities of India and USA. The CIT(A) passed an order *inter alia* rejecting the additional ground raised by the Assessee and held that the upward adjustment made as per MAP is undisclosed in books of accounts and hence the same cannot be allowed as deduction.

22. The learned counsel for the Assessee submitted that 1<sup>st</sup> proviso to Section 92C(4) of the Act would be applicable only in a case where adjustment to the arm's length price is made by the Assessing Officer u/s.92CA(4) because of the expression used in the 1<sup>st</sup> proviso is “no

*deduction under Sec.10A shall be allowed in respect of the amount of income by which the total income of the Assessee is enhanced after computation of income **under this sub-section**".* The sub-section referred to in the proviso is Sec.92CA(4). Determination of income pursuant to agreement under MAP cannot be equated to a determination of ALP u/s.92CA(3) & (4) of the Act. Such addition to the total income pursuant to agreement under MAP would be in the nature of voluntary adjustments made by the Assessee. The additional income determined as per the MAP resolution and is not a Transfer Pricing adjustment made by the AO as referred to in section 92C(4) of the Act. The proviso to Section 92C(4) would be attracted only when the arm's length price is determined by the AO under sub-section (3) of the Section 92C.

23. It was submitted that a TP adjustment as referred to in section 92C(4) of the Act intends to enhance the taxable income so that tax is paid by the assessee on the additions made, whereas a MAP resolution requires that the Assessee make additional billings and receive payment from the US AE and such payment should be recorded in the books of account in the year in which it receives the payment from the AE. It was pointed out that the Assessee, on accepting the MAP resolution, has done additional billing for export of services as required under the MAP resolution. The invoice copies of the additional billings done were submitted before the CIT(A) during the appellate proceedings.

24. It was further submitted that initially, the Assessee had determined the ALP based on the Transfer Pricing study conducted by it, considering all the procedures, which were available at that point in time and being eligible to STPI unit/s, it had claimed deduction under section 10A of the Act on the profits earned on export by the eligible undertakings. Subsequently, based on an agreement between the two sovereign nations, the competent authorities have agreed on the share of profit to be retained

in the two countries, which has been accepted by the two transacting parties and given effect to by recording in the books, raising an invoice and receiving the consideration. It was thus submitted that the same treatment as accorded to the original transaction should be extended to the enhanced income determined now under MAP and the deduction under section 10A of the Act should be granted by considering the enhanced income for the purposes of "Profit of the undertaking", "Export Turnover" and "Total Turnover".

25. A comparative analysis of TP adjustments and MAP was given by him, which is as under:

| <b>Particulars</b> | <b>TP Adjustments</b>  | <b>MAP</b>   |
|--------------------|--|--|
| Meaning            | Adjustment made by the revenue authorities to the international transactions entered with AEs where the AO/ TPO believes that the ALP has not been computed correctly. | MAP, which is in effect a negotiation, is a resolution arrived between the Competent Authorities of the two countries                        |
| Parties Involved   | The Transfer Pricing Officer and the assessee  | Competent Authorities from both countries would negotiate on behalf of the taxpayer and its AE in the other countries                        |
| Timing             | During assessment proceedings  | The taxpayer can apply for MAP only on receipt of assessment order from the tax authorities  |
| Basic Criterion    | The TPO makes adjustments where he believes that the ALP has not been computed correctly   | MAP is pursued to provide resolution by negotiation between two sovereign countries resulting in allocation of profits between the countries |

| Particulars                 | TP Adjustments  | MAP  |
|-----------------------------|---|--|
| Intention                   | To protect revenue loss to the country  | To eliminate economic double taxation  |
| Implications Indian company | Increase taxable income only; however no increase in revenue as per books, <u>no invoicing and no actual realization of money</u> | Along with an increase in taxable income, the same is also <b><i>subsequently invoiced and realized and thereby results into an inflow of foreign exchange in India.</i></b> |
| Implications to the AE      | The ALP determined by the TPO may not be accepted by the AE's country   | As this is based on resolution between the competent authorities, the same ALP would be considered by both the countries.  |

26. The learned counsel for the Assessee submitted that under Advance Pricing Agreement (APA) which is an agreement between the CBDT and any person, ALP is determined in advance or the manner of determination is specified in a particular manner in relation to an international transaction. Under the Act a legal framework has been created for providing for a legally binding agreement between the taxpayer and the CBDT. The Finance Act, 2012, inserted sections 92CC and 92 CD in the ITA to provide the legal basis for APA in India. These statutory provisions, effective from 1 July 2012, empowered the CBDT to enter an agreement with any person, with the approval of Central Government, determining the ALP or specifying the manner of determination of ALP in relation to an international transaction to be entered into by that person.

27. It was submitted by the learned counsel for the Assessee that where an assessee opts for the Advance Pricing Agreement (APA) for determining the ALP, it has to file modified return under section 92CD of the Act and can claim deduction under section under section 10AA of the Act on the enhanced income in the modified return. The said view has also

been upheld by the Hon'ble Pune Tribunal in the case of *Dar Al Handasah Consultants (Shair & Partners) India Private Limited vs. DCIT (ITA No. 1413/PUN/2019, dated 02 Dec 2019)*, which has held that assessee is entitled for deduction under section 10A of the Act on additional income offered as per APA.

28. It was submitted that the enhancement of income on account of MAP resolution is akin to a voluntary TP adjustment made while filing the return of income and therefore, the said income would have to be taken into consideration for the purposes of computing the deduction under section 10A. Reliance was also be placed on the decision of the Hon'ble High Court of Karnataka in *Igate Global Solutions Ltd (order dated 17.06.2014 passed in ITA No. 453/2008)* wherein the High Court concurred with the decision of the Tribunal holding that there was an error committed by the AO in relying on section 92C(4) of the Act, where the ALP was determined by the assessee and not by the assessing authority. Reliance was also placed on *EYBGS India Pvt. Ltd vs. DCIT (2020) (I.T.(TP)A. No. 218/Bang/2015)* (Bangalore ITAT) wherein, it has been held that the Assessee would be entitled to claim the benefit of section 10A of the Act on the additional income in respect of transfer pricing adjustment *suo moto* offered by the assessee.

29. Reference was made to decisions to the effect that deduction under section 10A should be allowed on the expenses disallowed. Reliance is placed on the following:

1. CBDT circular No. 37/2016 dated 02 November 2016
2. Decision of Hon'ble Karnataka High Court in the case of CIT vs. M/s. M Pact Technology Services Private Limited (order dated 11.07.2018 passed in ITA No. 228/2013)
3. Precision Camshafts Ltd v. ACIT [2016] 67 taxmann.com 126 (Pune - Trib.)

It was submitted by him that Section 92C(4) of the Act would be inapplicable as the enhanced income amounting to Rs. 31,05,17,297/- has been arrived at based on the resolution arrived at under MAP and offered to tax by the assessee.

30. The Id. DR submitted that the addition agreed under the MAP will not be entitled to benefit of deduction u/s. 10A of the Act. His first submission was that the resolution of dispute under the MAP cannot be equated to determination of the price by the revenue authorities under the Advance Pricing Arrangement [APA]. According to him, the amount settled under the MAP is as good as an addition made by the TPO and therefore the first proviso to section 92CA(4) of the Act will be applicable and the assessee will not be entitled to the benefit of the amount of addition agreed on account of determination of ALP under the MAP.

31. We have given a very careful consideration to the rival submissions. As far as the provisions of the Act are concerned, the provisions of the section 92CA(4) reads as follows:-

“(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

**Provided** that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :”

32. A reading of the first proviso to section 92C(4) of the Act would show that deduction 10A will not be allowed in respect of amount of income by which the total income of the assessee is enhanced after computation of income u/s. 92C(4) of the Act by the TPO which in turn is based on the Arm's Length Price computed by the Assessing Officer pursuant to order of

TPO passed u/s.92CA(3) of the Act. Section 92CA(4) of the Act refers to the ALP determined by the AO. The first question that needs to be answered is as to, whether the price agreed under the MAP can be said to be the ALP determined by the AO. The MAP is a procedure agreed between the two countries under Double Taxation Avoidance Agreement (DTAA). Article 27 of the CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME reads as under:-

“ARTICLE 27

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. This case must be presented within three years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.
2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.
3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the

elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure.”

33. The provisions of Rule 44H of the Income Tax Rules, 1962 (Rules) provides the manner in which resolution of disputes under mutual agreement procedure are to be given effect to and it reads thus:

*"44H. Action by the Competent Authority of India and procedure for giving effect to the decision under the agreement.—(1) Where a reference has been received from the competent authority of a country outside India under any agreement with that country with regard to any action taken by any income-tax authority in India, the Competent Authority in India shall call for and examine the relevant records with a view to give his response to the competent authority of the country outside India.*

(2) The Competent Authority in India shall endeavour to arrive at a resolution of the case in accordance with such agreement.

(3) The resolution arrived at under mutual agreement procedure, in consultation with the competent authority of the country outside India, shall be communicated, wherever necessary, to the Chief Commissioner or the Director-General of Income-tax, as the case may be, in writing.

(4) The effect to the resolution arrived at under mutual agreement procedure shall be given by the Assessing Officer within ninety days of receipt of the same by the Chief Commissioner or the Director-General of Income-tax, if the assessee,—

(i) gives his acceptance to the resolution taken under mutual agreement procedure; and

(ii) withdraws his appeal, if any, pending on the issue which was the subject matter for adjudication under mutual agreement procedure.

(5) The amount of tax, interest or penalty already determined shall be adjusted after incorporating the decision taken under mutual agreement procedure in the manner provided under the Income-tax Act, 1961 (43 of 1961), or the rules made thereunder to the extent that they are not contrary to the resolution arrived at.

*Explanation.*— For the purposes of rules 44G and 44H, "Competent Authority of India" shall mean an officer authorised by the Central Government for the purposes of discharging the functions as such."

34. The purpose for which the first proviso of section 92CA(4) of the Act was enacted is given in the CBDT Circular No.14/2001 dated 09.11.2001 as follows:-

“55.12 The first proviso to section 92C(4) recognizes the commercial reality that even when a transfer pricing adjustment is made under that sub-section, the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country. Therefore, it has been provided that no deductions u/s 10A or 10B or under Chapter VI-A shall be allowed in respect of the amount of adjustment.”

33. In the present case the conditions under which the dispute was resolved under MAP, was that the Assessee had to increase its taxable income and the sum agreed was to be **subsequently invoiced and realized and thereby there was inflow of foreign exchange in India.** Such features do not exist when the adjustment to ALP is suggested by a TPO which is subsequently incorporated in an order of assessment by the AO.

34. The Pune Bench of the ITAT had an occasion to deal with an identical question in the context of determination of ALP under the Advance Pricing Arrangement [APA] in the case of *Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra)* and took the view that deduction u/s. 10A of the Act on additional income offered as per APA would be eligible to claim deduction u/s. 10AA.

35. As rightly pointed out by the learned counsel for the Assessee in the course of his argument, the addition on account of determination of ALP can be in a different manner

- (i) suo motu by the assessee in his return of income;
- (ii) by the Assessing Officer has been accepted by the assessee or to the extent confirmed by the appellate forums under the Act;
- (iii) determined by an advance pricing agreement
- (iv) is made as per the safe harbour rules framed under section 92CB; or
- (v) is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or section 90A for avoidance of double taxation,

36. The proviso to section 92CA(4) of the Act will apply only to adjustment to transfer pricing made by the AO which is enumerated in Sl.No.(ii) above and not to any other modes of determination of ALP. The decision of the Pune Bench of ITAT in the case of *Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra)* will be clearly applicable to the facts of the present case.

37. Another issue which was addressed by the parties before us was the question, whether non-receipt of foreign exchange within the period required u/s. 10A of the Act would be a bar to allow the deduction in AY

2007-08. In this regard, it is undisputed that the assessee has received foreign exchange in respect of the sum agreed under the MAP and has duly accounted for in its books of account in AY 2016-17. However, the said income was excluded in the computation of total income in AY 2016-17. On identical facts, the Pune Bench of the Tribunal in the case of *Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra)* took the view that deduction u/s. 10A has to be allowed in the assessment year in which the international transaction took place. The following were the relevant observations of the Tribunal:-

*“iii. Whether the assessee has satisfied the conditions of deduction u/s 10A?”*

14. Now we turn to the view canvassed by the AO that the assessee failed to comply with the mandate of sub-section (3) of section 10A, which provides that: "This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India, by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf". A perusal of sub-section (3) of section 10A transpires that the condition for bringing into India the requisite convertible foreign exchange within a period of six months from the end of the previous year is not be all end all of the issue. It also extends to "such further period as the competent authority may allow in this behalf". In other words, if the competent authority has allowed further period for bringing into India the convertible foreign exchange, the assessee will be entitled to deduction u/s.10A. Explanation 1 to section 10A(3) states that: 'For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.'

15. Sub-section (1) of section 92CC provides that "The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person ". It is thus clear from the mandate of sub-section (1) of section 92CC that the

CBDT enters into an APA with the approval of the Central Government. The APA is a package deal aimed at reducing litigation. If the APA contains some clause relaxing the rigor of any provision or to facilitate its workability, such a clause will prevail over the normal provisions of the Act. It is mandated by the legislature itself through sub-section (2) of section 92CD, which opens with a saving clause by providing: 'Save as otherwise provided in this section', all other provisions of the Act shall apply. Sub-section (1) of section 92CD provides that: '.... such a person shall furnish .... a modified return in accordance with and limited to the agreement.' A corollary which follows on a harmonious construction of sub-sections (1) and (2) of section 92CD is that if the APA contains a clause departing from the normal provisions, it is such clause which shall prevail upon the normal provision.

16. We have gone through the APA entered between the assessee and the CBDT. Clause 7 of the APA discusses the "Critical assumptions". It provides that: 'the critical assumptions (as referred to in the Rules) shall, for the purposes of this Agreement, be as specified in Appendix II.' Clause 5 of the Appendix II deals with 'Invoicing and Credit terms'. The material part of such a clause, which is relevant for the year under consideration, states that: '... the Applicant shall show the difference between the invoiced amount for the previous year/rollback years and the ALP as agreed, as tax adjustment in the modified tax returns for Assessment year 2010-11 to Assessment year 2014-15 and will also raise an invoice (and realise it) for the equivalent amount in the month following the month in which the Agreement is signed'. On going through the relevant parts of clause 5 of the Appendix II, it clearly emerges that the CBDT provided for raising the invoice for the additional amount and also 'realise it' in the month following the month in which the APA is signed. To put it simply, the CBDT not only stipulated for raising of the invoice for the additional income but also for the realization of the additional amount within the month following the month in which the Agreement is signed. Thus, it is overt that the APA contains a clause for realizing the amount or bringing into India convertible foreign exchange for the additional amount of invoice within one month's period. There can be no other reason for mandating in the APA for bringing into India convertible foreign exchange within one month following the month in which the APA is signed except for the granting the consequential benefits of such realization, even though sub-section (1) of section 92CD gives time of three

months for filing the modified return. The sequitur is that the APA has made it mandatory for the assessee to bring in convertible foreign exchange in India within one month. But for granting the relevant deductions connected with the realization of convertible foreign exchange in India, there was no purpose to stipulate it in the APA. This stipulation is, thus, a direction to grant deduction u/s 10A only if the assessee succeeds in bringing in convertible foreign exchange in India within one month, bringing the case within the saving clause of sub-section (2) of section 92CD. As the assessee brought into India the convertible foreign exchange within the stipulated one month's period, it became entitled to deduction u/s 10A.

17. What is further pertinent to note from para 2 of the Clause 6 of the APA is that: "The determination of ALP for Rollback years is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as already declared in the return of income of the said year". Reverting to facts of the extant case, it is seen that the assessee declared total income of Rs.45,21,431/- in the original return. After the increase in the income due to the APA and with the simultaneous claim of deduction u/s.10A, the total income of the assessee as declared in the modified return remained at the same level. Thus, it is neither a case of reducing the total income nor increasing the total loss. Ex consequenti, it is held that the assessee has satisfied the condition of deduction u/s 10A(3) read with section 92CD(2) of the Act.

18. To sum up, we hold that the proviso to section 92C(4) does not debar deduction u/s 10A on additional income in assessment u/s 92CD; assessment u/s 92CD provides for granting deduction u/s 10A; and the assessee has satisfied the requirement of section 10A(3) read with section 92CD(2), thereby entitling it to deduction u/s.10A on the additional amount of Rs.20,36,023/-. The impugned order is overturned and deduction is granted.

19. In the result, the appeal is allowed."

38. We have already observed that similar to provisions of section 92CC of the Act, the provisions of the DTAA r.w.s. 90(2) of the Act provide to the contrary in matters where issues are settled under the MAP. Following the

decision of the Tribunal referred to above, we hold that the assessee should be allowed the benefit of deduction u/s. 10A of the Act in respect of the amount settled under the MAP for the AY 2007-08. Accordingly, the relevant grounds of appeal are allowed.

39. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 24<sup>th</sup> day of June, 2020.

Sd/-  
( B R BASKARAN )  
ACCOUNTANT MEMBER

Sd/-  
( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 24<sup>th</sup> June, 2020.

*/Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.