

IN THE INCOME TAX APPELLATE TRIBUNAL "K"  
BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JM&  
SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No.1698/Mum/2015  
(निर्धारणवर्ष / Assessment Year: 2010-11)

ACIT 14(1)(2) 460 AayakarBhavan, 4 <sup>th</sup> floor, M. K. Marg, Mumbai-400 020.	<b>बनाम/</b> Vs.	General Mills India Pvt. Ltd. Alpha 8 <sup>th</sup> floor, Main Street Hiranandani Garden, Powai,Mumbai- 400076.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACG1773B		

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आयकरअपीलसं./ I.T.A. No. 1804/Mum/2015  
(निर्धारणवर्ष / Assessment Year: 2010-11)

General Mills India Pvt. Ltd. Alpha 8 <sup>th</sup> floor, Main Street Hiranandani Garden, Powai, Mumbai-400076.	<b>बनाम/</b> Vs.	ACIT 14(1)(2) 460 AayakarBhavan, 4 <sup>th</sup> floor, M. K. Marg, Mumbai-400 020.
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अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Sh. M. P. Lohia, AR
प्रत्यर्थीकीओरसे/ <b>Respondentby</b>	:	Sh. Anani Mohan, DR

<b>Virtual date of Hearing</b>	:	13/07/2020
<b>Date of Pronouncement</b>	:	27.07.2020

आदेश / ORDER**Per Shri S. Rifaur Rahman (Accountant Member):**

These two appeals filed by the revenue as well as assessee are against the final order of assessment passed u/s 143(3) r.w.s. 144C(1) of I.T. Act, 1961 in pursuance of the directions issued by the Dispute Resolution Panel -III (in short 'DRP') u/s 144C(5) of the Act vide order dated 02.12.14 for AY 2010-11.

2. Since all the issues involved in these two appeals are common, therefore, they have been clubbed, heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. The brief facts of the case are, the assessee filed its return of income for the assessment year 2010-11 on 18.09.2010 declaring loss of ₹ 10,88,54,565/-. The case was selected for scrutiny and notice under section 143(2) and 142(1) of the Income Tax Act, 1961 (in Short Act) were issued and served on the assessee. On verification of audit report, it was noticed that assessee had transactions with its associated concerns. A

reference was made under section 92 CA(1) of the Act to Transfer Pricing officer.

4. The TPO observed that General Mills India Private Limited (GMIPL) is engaged in the business of manufacturing ATTA, semiya, Pizza kits dry cake mix and Indian frozen breads and trading in Canned corn nib lets, cream style sweet corn and asparagus spears, sold under the brand name Green Giant. GMIPL also provides software development services and business process services to its associated enterprises. The assessee is 100% subsidiary of General Mills Mauritius Inc.

5. During the year, assessee has reported operating income, operating profit and operating margins from various segments as under:

S.No.	Segments	Operating Income/ Cost (Rs. in Crores)	Operating Profit/ Gross profit (Rs in Crores)^	Operating Margin (%)
1	Import of food products for resale ("Trading")	29.15	0.09	0.30
2	Export of semi-processed food products	19.97	0.51	2.60

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	('Manufacturing')			
3	Provision of software development services	9.77	1.95	20%
4	Provision of business process services	40.94	8.19	20%
5	Provision of procurement support services	0.72	0.14	20%

5.1 The assessee has reported following international transactions in Form 3CEB as under:

Sr. No.	Nature of Transaction	Amount of transaction (Rs in crores)		Method used by assessee to determine ALP	
		AY 10-11	AY 09- 10	AY 10-11	AY 09- 10
1.	Import and resale of food products	14.44	25.36	TNMM	TNMM
2.	Export of atta (Trading)	7.93	12.54	TNMM	TNMM
3.	Export of semi processed food products	20.48	28.69	TNMM	TNMM

4.	Reimbursement of ingredients and packaging material	2.22	2.82	Not Applicable	Not Applicable
5.	Import of fixed assets	24.02	NIL	TNMM	Not Applicable
6.	Provision of software development services	11.72	14.34	TNMM	TNMM
7.	Provision of business process services	49.13	14.47	TNMM	TNMM
8.	Provision of procurement support services	0.86	0.76	TNMM	TNMM
9.	Reimbursement of expenses	0.84	1.77	Not Applicable	Not Applicable
10.	Recovery of expenses	NIL	7.83	Not Applicable	Not Applicable

5.2 During the year, assessee has reported revenue from provision of business process services to the extent of ₹ 49.13 crores, reported operating cost of ₹ 40.94 crores and operating margin of ₹ 8.18 crores. The PLI is 20% whereas arithmetic mean of comparables as per TP report and analysis made by

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assessee is 18.53%. The assessee has considered 9 comparables in its study, which is given below:

S.No.	Name of the Comparable Company	PLI as per TP report (%)	Updated PLI FY 2009-10 (%)
1	Accentia Technologies Limited	42.42	43.62
2	Aditya Birla Minacs Worlwide Limited	1.00	NC
3	C G-VAK Software & Exports Limited	-3.23	0.29
4	Cepha Imaging Private Limited	2.87	NC
5	Cosmic Global Limited	36.35	16.59
6	Informed Technologies India Limited	11.05	24.96
7	Infosys BPO Limited	23.02	31.60
8	R Systems International Limited	9.95	7.09
9	Vishal Information Technologies Limited	43.33	43.49
	Arithmetic Mean	18.56	23.95
	Assessee		20.00

6. TPO observed that the assessee has taken itself as the tested party and selected TNMM as the most appropriate method and carried out the search process and calculated the operating

profit to operating cost margin for the comparable companies using single year data at 23.95%. In order to select proper comparables functionally similar to the assessee company, TPO adopted following filters:

- a) use of relevant financial data
- b) rejected use of multiple year data
- c) rejected companies with different accounting year
- d) companies with turnover less than 5 crore are rejected
- e) companies with income from IT enabled services more than 75% of the operating revenues are selected
- f) companies with less than 75% earnings from exports rejected
- g) companies with persistent losses/diminishing revenues are rejected
- h) companies with related party transactions more than 25% of the revenue are rejected
- i) companies with peculiar economic circumstances are rejected

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7. Further, the TPO rejected 6 comparables out of 9 comparables selected by the assessee by applying above said filters. Since the assessee is in appeal before us objecting the rejection of 2 comparables viz., CG – VAK Software and Exports Ltd (segmental) and R Systems International Ltd, we extract below the reasons for rejecting only for these companies by the TPO.

<i>Sl. No.</i>	<i>Name of the comparable</i>	<i>Remarks</i>
1	CG-VAK Software & Exports Ltd., (Segmental)	However on examination of the annual report it is seen that the company is predominantly an IT services company. Page 4 of the annual report contains the comments of the director and mentions clearly that software services contributed 86% and the BPO services contributed only 14% to the operations of the company. Further, on going through the P&L A/c it is seen that the ITES services contributed Rs.82 lacs out of the total IT /ITES income of Rs.594 lacs. Hence the company is proposed to be rejected as a comparable for the AY20 10-11.
2	R Systems International Ltd.	On going through the information available in the public domain and the annual report for FY 2009-10, it is seen that it is a leading provider of outsourced product development and customer support <u>services</u> . Other companies entered into multiple year contracts with this company to develop, sustain and support their products using onsite, offshore and onshore modules. Proprietary project tracking and reporting tools create collaborative working environment with the clients. On going through this, it is seen <u>that the comparable is not in ITES services</u> . Hence, it is rejected as a comparable.

8. Assessee filed its objection before the TPO for rejecting CG –VAK Software and R Systems International Ltd, which is reproduced below:

***a) CG -Vak Software and Exports Limited (Seg)***

*The company is engaged in provision of IT enabled services and hence is functionally similar to the Assessee. However, your goodself has rejected the company citing that the company has earned majority of its revenues (86%) from the provision of software services and that the revenues from BPO services amounting to Rs. 82 lacs out of total revenues of Rs 594 lacs. In this context, we would like to submit as follows:*

***i) Separate segmental data is available for Business Processing Outsourcing ('BPO') segment***

- While the company is engaged in rendering both software services as well as BPO services, the company has provided the segmental information in respect of the same on page 26 of its Annual Report for the financial year ending 31 March 2010 (attached as **Annexure 3**), wherein the company has bifurcated its revenues into 2 segments i.e. Software Services and BPO services.*

- Given that the segmental information in respect of the BPO services is separately available for analysis, the proportion of the BPO revenues of the company to its overall revenues should not be relevant Accordingly, it is not*

*appropriate to reject the company merely on the basis that the company derives only 14% of its revenues from BPO services.*

**ii) Turnover filter should not be applied for selection of comparables**

- *Your goodself would appreciate that the assessee is remunerated for its services on a fixed cost plus mark-up basis and hence its margins are not impact by economies of scale.*

- *Further, where a particular company is functionally comparable, turnover should not be a relevant criterion for acceptance / rejection of such a company.*

- *Accordingly, it is submitted that no turnover filter should be applied for selection of comparables in the assessee's case.*

*Based on the above, it is submitted that this company should be considered as a comparable.*

**b) R Systems International Limited**

*The company is engaged in provision of IT enabled services and hence is functionally similar to the assessee. However, your goodself has proposed to reject this company as a comparable on the basis that the company is engaged in outsourced product development and customer support services and hence is not engaged in ITES services. In this context, we would like to submit as follows:*

**i) *Separate segmental data is available for Business Processing Outsourcing ('BPO') segment***

- *While the company is engaged in rendering both software services as well as BPO services, the company has provided the segmental information in respect of the same on page 24 of its Annual Report for the financial year ending 31 March 2010 (attached as Annexure 4), wherein the company has bifurcated its revenues into two segments ie Software Services and BPO services.*

- *The fact that the company is engaged in BPO services is evidenced as follows:*

- *On page 2 of the Annual Report, it is mentioned that The Company's strong value system empowers its employees to provide customers with consistent good quality IT and ITES services.*

*On page 7 of the Annual Report, the company mentions that "We provide wing-to-wing services that cover Customer Interaction and Back Office Processing."*

*On page 21 of the Annual Report, the company mentions that "Our Technical Support and BPO capability will continue to focus on servicing markets in USA and Europe. These markets continue to provide cost arbitrage value and help strengthen our capabilities.*

*In the Directors Report on page 32 of the Annual Report, the company mentions that "In July 2009 Software Development*

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*and BPO Centres of R Systems, based in Noida have been certified by the consulting firm KPMG for PCMM Level 5."*

*In the Management Discussion and Analysis on page 60, under the head 'company overview', it is stated that "R Systems International Limited (the "Company") and its subsidiaries (collectively referred to as "R Systems") is one of the leading provider of outsourced product development and customer support services."*

- *On page 61, under the head 'opportunities and threats' the company mentions that*

*"Business process outsourcing spending in 2010 is expected to be increasingly driven by F&A segment and procurement, followed by HR outsourcing. Providers will increase their focus on developing platform BPO solutions across verticals and services."*

*On page 66, it is also stated that "R Systems derives operating income principally from software development, customization services and from the business process outsourcing services." Further, the company has also given a break-up of the percentage of revenues from software development and customization services and business process outsourcing services.*

- *Further, in the Risk Management Report from page 72-78 of the Annual Report, the company mentions at various places mentions the potential risks in the IT and ITES sector.*

*In the Notes to Accounts on page 95, under the head Nature of operations it is stated as follows:*

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*"The Company is a leading global provider of IT solutions and Business Process Outsourcing (BPO) services. The Company's primary focus is to provide full service IT solutions, software engineering services, technical support, customer care and other IT enabled services to the high technology sector, independent software vendors (ISV's), banks, financial services companies and health care sector."*

*On page 99 of the Annual Report, under the head 'Segmental Information' in the Notes to Accounts, it is clearly stated that the company operates under two segments viz Software development and customisation services and Business Process Outsourcing Services. Further, segmental break up of revenues arising from the BPO segment are given on page 100 of the Annual Report.*

*- On page 96, in point) of schedule 17 notes to accounts, it is stated that revenue associated with software development and maintenance services/ customization of products and business process outsourcing services rendered on time and material basis is recognized when services are rendered.*

*Your goodsself has proposed to reject this company stating that it is functionally different from the business of the Assessee. However, it is evident that the services rendered by R Systems are in the nature of ITES and are similar to the services rendered by the assessee.*

*Based on the above, it is submitted that the BPO segment of the company is comparable to the Assessee and hence the company should be considered as a comparable (on segmental basis).*

9. After considering the objections of the assessee, TPO rejected the contention of the assessee by observing that CG – VAK is pre-dominantly an IT services company. Page 4 of annual report contains the comments of the director and it mentions clearly that software services contributed 86% and BPO services contributed only 14% to the operations of the company. Further, on going through the P&L account, it is seen that ITeS services contributed ₹ 82 lakhs out of total income of ₹ 594 lakhs. **In view of the (the observation is incomplete)**

10. With regard to R Systems international Ltd, he observed that the company is a leading provider of outsourced product development and customer support services. Other companies entered into multiple year contracts with this company to develop, sustain and support their products using on-site, offshore and onshore modules. Proprietary project tracking and reporting tools collaborative working environment with the clients. On going through this, it is seen that the comparable is **(the observation is incomplete)**

11. The TPO finalized the 5 comparables and arrived at the average margin of 31.88%, accordingly calculated Transfer Pricing adjustment of Rs. 4,86,45,217/-.

12. Aggrieved with the above order, assessee preferred objection before the DRP and the objections are:

- a. rejection of the comparables viz., Aditya Birla Minacs, Cipla Imaging, CG-VAK and R Systems by the TPO,*
- b. assessee also contended that the TPO not appreciated the fact that assessee is a captive service provider and economic adjustment for the difference between risk profile of the comparables and risk profile of the assessee,*
- c. also contended that the working capital adjustment should have been provided by the TPO,*
- d. the AO disallowed the exemption claimed under section 10 A of the act by setting off the losses of non-STPI units against the profit of the STPI unit.*
- e. Objection against initiating penalty proceedings under section 271 (1) (c).*

13. Assessee filed detailed submissions before DRP and DRP rejected the submissions of the assessee. The DRP considered the objections only on setting off of losses of non-STPI unit against the profit of STPI unit and by relying in the case of Black and

Veatch Consulting P Ltd (348 ITR 72) allowed the contention of the assessee.

14. Against the above order, both revenue as well as assessee is in appeal before us. The respective grounds of appeal filed by Revenue and Assessee are reproduced below:-

**Grounds of appeals filed by the revenue:-**

*1 " On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in directing the AO to allow section 10A deduction without set off loss of non-eligible unit."*

*2. 'The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.*

*3. The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored.*

**Grounds of appeals filed by the assessee:-**

**Transfer pricing adjustment**

*1. erred in making transfer pricing adjustment of Rs. 4,86,45,217 to the total value of the international transaction of provision of business process services rendered by the Appellant;*

**Base erosion**

*2. erred in making a transfer pricing adjustment without appreciating the fact that the Appellant is eligible for tax holiday under section 10A of the Act and accordingly, there is no incentive for shifting of profits;*

**Multiple year**

*3. erred in rejecting multiple year data analysis conducted by the Appellant and using non contemporaneous data ie single year data for arriving at the arm's length price ('ALP') and accordingly, also rejecting two companies, Aditya Birla Minacs Worldwide Limited and Cepha Imaging Private Limited, which are not comparable in FY 2009-10 but were comparable in earlier two years;*

**Comparable**

*4. erred in rejecting companies considered as comparable by the Appellant, viz. CG-Vak Software & Exports Limited and R System International Limited*

*without appreciating that these companies are functionally comparable to the Appellant;*

5. *erred in not appreciating the fact that the segment of aforesaid companies are comparable and have been accepted by the TPO in AY 2011-12 (subsequent years);*

**Working capital**

6. *erred in not considering the working capital adjustment which is required to be undertaken in the Appellant's case to account for the difference in the working capital levels between the companies identified as comparables and the Appellant;*

**Risk**

7. *erred in not appreciating the fact that the Appellant is a captive service provider while comparing the activities of the Appellant to full-fledged information technology enabled service ('ITeS') providers and not making any economic adjustment for differences between the risk profile of the comparable companies vis-a-vis the risk profile of the Appellant;*

8. *erred in not considering the benefit of +/- 5% as allowed as per section 92C(2) of the Act.*

15. With regard to appeal filed by the assessee, learned AR submitted that ground No. 1 is general and ground No. 2 and 3 are not pressed, ground No. 4 and 5 relating to 2 comparables which TPO has rejected and with regard to ground No. 6,7 and 8 relating to working capital adjustment and risk adjustment not provided by TPO. Accordingly ground No. 1, 2 and 3 are **dismissed**.

16. Ld AR submitted that TPO has rejected two comparables that is CG Vak and R Systems, which is selected by assessee as comparable companies in its studies. With regard to CG Vak, he brought to notice page 17 of TPO order, in which TPO observed that CG Vak is pre-dominantly an IT services company and it has other services which contributed 86% and BPO services has contributed only 14%. From the ITeS services it has earned only 82 lakhs out of total IT/ITeS as total earnings of ₹ 594 lakhs. Therefore, this company is rejected as comparable for the assessment year 2010-11. Ld AR submitted that assessee has considered only the segmental results declared by the company and made the analysis. Further it is submitted that the TPO has accepted this company as comparable in assessment year 2009–

10 and 2011–12. He brought to notice page 285 of the paper book which is TPO order for the assessment year 2009–10 in which the assessing officer has accepted the arms length price reported by the assessee along with its TP study. He also brought to notice page 291 and page 293 of the paper book in which assessee has submitted TP study before TPO in which assessee has declared price margin of 20% in provision of business process services and assessee has adopted arithmetic mean margin of 18.56% for the comparable companies selected by it. Similarly, he also brought to notice page 295, page 305 and page 307 of paper book in which the TPO has accepted the arms length price reported by the assessee and TP document and comparables selected by the assessee for the assessment year 2011–12. He submitted that in both the above said assessment year, assessee selected CG Vak as a comparable and it is wrong to say that CG Vak is incurring continuous losses over the years he brought to notice page 459 of the paper book in which assessee has considered the operating margin of the BPO segment which is 0.29% of the revenue reported. He also relied on the case of M/s Techbooks International private limited (ITA

No. 240/Delhi/2015), he submitted that in this decision the hon'ble court observed that this company was eliminated by the TPO because of low turnover reported by it i.e. 0.83 crores and the hon'ble court has directed the TPO to include this comparable company with the observation that in the case of Chrys Capital investment advisers (India) private limited held that high turnover or high profit can be no reason to eliminate an otherwise comparable company. Since CG Vak is functionally comparable with the assessee company, he submitted that CG Vak is functionally doing a similar services as of assessee therefore this company should be included as comparable company.

17. With regard to R System, he brought to notice page 7 of TPO order, TPO observed that it is a leading provider of outsourced product development and customer support services and observed that this company is not into ITeS service. In this regard Ld AR brought to our notice page 371 of paper book in which the company has declared in its annual report, in the segment "our services" includes the details of services it provides which includes BPO services. Further he brought to notice page

422 of paper book which is segmental report of the company in which it has disclosed Rs. 5791.77 lakhs as its turnover in BPO segment which is 19.93% of the total turnover. Further he brought to notice page 451 of paper book in which this company has declared primary segments in which BPO is one of the segment reported by it. He further submitted that the financial data reported by this company for the period January to 31<sup>st</sup> December, he submitted that the accounting year followed by the assessee is April to March, the three-month data from January to March can be worked out by obtaining the audited financial statement from this company. In this regard he relied on the case law which directed the TPO to obtain the last quarter data and workout the financial results for the year and include this company as comparable company in those respective cases. The respective decisions are given below:

- i) Maersk Global Service P Ltd ITA no 2594/mum/2014
- ii) Willis Processing Services ITA No 1890/mum/2015
- ii) Aegis Limited ITA No 1213/mum/2014
- iv) Mercer Consulting India P Ltd ITA no 966/Del/2014

18. Further he submitted that TPO has accepted R System as comparable company in the assessment years 2009 – 10 and 2011 – 12.

19. With regard to ground No. 6 and 7, Ld AR submitted that TPO has not even discussed about the working capital adjustment and risk adjustment. He brought to notice page 6 of the DRP order in which DRP has rejected the contention of the assessee. He brought to our notice page 48 of appeal papers, in which assessee has submitted the legality of allowing working capital adjustment and various decisions of the courts which has allowed the working capital adjustment and risk adjustment. He brought to our notice case law listed in appeal paper book, which is submitted before us. He prayed that the working capital and risk adjustment has to be made considering the fact that assessee is a captive service provider and comparable companies which will have variations in respect of working capital and risk factors.

20. With regard to revenue appeal, he submitted that the issue under challenge is squarely covered by Yokogawa decision of the Hon'ble Supreme Court (391 ITR 274).

21. On the other hand Ld DR submitted a detailed written submission before us and he brought to our notice all the submissions made by him in written form which is reproduced below:

***I. Ground No. 4 & 5 of Assessee's Appeal***

***1. Why CG Vak Software and Exports Ltd. is not a valid comparable for A.Y. 2010-11***

***Argument no. 1***

*1. The assessee's turnover in the ITES (BPO) segment is 49.13 crore i.e., approximately 50 crore. Against this, CG Vak turnover in the BPO segment is just 82.79 lac.*

*2. TPO in para 9 page 8 of the order (APB page no. 93) has applied lower turnover filter under ITES at Rs. 5 crore. The assessee has not objected to this turnover filter either before the DRP or in its ground of appeal. Hence, GC Vak is being **eliminated on account of turnover filter**.*

*3. Lower and upper limit of turnover has been approved by **Hon'ble Bombay High Court in the case of CIT vs Pentair Water India Pvt. Ltd. in Tax Appeal No. 18 of 2015 in para 5**. Similar view has been taken by **Hon'ble Punjab and Haryana High Court in the case of Agilent Technologies (international) Pvt. Ltd. Vs ACIT in ITA No. 121 of 2014 (O & M)**. **Hon'ble***

*ITAT, Bangalore Bench in the case of Swiss Re Global Business Solutions Pvt. Limited vs DCIT ITA(TP)A No. 2315/ Bangalore/2016 (AY 2012-13), while following the Hon'ble Bombay High Court decision, has held in para 7 & 8 that-*

*(i) The turnover is a relevant factor for the purpose of determining the comparability of the proposed companies for the purpose of determining the ALP.*

*(Para 7)*

*(ii) The Tribunal in a series of decision has taken a consistent view that in case turnover filter is applied it should be in the multiple of the assessee's turnover. Accordingly the Tribunal has taken a view that in normal circumstances ten times of the assessee's turnover on both sides lower as well as higher would be an appropriate tolerance range of turnover while selecting the comparable companies. (Para 8)*

*Argument no. 2*

*1. CG Vak has continuously declining turnover and losses over the years. (Figures in Lac)*

<b>A.Y.</b>	<b>Turnover from BPO Service</b>	<b>PBT (of BPO Service)</b>
2009-10	86.10	(-) 3.43
2010-11	82.79	(-) 2.21
2011-12	63.18	(-) 15.34
2012-13	20.20	(-) 14.91

*2. Hon'ble Delhi High Court in case of SteriaIndia Ltd. Vs DCIT (2018) 92 taxmann.com 120 (Delhi) has*

*found CG Vak Software & Exports Ltd., not a valid comparable for AY 2010-11 in para 12,13 & 14. Although the observation is related to Software Services Segments and employee cost filter, the ratio is equally applicable to ITES/BPO segment too. In para 16, Hon'ble High Court while discussing another company has held that **"Persistent losses coupled with declining turnover over the period indicated abnormal functional circumstances, which rendered it non-comparable and justified the exclusion of such companies from the list of comparables."***

**Conclusion- Hence, CG Vak Software & Export Limited deserved to be excluded.**

**2. Why R System is not a valid comparable for A.Y. 2010-11**

Argument no. 1

1. R System follows different FY ending on 31<sup>st</sup> December. Hence, the financial results of the company **cannot be considered as Contemporaneous data for the purpose of comparability.**

2. TPO in para 9 page 8 of the order (APB page no. 93) has applied rejection of different FY filter. The assessee has not objected to this turnover filter either before the DRP or in its ground of appeal. Hence, R System has been **eliminated on account of turnover filter.**

3. *There are a large no. of judicial decisions where Companies with different financial years have been excluded as a valid comparable.*

1. *P T C Software (I) Pvt. Ltd. 75 taxmann.com 31 (Bom.)*

2. *Principal Global Services (P) Ltd. 95 taxmann.com 315 (Bom)*

3. *Tevapharma India (P) Ltd. 81 taxmann.com (2017) (Mum. Trib)*

4. *HapagLloyd Global Services P. Ltd. ITA NO. 8499/M/2010 dated 28.02.2013*

5. *Ocwen Financial Solutions (P) Ltd. 96 taxman.com 505 (Pune Trib)*

6. *XL Health Corporation India P. Ltd. 91 taxmann.com 310 (Bang. Trib.)*

Argument no. 2

1. *R System has continuously declining turnover and losses over the years. (Figures in Crore)*

<b>A.Y.</b>	<b>Turnover from BPO Service</b>	<b>PBT (of BPO Service)</b>
2009-10	21.22	(-) 22.87
2010-11	18.85	(-) 0.96
2011-12	23.39	(-) 1.05

2. *The ratio of Hon'ble Delhi High Court in case of Steria India Ltd. Vs DCIT (2018) 92 taxmann.com 120 (Delhi) will be equally applicable for R System too where it has been held that "Persistent losses coupled*

*with declining turnover over the period indicated abnormal functional circumstances, which rendered it non-comparable and justified the exclusion of such companies from the list of comparables.”*

**Conclusion- Hence, R System International Limited deserved to be excluded.**

**II. Ground No. 6 & 7 of Assessee's Appeal- Request for allowing Working Capital & Risk Adjustments**

*1. The DRP in para 14 has observed that the assessee has not established that the alleged difference in risk and working capital would materially affect the amount of net profit margin in the open Market in terms of provisions of rule 10B(1)(e).*

*Since adjustments of any type is not automatic, the rejection is correctly made.*

22. Considered the rival submissions and material on record. We notice that assessee is aggrieved with the removal of 2 comparable companies that is CG Vak and R Systems. We considered the detailed submissions of both the counsels and in our view, CG VAK Software and Exports Ltd. is eliminated for the reason that the BPO services contributed only 14% to the total earnings of the company and also revenue generated by this division is only ₹ 82 lakhs. The observation of the TPO is, it fails

on turnover filter and it is not a predominantly an IT service company. It is fact that TPO has applied turnover filter and assessee has objected to the same. We further notice that the BPO segment of the CG Vak company is declining from Rs.86.10 crores to Rs. 20.20 crores from assessment year 2009 – 10 to 2012 – 13 respectively and we also noticed that this company is consistently incurring loss over the years, it is pertinent to note that TPO has applied one of the filter for consistent losses. Ld AR brought to our notice modified profit calculation made for this assessment year by the assessee for the BPO segment which comes to 0.29%. The assessee has reworked the calculation by observing that the company has other un-allocable income to the extent of ₹ 25.53 lakhs, which it has allocated based on turnover. We do not agree with the assessee that unallocated income which CG Vak has not allocated, may be because of non-available of proper data. The assessee cannot presume and allocate the same based on turnover. This company itself declared the result as loss over the years in this division.

23. It is fact that the TPO has adopted turnover filter and also rejected this comparable based on insignificant revenue

contributed. The Ld AR relied on the decision of Techbooks International (supra) in which the coordinate bench directed the TPO to include this company as comparable since this company was specifically eliminated because of low turnover. This decision is from Co-ordinate Bench of Delhi. However, the coordinate benches of Mumbai consistently considered the T.O. filter as proper tool to eliminate the comparable studies.

23.1. However, in the given case TPO applied turnover filter and the various courts have held that turnover filter is a important filter which is a tool to eliminate large entities which enjoys considerable advantage with their huge revenue generation ability and capability to absorb fixed overheads. We notice that the turnover of CG Vak is 59 times lessar than the assessee. “It is one of the reason that this company’s revenues are coming down and its profits also declining. Since this company failed in revenue filter and as submitted by the Ld DR that this segment is declaring consistent losses over the years, we do not see any reason to include this as comparable company. Accordingly, contention of the assessee is **rejected**.”

24. With regard to R Systems, we notice from the submissions of the Ld AR that R systems has disclosed their financial information and revenue generation from BPO segment. The financial information clearly indicate that this company has BPO segment and declared their financial results segment-wise. Therefore, this company is functionally comparable with this assessee company. The separate BPO segment financial results is available for the period January to December. Since the financial results are available only for Jan-December, we notice from the decisions of the coordinate benches that it has consistently approved the method of working out the segmental data from the existing records and obtaining last quarter i.e., January to March from R Systems to compile the data for the period April to March and then directing the TPO to make the analysis of comparability study by including this company as comparable company. We considered the cases referred by Ld AR in his submission and cases are part of paper book. Therefore, we are inclined to refer this issue back to TPO/AO to include this company as comparable company and work out the segmental data for the

period April to March'2010. Accordingly, the ground raised by the assessee is **allowed for statistical purpose.**

25. With regard to Ground Nos 6 and 7, we notice that TPO has not even considered to determine whether the assessee has any marketing and technical risk compared to comparables. It is fact that assessee is a captive service provider and earned income out of the transaction by cost plus basis. It can be seen that the assessee has encountered the risk of having a single customer, whereas the same cannot be said with regard to comparables. The comparables may be dealing in market and therefore they were prone to the marketing and technical risks. They may have incurred certain expenditure on marketing in order to mitigate the risk. Therefore, the risk encountered by the assessee cannot be said to be equal risk attached to the comparables in such a situation. TPO output to have calculated the risk adjustment.

26. With regard to working capital adjustment, the business module of the captive service provider and the regular service provider may not be same and it is the duty of the TPO to calculate whether there exists any variation which requires

adjustment to the net margin. Since TPO has not calculated the risk adjustment and working capital adjustment to the net margin of the comparables for bringing them on par with the assessee company. Even though assessee has made its submission before TPO as well as DRP. Therefore we are inclined to remit this issue also back to the file of TPO/AO to calculate the risk adjustment and working capital adjustment by collecting the relevant information. Accordingly ground raised by the assessee is **allowed for statistical purpose.**

27. With regard to appeal preferred by the revenue, Ld. DR brought to our notice that the ground raised by the revenue is squarely covered by the decision of Hon'ble Supreme Court in the case of **CIT &Anr. Vrs. M/s Yokogawa India Ltd. in Civil Appeal No. 8498 of 2013.**

28. On the other hand, Ld. AR supported the orders passed by the revenue authorities.

29. Considered the rival submissions and material placed on record, we notice that the identical ground raised in the revenue's appeal has already been decided by the decision of Hon'ble

Supreme Court in the case of **CIT & Anr. Vrs. M/s Yokogawa India Ltd. in Civil Appeal No. 8498 of 2013**, wherein the Hon'ble Supreme Court has disposed of the appeal. For the sake of clarity, which is reproduced below:-

*17. If the specific provisions of the Act provide [first proviso to [Sections 10A\(1\)](#); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in [Sections 70, 72 and 74](#) of the Act would be premature for application. The deductions under [Section 10A](#) therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression “total income of the assessee” in [Section 10A](#) has already been dealt with earlier and*

*in the overall scenario unfolded by the provisions of [Section 10A](#) the aforesaid discord can be reconciled by understanding the expression “total income of the assessee” in [Section 10A](#) as ‘total income of the undertaking’.*

*18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though [Section 10A](#), as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly.*

30. Therefore, respectfully following the above decision of Hon’ble Supreme Court, which is applicable *mutatis mutandis* in the present case, we are inclined to dismiss the grounds raised by the revenue.

31. In the net result, the appeal filed by the assessee is **allowed for statistical purposes** and appeal filed by the revenue is **dismissed**.

Order pronounced in the notice board on 27<sup>th</sup> July 2020

Sd/-

(Saktijit Dey)

न्यायिकसदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :

Sr.PS. Dhananjay

Sd/-

(S. Rifaur Rahman)

लेखासदस्य / Accountant Member

27.07.2020

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai