

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

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

IT(TP)A Nos.1309 and 1310/Bang/2010
Assessment Years : 2006-07 & 2007-08

M/s. Transworld ICT Solutions Pvt. Ltd., Innovator, No.15, Hoody, Whitefield Road, Mahadevapura Post, Bengaluru – 560 048. PAN : AABCT 3824 F	Vs.	DCIT, Circle – 2(1), Bengaluru.
ASSEESSEE		RESPONDENT

Assessee by	:	Shri. G. S. Prashanth, CA
Revenue by	:	Shri. Dilip, Advocate, Standing Counsel for Department

Date of hearing	:	17.03.2022
Date of Pronouncement	:	22.03.2022

ORDER

Per N V Vasudevan, Vice President

These are appeals by the assessee against two final Orders of Assessment both dated 22.09.2010 passed by the DCIT, Central Circle – 2 (Bengaluru) under section 143(3), 144 C and 153A of the Income Tax Act, 1961(hereinafter called ‘the Act’) and are in relation to Assessment Years 2006-07 & 2007-08.

2. The assessee is a company incorporated on 23.05.2001. It is wholly subsidiary of M/s. Transworld ICT Holdings Ltd., British Virgin Islands, a group company of First Curacao Ltd., a Bermuda registered company, set up to run an online banking provisionally based at Curacao in Dutch, Antilles, Netherlands. The assessee company carried out software development service (SWD Services) and Information Technology enabled Services (ITeS) to its Associate Enterprise (AE). The assessee was incorporated

with the objective of providing excellence services mainly in the field of Banking, Finance and Commercial applications. The assessee also designs, develops and maintains computer software and programming for commercial products and services including internal business information systems. The various services provided by the assessee includes design, develop, maintain, sell, distribute, market and license computer software including programs, systems and products in the above mentioned areas. The assessee also provides business and productivity solutions utilizing electronic commerce and other network based information and other services including licensing of related computer software and programs. Services like customer support, education, training and consultations relating to all the above said areas are also provided by the assessee.

3. In terms of the provisions of Sec.92-A of the Act, the assessee and its wholly owned holding company were Associated Enterprises ("AEs"). In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services and ITeS were "international transaction" i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the any income arising from an international transaction shall be computed having regard to the arm's length price. In this appeal by the Assessee, the dispute is with regard to determination of Arms' Length Price (ALP) in respect of the international transaction of rendering SWD services and ITeS to the AE.

4. A search and seizure operation under section 132 of the Act was carried out in the business premises of the assessee on 18.12.2006. Pursuant to the search, notice under section 153A of the Act was issued for 6 Assessment Years 2002-03 to 2007-08 as required under section 153A of the Act. As far as Assessment Year 2006-07 & 2007-08 are concerned, the assessee has challenged the additions made to the total income of the assessee in the Order of Assessment passed under section 153A of the Act determining the Arm's Length Price (ALP) of the international transaction of rendering software development services(SWD Services) and ITeS by the assessee to its Associated Enterprises (AE) and also holding that the assessee, over and above providing SWD services and ITeS also rendered activities like banking functions, treasury operations, customer support operations etc., and earned income in the form of commission from rendering these services. There are certain common legal issues in both these appeals. Besides the above common legal issues, there is common addition made to total income on the ground that over and above providing SWD services and ITeS also rendered activities like banking functions, treasury operations, customer support operations etc., and earned income in the form of commission from rendering these services. that are raised by the assessee in these two appeals. The addition in this regard is challenged by the Assessee in Grd.No.8 raised in both the appeals. Grd.No.8 will be dealt with separately after decision on the issue of determination of ALP in SWD services segment and ITeS segment in both the AYs. These appeals were heard together and we deem it convenient to pass a common order.

5. IT(TP)A No.1309/Bang/2010 for Assessment Year 2006-07

As far as the appeal of the assessee for Assessment Year 2006-07 is concerned, the assessee has raised the following grounds of appeal:

- 1. The order of the authorities below in so far as it is against the appellant is opposed to law weight of evidence, natural justice, probabilities, facts and circumstances of the appellant's case.*

2. *The appellant denies itself liable to be assessed on a total income of Rs.3,11,63,848/- as against the returned income of Rs. 3,88,050/- under the facts and circumstances of the case.*
3. *Legal Grounds:*
 - 3.1 *The reference to TPO is bad in law as the mandatory conditions have not been satisfied or complied with as the reasons have not been recorded before the matter was referred to the TPO.*
 - 3.2 *The order is further bad in law as the appellant was denied of opportunity of being heard before reference to the TPO which is against the principles of natural justice.*
4. *The authorities below are not justified in holding that the amendment to proviso to section 92C(2) of the Act is effective from 1-10-2009 was clarificatory and denied the 5% rebate which ought to have been given as per the existing proviso for the respective years.*
5. *Appropriate Transfer Pricing Methodology:*
 - 5.1 *The authorities below failed to appreciate that CPM is the appropriate methodology for determining the transfer pricing for IT and ITES services. The authorities below are not justified in rejecting the Cost plus Methodology without assigning any cogent reasons under the facts and circumstances of the case.*
 - 5.2 *Without prejudice, the authorities below were not justified in law in rejecting the revised Transfer Pricing Study submitted by the appellant company under TNMM methodology is not in accordance with law under the facts and circumstances of the case.*
 - 5.3 *The authorities below ought not to have used a separate database (PROWESS) for conducting the TNMM study and further the authorities below failed to consider the details and database considered by_ the appellant under the facts and circumstances of the case.*
 - 5.4 *The authorities below have deviated from functional analysis, OECD guidelines and other conditions which are necessary for selecting comparables under the facts and circumstances of the case.*
 - 5.5 *The authorities below are not justified in law in not limiting the turnover to Rs.50 crores for the purpose of arriving at comparables since the turnover of the appellant company had not crossed more than Rs.10 crores under the facts and circumstances of the case.*

- 5.6 *The authorities below are not justified in rejecting an higher employee cost filter (40% rather than 25% of the Turnover) adopted by the appellant under the facts and circumstances of the case. The authorities below are not justified in law in not normalizing the operating profit by not considering for ESOP (Employee Stock Options) costs based upon fair market value which is the realistic approach to arrive at the true employee" cost under the facts and circumstances of the case.*
- 5.7 *The authorities below further not justified in combining all the purchases, sales and other transactions and comparing them only with turnover (and not against the sum of turnover and purchases) while applying Related Party Transactions filter under the facts and circumstances of the case.*
- 5.8 *The authorities below are not justified in law in summarily rejected all the Companies which made losses for last 3 years without ascertaining any facts. On the other hand the authorities below have included all companies with abnormal profit margins.*
- 5.9 *The authorities below are not justified in law in rejecting the companies having minor variations during the end of the financial year under the facts and circumstances of the case.*
- 5.10 *The authorities below have rejected all companies only when the onsite revenues are more than 75% and have failed to appreciate that the appellant company had zero onsite revenue. Without prejudice, the authorities below ought to have considered companies with at most 5-10% onsite revenues under the facts and circumstances of the case.*
- 5.11 *The learned authorities below failed to understand the risk-insulated environment in which the appellant operated and the nature of services provided by it to the AE while determining the ALP. Further the authorities failed to consider the lower risk companies receive lower returns while computing the mark-up under the facts and circumstances of the case.*
- 5.12 *The authorities below are further not justified in law in holding that the appellant company has not provided the computation before seeking for working capital adjustment.*
- 5.13 *The order of the authorities below has various factual errors and further the authorities below have not followed a consistent Policy in adopting the filters under the facts and circumstances of the case.*

6. *Without prejudice the authorities below ought to have considered the objections raised by the appellant regarding the companies selected by the TPO and the justification provided for the companies selected by the appellant. The authorities below ought to have at least taken the average of companies which the appellant and the TPO did not dispute.*
7. *Without prejudice the authorities should have adopted the income by taking into account the average of the comparables which have been accepted by both the appellants and the revenue and ignored all other comparables on the facts and circumstances of the case.*
8. *Transactions involving money transfers*
 - 8.1 *The authorities below have incorrectly concluded that the AE collected the income with the help of the appellant company which is not factually correct.*
 - 8.2 *Further the authorities below after accepting the claim of the appellant that it was not engaged in Wire Transfer activity and the additions made to the income of the appellant are not in accordance with law.*
 - 8.3 *Without prejudice, the DRP in its order of direction has only commented on the nature of wire transfer activities. However the AO is not justified in aggregating Wire Transfer charges and Intra-Account Charges for AY2007-08 under the facts and circumstances of the case.*
 - 8.4 *The appellant denies itself liable to be assessed to a sum of Rs 2,64,82,362/-on account of agency commission on money transfers.*
 - 8.5 *Without prejudice the comparable is not at all correct or capable of comparison both on facts and in law and further without prejudice the amount determined is highly excessive and requires to be reduced to Nil.*
9. *Disallowance under Section 10A*
 - 9.1 *The authorities below are not justified in reducing the delivery charges from the export turnover and thereby restricting the claim of the appellant under section 10A of the*
 - 9.2 *Without prejudice the authorities below are not justified in law in disallowing the claim of exemption under section 10A of the Act for the additions made by the TPO under the facts and circumstances of the case.*
10. *The authorities below are not justified in levying interest under Sec 234(A), (B), (C) on the facts and circumstances of the case. The levy is*

further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.

6. Vide applications dated 23.11.2010, 07.02.2020 and 14.12.2021, the assessee has sought to raise the following additional grounds:

11. *The entire assessment based upon the search proceedings which itself is bad in law as the mandatory conditions for being a valid search did not exist nor are they discernable from the facts. The conditions prescribed under Sec 132(1)(A),(B),(C) are not satisfied and consequently the issue of notice under Sec 153(A) is to be set aside.*
12. *The proceedings on the grounds of transfer pricing is bad in law as there was no behind introducing the transfer pricing provisions in the Act is to prevent shifting of attempt by appellant company to shift profits outside of India. The basic intention profits outside India.*
13. *The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.*
14. *In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity.*
16. a) *The authorities below ought to have restricted the upper limit of turnover at 10 times that of the appellant under the facts and circumstances of the case.*
b) *Without prejudice, the authorities below ought to have applied the turnover filter of Rs.1 crore to Rs.200 crores for selection of comparables under the facts and circumstances of the case.*
17. *The authorities below erred in selecting the following functionally dissimilar companies as comparable for Information Technology Enabled Services segment under the facts and circumstances of the case:*
 - a. *Vishal Information Technologies Limited*
 - b. *Asit Mehta Financial Services Limited*
 - c. *Goldstone Infratech Limited (Seg)*
 - d. *Apex Knowledge Solutions Private Limited*
 - e. *Maple e Solutions Limited*
18. *The action of the authorities below in sustaining the additions is bad in law as there were no incriminating materials found during the search*

and hence the addition is without any tangible evidence on record and thus the same is liable to be deleted under the facts & circumstances of the case.

19. *The mandatory condition of recording of satisfaction regarding an inference of liability is not complied with and thus the notice issued under section 153A of the Act is bad in law and consequently, the assessment completed on such an invalid notice is void ab initio & liable to be quashed on the facts of the case.*

7. The additional grounds that are sought to be raised by the assessee are purely legal grounds. The additional grounds that are sought to be raised by the assessee in ground Nos.11 to 13, 16 and 17 are legal grounds which can be adjudicated based on the facts already on record and they are admitted for adjudication, keeping in mind the law laid down by the Hon'ble Supreme Court in the case of NTPC Ltd., 229 ITR 383 (SC). As far as ground Nos.16 and 17 are concerned, they are nothing but an elaboration of ground Nos.5.4 to 5.12 already raised by the assessee in the main grounds of appeal.

8. At the time of hearing, learned Counsel for the assessee made submissions on ground Nos.3.1 and 3.2. In these grounds, it has been submitted that the AO, before making a reference to Transfer Pricing Officer (TPO) under section 92CA of the Act, has not complied with the mandatory conditions laid down in the said section and has not afforded opportunity of being heard to the assessee before making a reference to the TPO. Though the learned Counsel for the assessee did not spell out as to what are the mandatory conditions that have not being satisfied or complied with by the AO while making a reference to the TPO, a plain reading of section 92CA of the Act shows that once an assessee enters into an international transaction, the AO has to make a reference to the TPO and the fact that he made a reference in the present case can only go to show that the AO is satisfied that it was necessary or expedient to make a reference to the TPO for determination of ALP of international transaction entered into by an assessee. The order passed in section 92CA of the Act clearly spells out that prior approval of the CIT,

Karnataka Central Bengaluru, dated 10.09.2008 has been obtained by the AO before making a reference under section 92CA of the Act to the TPO. In these circumstances, we are of the view that there is no merit in ground No.3.1 raised by the assessee. Consequently, grounds 3.1 is held to be without any merit and is dismissed. As far as Grd.No.3.2 is concerned, Section 92CA(1) requires an Assessing officer to refer an International Transaction for determination to the TPO if he considers it "necessary or expedient" to refer the matter to the TPO. The exercise of finding out whether any income arises and/or is affected or potentially arises and/or is affected by the International Transaction would certainly be a factor to determine whether or not it is necessary or expedient to refer the matter to the TPO. Since no objection was raised by the assessee to the applicability of Chapter X then the prima facie view of the Assessing officer would be sufficient before referring the transaction to the TPO for determining the ALP. Consequently, there is no merit in Grd.No.3.2 raised by the Assessee.

9. As far as ground Nos.11 and 12 are concerned, pursuant to the statutory amendment to the law, the Tribunal is precluded from examining the validity of search action and therefore the following is relevant amendment to the law. The Finance Act, 2017 (w.e.f. 1-4-1962) has inserted an Explanation to Sec.132(1) of the Act, which reads thus:

“Explanation.—For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.”

In view of the above, we do not find any merit in ground Nos.10 as without calling for the reason to believe recorded u/s.132 of the Act before issuing an authorization to search a person and property, one cannot come to a conclusion whether the condition precedent for issue of warrant of authorization to search u/s.132 of the Act are satisfied or not.

10. As far as ground No.12 raised by the assessee is concerned, the Special Bench of the ITAT, Bengaluru, in the case of Aztec Softech Technology Vs. ACIT 107 ITD 141 Bengaluru (SB) has laid down proposition that there is no requirement of establishing that there has been an attempt to shift profits out of India before making a reference to the TPO and that before making a reference to the TPO, there is no requirement of affording assessee opportunity of being heard.

11. So also ground Nos.18 and 19 raised by the assessee are without any merit because the assessee did not file a transfer pricing analysis alongwith the returns filed under section 139(1) of the Act and therefore the AO was well within his powers to examine the issue without regard to ALP in the proceedings under section 153A of the Act. These grounds are accordingly dismissed.

12. We shall now take up for consideration the main ground of appeal which is with regard to the determination of ALP in respect of the international transaction of rendering ITeS for AY 2006-07. As we have already seen the assessee has rendered software development services and ITeS to its AE. The transaction of rendering SWD services has been accepted by the TPO to be at Arm's Length. As far as the international transaction of rendering ITeS is concerned, to substantiate the price it received from the AE for the services so rendered as at arm's length, the assessee filed transfer pricing study in which it adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for determining the ALP. The operating revenue of the assessee was Rs.5,97,98,396/- and the operating expense was Rs.5,16,56,563/-. The operating profit was Rs.81,41,813/- giving a profit margin of 15.76%. The assessee chose Operating Profit/Operating Cost (OP/OC) as the profit level indicator for comparing its margin with the comparable companies. The Transfer Pricing Officer (TPO) rejected the TP analysis of the assessee whereby the assessee compared its profit margin with its comparable companies and claimed that the margin it earned in the international transaction was

comparable with the profit margins of the comparable companies. The TPO, while accepting TNMM as the MAM and OP/OC as Profit Level Indicator (PLI) for comparison, as adopted by the assessee, rejected the assessee's TP Study for various reasons and embarked on a fresh search, using the data bases Prowess and Capitaline. After issuing a show cause notice to the assessee proposing to adopt a fresh set of comparables and considering the assessee's objections, the TPO selected the final list of 13 comparables and their profit margin and the average profit margin of the comparables were as under :—

**FINAL SET OF COMPARABLE COMPANIES CONSIDERED BY THE TPO AND THE
OP TO TOTAL COST %**

Sl.No.	Company Name	OP to Total Cost %
1.	Maple eSolutions Ltd.	32.66
2.	AllsecTechnologies Ltd	28.51
3.	Datamatics Financial Services Ltd. (Seg.)	24.99
4.	Transworks Information Services Ltd.	19.56
5.	Cosmic Global Ltd.(Seg.)	16.03
6.	Vishal Information Technologies Ltd.	19.56
7.	Asit C.Mehta Financial Services Ltd. (earlier known as Nucleus & GIS (India) Ltd.	34.52
8.	Goldstone Infratech Ltd. (Seg.) (earlier known as Goldstone Teleservices Ltd.)	29.01
9.	Spanco Ltd. (seg.) (earlier known as Spanco Telesystems & Solutions Ltd.)	20.86
10.	Ace Software Exports Ltd.	7.72
11.	Apex Knowledge Solutions Pvt.Ltd.	20.48
12.	R Systems International Ltd. (Seg.)	15.11
13.	Flextronics Software Systems Ltd. (Seg.)	14.54
	Average	24.00

13. The TPO determined ALP of the international transaction as follows:

17.6 Computation of Arms Length Price :

The arithmetic mean of the Profit Level indicators is taken as the arms length margin (Please see Annexure-B for details of computation of PLI of

the comparables). Based on this, the arms length price of the software services rendered by you is computed as under :

<i>Arithmetic mean PLI</i>	:	24.00%
<i>Less : Working capital adjustment</i>	:	(-) 0.92%
<i>Arm's Length margin</i>	:	23.08%

Operating Cost	<i>Rs.5,16,36,563/-</i>
<i>Arm's Length margin</i>	<i>23.08% of the Operating Cost</i>
<i>Arm's Length Price @123.08% of operating cost</i>	<i>Rs.6,35,78,897/-</i>

17.7 Price Received vis-à-vis the Arm's Length Price:

The price charged by the taxpayer to its Associated Enterprises is compared to the Arm's Length price as under:

<i>Arm's Length Price @123.08% of operating cost</i>	<i>Rs.6,35,78,897/-</i>
Price received	<i>Rs.5,97,98,376/-</i>
<i>Shortfall being adjustment under section 92CA</i>	<i>Rs.37,80,521/-</i>

14. The adjustment suggested by the TPO was incorporated by the AO in the draft Order of Assessment against which the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP confirmed the action of the TPO. The AO incorporated the additions suggested by the TPO in the final Order of assessment against which the assessee has filed the present appeal before the Tribunal.

15. As far as determination of ALP is concerned, the grounds that were pressed for adjudication were grounds 5.4, 5.4 and 16 and 17. In these grounds, the assessee essentially has prayed for exclusion of 5 comparable companies chosen by the TPO.

16. We have heard the rival submissions and the plea of the assessee is for exclusion of 5 comparable companies out of 13 comparable companies chosen by the TPO. We have considered the rival submissions. As far as comparable companies chosen by the TPO at S.No.1,6,7 & 8 viz., Maple ESolution Ltd., Vishal Information Technological

Services Ltd., Asit C.Mehta Financial Services Ltd., and Gold Stone Infratech Ltd., we find that the Hyderabad Bench of the ITAT in the case of HSBC Electronic Data Processing India Ltd. Vs. ACIT, ITA No.1624/Hyd/2010 by order dated 28.6.2013 considered comparability of these companies in the case of a company engaged in rendering IT enabled services to its AE similar to that of the Assessee in the present case. The tribunal held that the aforesaid companies are not comparable. The following were the relevant observations of the Tribunal.

"8. The first objection is with reference to selection of comparable data by the TPO with reference to the following five companies-

- (a) Vishal Information Technologies Ltd.*
- (b) Goldstone Infratech Ltd.*
- (c)*
- (d) Maple e-Solutions Ltd.*
- (e) Nucleus Netsoft & GIS(India) Ltd. (now known as (Asit C. Mehta Financial Services Ltd.)*

Vishal Information Technologies Ltd.

9. The assessee's objection with reference to inclusion of this comparable is on the reason that the company is functionally different, also does not satisfy the filters such as employee cost and on-site revenue filter. It was submitted that employee cost forms a major portion of the total cost of BPO services and in the assessee's case employee cost is 62% of the total cost, whereas in the selected company the employee cost is less than 2%, which indicates that most of the work was outsourced and the out-sourcing cost was at 88.64% of the operating cost. It was further submitted that the ITAT Bangalore in the case of First Advantage Off-shore Services (ITA No.1252/Bang/2010) has directed to use employee turnover filter in a consistent manner for selection of comparables and in the case of Maersk Global Services Centre (India) Pvt. Ltd. (14 ITR(Trib) 541) the Mumbai Bench of the Tribunal has analysed and rejected this company as comparable for the reason that it has outsourced a considerable portion of its business and is functionally different. Moreover, it was also submitted that the DRP in the later year of 2008-09 vide its order dated 3.8.2012 has rejected this company as a comparable (name changed to Coral Hub Ltd.), vide para 18 of the order, wherein ultimately, it was decided that there is major difference in functionality and the business model and the DRP Bench was of the view that Coral Hub (formerly known as Vishal

Information Technology Ltd.) was not a suitable comparable and needs to be dropped from the final set of comparables. Based on the above submissions, it was submitted that this company cannot be used as a comparable and has to be excluded.

9.1. The learned Departmental Representative, however relied on the orders of the TPO.

9.2. After considering the rival contentions, we find considerable force in the contentions advanced by the learned counsel. There is no dispute with reference to the fact that most of the cost incurred by the company taken as comparable is outsourcing cost, as can be seen from the Annual report placed in the paper-book and ITAT, Mumbai in the case of Maersk Global Service Centre (supra) has analysed and rejected this company as comparable, due to the reason that it has outsourced a considerable portion of its business and it is functionally different. This factor was also approved by the DRP in assessee's own case in the later year, as can be seen from the copy of the order placed on record, for assessment year 2008-09. In view of this, we direct the Assessing Officer to exclude this company from the list of comparables.

Goldstone Infratech Ltd

10. The assessee's objection for inclusion of this comparable is on the basis of the filter on foreign exchange earnings, diminishing revenue filter and functionality, being run on lease basis. It was submitted that this company was rejected in the case of Stream International Services Pvt. Ltd. V/s. ADIT(International Taxation) by the Mumbai Bench of the Tribunal, vide its order dated 11.1.2013 in ITA No.8997/Mum/2010 for assessment year 2006-07.

10.1. After considering the rival contentions, we are of the opinion that the business model of the above company is different from that of the assessee. In this case, the foreign exchange revenue is less than 1% of the total turnover. Therefore, it fails the filter provided by the Assessing Officer, on the basis of the foreign exchange earnings. Further, the Revenue from BPO is failing over a period of three years. This issue was considered by the coordinate Bench (Mumbai Bench) of the Tribunal in the case of Stream International Services Ltd.(supra) wherein it was considered as under-

"14. The inclusion of second case objected to by the Id. AR is that of Goldstone

Infratech Limited (Seg) (earlier known as Goldstone Teleservices Limited). Here it is relevant to note that the TPO, inter alia, applied filter of 'Companies with export revenues more than 25% of the revenues'. Annual accounts of Goldstone Teleservices Limited indicate total revenue of the company at Rs. 30.89 crore from three segments, viz., Telecommunication at Rs. 13.63 crore, BPO at Rs. 5.02 crore and Insulator at Rs. 12.23 crore. The break up of such revenue of Goldstone Teleservices Limited has been provided at page 236 of the paper book. Schedule forming part of the annual accounts of Goldstone Teleservices Limited divulges earnings in foreign currency at Rs. 4.24 lakh. Such detail is available at page 239 of the paper book. When we compare earning in foreign currency at Rs. 4.24 lakh with the earnings of BPO at Rs. 5.02 crore or for that purpose of the entity as a whole at Rs. 30.89 crore, it becomes manifest that this case does not pass through the filter adopted by the TPO, being, the 'companies whose export revenues are more than 25% of the revenues'.

Therefore, we are of the opinion, that this company cannot be considered as a comparable for the purpose of determining the ALP in this case. We direct the same to be excluded.

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Maple e-Solutions Ltd.

12. The objection of the assessee with reference to this company is with regard to the financials of the company, on the ground of unreliability of data. It was submitted that selection of this company was rejected in the case of CRM Services India Pvt. Ltd in ITA No.468/Del/2009 and also in the case of Stream International Services (supra). Further, the assessee also relied on the DRP order in assessment year 2007-08, with reference to the above company.

12.1. We have considered the rival sub missions. We agree with the objections of the assessee. In the case of Stream International Services P. Ltd. (supra), it is held with reference to this company as under :

"18. We are unable to uphold the contention raised by the learned Departmental Representative. It is apparent from two orders passed — one by the Delhi Bench and the other by the Hyderabad Bench of the Tribunal — that the case of Maple eSolutions Limited has been directed to be excluded from the

list of comparables. As the assessment year under consideration is 2006-2007 and the Delhi Bench of the Tribunal has also considered the same assessment year while directing the exclusion of the case of Maple e Solutions Limited from the list of comparables, we are unable to accept the contention of the Id. DR in this regard. It is more so because no contrary view has been brought by the Ld. DR to our notice. Respectfully following the precedents, we direct the exclusion of this case from the final list of comparables."

Since the DRP in assessee's own case for assessment year 2007-08 also considered and excluded this company, we uphold the assessee's objection in this regard and direct the Assessing Officer to exclude this company from the comparables adopted.

Nucleus Netsoft & GIS(India) Ltd.

13. The last objection was with reference to the above company, which is on similar facts as that of Vishal Information Technologies, discussed above. It was submitted that this company is functionally different and fails under the employee cost filter. It was further submitted that there is a scheme of amalgamation of earlier company by the orders of the Hon'ble High Court of Judicature of Bombay, on 22.2.2006 and in view of amalgamation, the financials have changed and the business model also changed. Referring to the annual report placed on record, it was submitted that as against Rs.24.02 lakhs of employee costs for the year ending 31st March, 2005, the employee cost has increased to Rs.132.59 lakhs. Further, the data processing charges is also to the extent of Rs.1.04 crores, which indicates that the assessee is outsourcing the work. Accordingly, it cannot be selected as a comparable. Due to amalgamation during the year, the assessee's business model has changed and because of employee cost filter also, this comparable has to be excluded.

13.1 After considering the rival submissions, we are of the opinion that this company cannot be selected as a comparable not only on the reason of failing employee cost filter, but also due to amalgamation during the year, which has changed the business model of the company.

14. In view of the foregoing discussion, we agree with the assessee's objection that the above five comparables should be excluded.

17. The facts and circumstances and the Assessment year for which the aforesaid companies were not considered as comparable are identical to the case decided by the

Hyderabad Bench of ITAT and that of the case of the assessee. Respectfully following the decision of the Hyderabad Bench of ITAT, we direct the TPO to exclude the aforesaid companies from the list of comparable while arriving at the arithmetic mean of comparable.

18. As far as exclusion of Apex Knowledge Solutions Ltd., is concerned, this Tribunal in the case of Google India Pvt.Ltd. Vs. DCIT 29 Taxmann.com 412 (Bang-Trib) in a case of ITeS company rendering services such as the assessee rendered for AY 2006-07 (vide Paragraph 16 of the order) rejected this company as a comparable company as it was in the field of E-Publishing which cannot be said to be in the same line of business of ITeS. Following the same, we direct exclusion of this company from the list of comparable companies. The relevant grounds of appeal of the assessee are allowed.

19. We direct the TPO to compute ALP in ITES segment, after excluding the aforesaid companies from the list of comparable companies after giving the benefit of the second proviso to Sec.92(2) of the Act. The relevant grounds of appeal of the assessee are treated as allowed.

20. The Other ground that remains for consideration in this appeal is ground No.9 raised by the assessee which is with regard to the computation of deduction under section 10A of the Act whereby the AO reduced delivery charges from the export turnover without excluding the same from the total turnover. This issue is no longer res integra and has been settled by the Hon'ble Karnataka High Court in the case of Tata Elxsi 349 ITR 98 (Karnataka) wherein it was held that whatever is excluded from the Export turnover should also be excluded from the total turnover. Moreover, the order of the Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd. in Civil Appeal No.8489-98490 of 2013 & Ors. dated 24.04.2018. The order of the AO on this issue is therefore reversed and the ground of appeal of the assessee in this regard is allowed.

21. In the result, IT(TP)A No.1309/Bang/2010 is partly allowed.

22. **ITA No.1310/Bang/2010 for Assessment Year 2007-08**

The grounds of appeal raised by the assessee are as follows:

1. *The order of the authorities below in so far as it is against the appellant is opposed to law weight of evidence, natural justice, probabilities, facts and circumstances of the appellant's case.*
2. *The appellant denies itself liable to be assessed on a total income of Rs.3,29,53,129/- as against the returned income of Rs. 3,58,430/- under the facts and circumstances of the case.*
3. *Legal Grounds:*
 - 3.1 *The reference to TPO is bad in law as the mandatory conditions have not been satisfied or complied with as the reasons have not been recorded before the matter was referred to the TPO.*
 - 3.2 *The order is further bad in law as the appellant was denied of opportunity of being heard before reference to the TPO which is against the principles of natural justice.*
4. *The authorities below are not justified in holding that the amendment to proviso to section 92C(2) of the Act is effective from 1-10-2009 was clarificatory and denied the 5% rebate which ought to have been given as per the existing proviso for the respective years.*
5. *Appropriate Transfer Pricing Methodology:*
 - 5.1 *The authorities below failed to appreciate that CPM is the appropriate methodology for determining the transfer pricing for IT and ITES services. The authorities below are not justified in rejecting the Cost plus Methodology without assigning any cogent reasons under the facts and circumstances of the case.*
 - 5.2 *Without prejudice, the authorities below were not justified in law in rejecting the revised Transfer Pricing Study submitted by the appellant company under TNMM methodology is not in accordance with law under the facts and circumstances of the case.*

- 5.3 *The authorities below ought not to have used a separate database (PROWESS) for conducting the TNMM study and further the authorities below failed to consider the details and database considered by the appellant under the facts and circumstances of the case.*
- 5.4 *The authorities below have deviated from functional analysis, OECD guidelines and other conditions which are necessary for selecting comparables under the facts and circumstances of the case.*
- 5.5 *The authorities below are not justified in law in not limiting the turnover to Rs.50 crores for the purpose of arriving at comparables since the turnover of the appellant company had not crossed more than Rs.10 crores under the facts and circumstances of the case.*
- 5.6 *The authorities below are not justified in rejecting an higher employee cost filter (40% rather than 25% of the Turnover) adopted by the appellant under the facts and circumstances of the case. The authorities below are not justified in law in not normalizing the operating profit by not considering for ESOP (Employee Stock Options) costs based upon fair market value which is the realistic approach to arrive at the true "employee" cost under the facts and circumstances of the case.*
- 5.7 *The authorities below further not justified in combining all the purchases, sales and other transactions and comparing them only with turnover (and not against the sum of turnover and purchases) while applying Related Party Transactions filter under the facts and circumstances of the case.*
- 5.8 *The authorities below are not justified in law in summarily rejected all the Companies which made losses for last 3 years without ascertaining any facts. On the other hand the authorities below have included all companies with abnormal profit margins.*
- 5.9 *The authorities below are not justified in law in rejecting the companies having minor variations during the end of the financial year under the facts and circumstances of the case.*
- 5.10 *The authorities below have rejected all companies only when the onsite revenues are more than 75% and have failed to appreciate that the appellant company had zero onsite revenue. Without prejudice, the authorities below ought to have considered companies with at most 5-10% onsite revenues under the facts and circumstances of the case.*
- 5.11 *The learned authorities below failed to understand the risk-insulated environment in which the appellant operated and the nature of services*

provided by it to the AE while determining the ALP. Further the authorities failed to consider the lower risk companies receive lower returns while computing the mark-up under the facts and circumstances of the case.

5.12 The authorities below are further not justified in law in holding that the appellant company has not provided the computation before seeking for working capital adjustment.

5.13 The order of the authorities below has various factual errors and further the authorities below have not followed a consistent Policy in adopting the filters under the facts and circumstances of the case.

6. Without prejudice the authorities below ought to have considered the objections raised by the appellant regarding the companies selected by the TPO and the justification provided for the companies selected by the appellant. The authorities below ought to have at least taken the average of companies which the appellant and the TPO did not dispute.

7. Without prejudice the authorities should have adopted the income by taking into account the average of the comparables which have been accepted by both the appellants and the revenue and ignored all other comparables on the facts and circumstances of the case.

8. Transactions involving money transfers

8.1 The authorities below have incorrectly concluded that the AE collected the income with the help of the appellant company which is not factually correct.

8.2 Further the authorities below after accepting the claim of the appellant that it was not engaged in Wire Transfer activity and the additions made to the income of the appellant are not in accordance with law.

8.3 Without prejudice, the DRP in its order of direction has only commented on the nature of wire transfer activities. However the AO is not justified in aggregating Wire Transfer charges and Intra-Account Charges for AY2007-08 under the facts and circumstances of the case.

8.4 The appellant denies itself liable to be assessed to a sum of Rs 2,07,97,113/-on account of agency commission on money transfers.

8.5 Without prejudice the comparable is not at all correct or capable of comparison both on facts and in law and further without prejudice the amount determined is highly excessive and requires to be reduced to Nil.

9. *Disallowance under Section 10A*
- 9.1 *The authorities below are not justified in reducing the delivery charges from the export turnover and thereby restricting the claim of the appellant under section 10A of the Income-tax Act, 1961 under the facts and circumstances of the case.*
- 9.2 *Without prejudice the authorities below are not justified in law in disallowing the claim of exemption under section 10A of the Act for the additions made by the TPO under the facts and circumstances of the case.*
10. *The authorities below are not justified in levying interest under Sec 234(A), (B), (C) on the facts and circumstances of the case. The levy is further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.*
23. Additional Grounds raised by the assessee vide applications dt.25.11.2010, 7.2.20 & 14.12.21, are as follows:
11. *The entire assessment based upon the search proceedings which itself is bad in law as the mandatory conditions for being a valid search did not exist nor are they discernable from the facts. The conditions prescribed under Sec 132(1)(A),(B),(C) are not satisfied and consequently the issue of notice under Sec 153(A) is to be set aside.*
12. *The proceedings on the grounds of transfer pricing is bad in law as there was no attempt by appellant company to shift profits outside of India. The basic intention behind introducing the transfer pricing provisions in the Act is to prevent shifting of profits outside India.*
13. *The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.*
14. a) *The authorities below ought to have restricted the upper limit of turnover at 10 times that of the appellant under the facts and circumstances of the case.*
- b) *Without prejudice, the authorities below ought to have applied the turnover filter of Rs.1 crore to Rs.200 crores for selection of comparables under the facts and circumstances of the case.*

15. *The authorities below erred in selecting the following functionally dissimilar companies as comparable for Software Development Services segment under the facts and circumstances of the case:*
- a. *Kals Info Systems Limited*
 - b. *Lucid Software Limited*
 - c. *Bodhtree Consulting*
 - d. *Accel Transmatics Limited (Seg)*
 - e. *Megasoft Limited*
16. *The authorities below erred in selecting the following functionally dissimilar companies as comparable for Information Technology Enabled Services segment under the facts and circumstances of the case:*
- a. *Maple E Solutions Limited*
 - b. *Vishal Information Technologies Limited*
 - c. *Asit C Mehta Financial Services Limited*
17. *The action of the authorities below in sustaining the additions is bad in law as there were no incriminating materials found during the search and hence the addition is without any tangible evidence on record and thus the same is liable to be deleted under the facts & circumstances of the case.*
18. *The mandatory condition of recording of satisfaction regarding an inference of liability is not complied with and thus the notice issued under section 153A of the Act is bad in law and consequently, the assessment completed on such an invalid notice is void ab initio & liable to be quashed on the facts of the case.*
24. The additional grounds that are sought to be raised by the assessee are purely legal grounds. The additional grounds that are sought to be raised by the assessee in ground Nos.11 to 13, 16 and 17 are legal grounds which can be adjudicated based on the facts already on record and they are admitted for adjudication, keeping in mind the law laid down by the Hon'ble Supreme Court in the case of NTPC Ltd., 229 ITR 383 (SC). As far as ground Nos.14 and 15 are concerned, they are nothing but an elaboration of ground Nos.5.4 to 5.12 already raised by the assessee in the main grounds of appeal.

25. At the time of hearing, learned Counsel for the assessee made submissions on ground Nos.3.1 and 3.2. In these grounds, it has been submitted that the AO, before making a reference to Transfer Pricing Officer (TPO) under section 92CA of the Act, has not complied with the mandatory conditions laid down in the said section and has not afforded opportunity of being heard to the assessee before making a reference to the TPO. Though the learned Counsel for the assessee did not spell out as to what are the mandatory conditions that have not being satisfied or complied with by the AO while making a reference to the TPO, a plain reading of section 92CA of the Act shows that once an assessee enters into an international transaction, the AO has to make a reference to the TPO and the fact that he made a reference in the present case can only go to show that the AO is satisfied that it was necessary or expedient to make a reference to the TPO for determination of ALP of international transaction entered into by an assessee. The order passed in section 92CA of the Act clearly spells out that prior approval of the CIT, Karnataka Central Bengaluru, dated 10.09.2008 has been obtained by the AO before making a reference under section 92CA of the Act to the TPO. In these circumstances, we are of the view that there is no merit in ground No.3.1 raised by the assessee. Consequently, grounds 3.1 is held to be without any merit and is dismissed. As far as Grd.No.3.2 is concerned, Section 92CA(1) requires an Assessing officer to refer an International Transaction for determination to the TPO if he considers it "necessary or expedient" to refer the mater to the TPO. The exercise of finding out whether any income arises and/or is affected or potentially arises and/or is affected by the International Transaction would certainly be a factor to determine whether or not it is necessary or expedient to refer the matter to the TPO. Since no objection was raised by the assessee to the applicability of Chapter X then the prima facie view of the Assessing officer would be sufficient before referring the transaction to the TPO for determining the ALP. Consequently, there is no merit in Grd.No.3.2 raised by the assessee.

26. As far as ground Nos.11 and 12 are concerned, pursuant to the statutory amendment to the law, the Tribunal is precluded from examining the validity of search action and therefore the following is relevant amendment to the law. The Finance Act, 2017 (w.e.f. 1-4-1962) has inserted an Explanation to Sec.132(1) of the Act, which reads thus:

“Explanation.—For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.”

27. In view of the above, we do not find any merit in ground Nos.10 as without calling for the reason to believe recorded u/s.132 of the Act before issuing an authorization to search a person and property, one cannot come to a conclusion whether the condition precedent for issue of warrant of authorization to search u/s.132 of the Act are satisfied or not.

28. As far as ground No.12 raised by the assessee is concerned, the Special Bench of the ITAT, Bengaluru, in the case of Azetec Softech Technology Vs. ACIT 107 ITD 141 Bengaluru (SB) has laid down proposition that there is no requirement of establishing that there has been an attempt to shift profits out of India before making a reference to the TPO and that before making a reference to the TPO, there is no requirement of affording assessee opportunity of being heard.

29. So also ground Nos.18 and 19 raised by the assessee are without any merit because the assessee did not file a transfer pricing analysis along with the returns filed under section 139(1) of the Act and therefore the AO was well within his powers to examine the issue without regard to ALP in the proceedings under section 153A of the Act. These grounds are accordingly dismissed.

30. The other grounds that remains for adjudication in this Assessment Year is the determination of ALP with regard to SWD services and ITeS services rendered by the assessee to its AE.

31. SWD Segment : The profit margin of the assessee in the SWD segment was 15.78% and the turnover of the assessee was 8.51 Crore. Both the assessee and the AO chose TNMM as the MAM for determining ALP of the international transaction. The TPO, after rejecting the TP study of the assessee, claiming that the price received in the international transaction is at arm's length, selected 19 comparable companies which are as follows:

Sl. No.	Name of company	OP / TC (FY 2006-07)	Sales (Rs.Cr.)
1	Geometric Software Limited (Seg.)	6.70	98.59
2	Infosys Ltd	40.38	9028.00
3	KALS Info Systems Limited	39.75	1.97
5	Mindtree Consulting Ltd	14.67	448.79
6	Persistent Systems Ltd.	24.67	209.18
7	R.Systems International Ltd. (Seg.)	22.20	79.42
8	Sasken Communications Ltd. (Seg.)	13.90	240.03
9	Tata Elxsi Ltd (Seg.)	27.65	188.81
10	Lucid Software Ltd	8.92	1.02
11	Mediasoft Solutions Ltd	6.29	1.76
12	R S Software (India) Ltd	15.69	91.57
13	S I P Technologies & Exports Ltd	3.06	6.53
14	Bodhtree Consulting Ltd.	15.99	5.32
15	Accel Transmatic Ltd. (Seg.)	44.07	8.02
16	Synfosys Business solutions Ltd.	10.61	4.49
17	Flextronics Software Systems Ltd.	27.24	595.12

18	Lanco Global Solutions Ltd	5.27	35.63
19	Megasoft Ltd	52.74	56.15
19	iGate Global solutions Ltd.(Seg.)	15.61	527.91
	Arithmetic Mean		24.47%

32. The TPO determined the ALP as follows:

“14.6 Computation of Arms Length Price :

The arithmetic mean of the Profit Leel indicators is taken as the arms length margin (Please see Annexure-B for details of computation of PLI of the comparables). Based on this, the arms length price of the software services rendered by you is computed as under :

Arithmetic mean PLI : 24.47%

Arm’s Length Price

Operating Cost	Rs.7,35,13,165 /-
Arm’s Length margin	24.47% of the Operating Cost
Arm’s Length Price @124.47% of operating cost	Rs.9,15,01,836/-

14.7 Price Received vis-à-vis the Arm’s Length Price:

The price charged by the taxpayer to its Associated Enterprises is compared to the Arm’s Length price as under:

Arm’s Length Price @123.08% of operating cost	Rs.9,15,01,836/-
Price received	Rs.8,51,16,592/-
Shortfall being adjustment under section 92CA	Rs.63,85,244/-

The difference of Rs.63,85,244/- as determined above is the transfer pricing adjustment u/s. 92CA.”

33. The DRP confirmed the action of the TPO. In this appeal, the assessee seeks exclusion of 12 out of comparable companies that remain after the order of the DRP. The assessee seeks exclusion of the following 7 comparable companies on the basis of turnover filter viz., Infosys Ltd., Mindtree Consulting Ltd., Persistent Systems Ltd., Sasken Communication Ltd., Tata Elxi Ltd., i-Gate Global Solutions Ltd. and Flextronics

Software systems Ltd., on application of turnover filter. The assessee seeks exclusion of 7 comparable companies on the basis that the turnover of the 7 comparable companies was more than Rs.200 crores and therefore it should not be compared with the assessee whose turnover was only Rs.8.51 Crores. If one peruses the chart of comparables of the TPO given in the earlier paragraph of this order, one might find that the turnover of all the 6 companies are more than Rs.200 Crores. This Tribunal has been taking a consistent stand on the application of turnover filter in choosing comparable companies.

34. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

“41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-

“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .ire (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study.”

42. The Assessee’s turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon’ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of comparable companies is held to correct and such action does not call for any interference.”

35. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), took note of all the conflicting decision on the

issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

“17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capgemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global

Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)."

36. Following the aforesaid decisions, we hold that the 6 comparable companies whose turnover is above Rs.200 crores should be excluded from the list of comparable companies.

37. The 5 other comparable companies which the assessee's seeks exclusion on the ground of functional comparability are, Kals Information Systems Ltd., Lucid Software Ltd., Accel Transmission Ltd., Bodhtree Consulting Ltd., and Megasoft Ltd.

38. As far as exclusion of Kals Information Systems Ltd., Lucid Software Ltd., and Accel Transmission Ltd., are concerned, this Tribunal in the case of Cypress Semiconductor Technology India Pvt.Ltd., 63 Taxmann.com 162 (Bang.-Trib) in the case of an assessee rendering SWD services such as the assessee in this appeal and in relation to AY 2007-08 in which the TPO in the said case also chose the same comparable companies chosen in the case of the assessee in this appeal, directed that these three companies cannot be regarded as comparable companies. Kals Information systems Ltd., was rejected as a comparable company for the reason that it has revenues from both software development and software products and was engaged in providing training. As per the annual report, the salary cost debited under the software development expenditure

was Rs. 45,93,351. The same was less than 25% of the software services revenue and therefore the salary cost filter test fails. Besides the above, 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 KALS was rejected for AY 2006-07 on account of it being functionally different from software companies. As far as Lucid Software Ltd., is concerned, it was held that this company was in software services and software products and segmental details were not available for comparing the profit margin of the software services segment with the assessee. In so far as Accel Transmission Ltd., it was held that this company was functionally different as it was in software animation. Following the said decision, we direct exclusion of the aforesaid 3 companies from the list of comparable companies.

39. As far as Bodhtree Consluting Ltd., is concerned, in the case of Principal Global Services Pvt.Ltd. Vs. DCIT (2016) 69 taxmann.com 219 (Pune-Trib) rendered in the case of an assessee rendering SWD services such as the assessee in this appeal and in relation to AY 2007-08 in which the TPO in the said case also chose the same comparable companies chosen in the case of the assessee in this appeal, directed that this company cannot be regarded as comparable company for the reasons given in para 8 of this order viz., that this company had fluctuation profit margin which was due to a different revenue recognition policy and hence the profit margins cannot be compared. As far as exclusion of Megasoft Ltd., is concerned, this tribunal in the case of Triology E-Business Software India Pvt.Ltd. 29 Taxmanncom 310 (Bang-Trib) rendered in the case of an assessee rendering SWD services such as the assessee in this appeal and in relation to AY 2007-08 in which the TPO in the said case also chose the same comparable companies chosen in the case of the assessee in this appeal, directed that the profit margin of the SWD service segment along should be compared.

40. We direct the TPO to compute ALP in the SWD services segment in accordance with the directions contained in this order after affording opportunity of being heard to the assessee.

41. ITeS Segment : As far as ITeS segment is concerned, the turnover of the assessee in the ITeS segment was a sum of Rs.8.67 crores with a margin of 15.77%. Both the assessee and the TPO chose TNMM as the MAM for determining ALP and the PLI chosen for the comparison of the assessee's margin with that of the comparable companies was OP/OC. The assessee's OP/OC in the ITeS segment was 15.77%. The TPO, after rejecting the TP study of the assessee, chose 13 comparable companies which were as follows:

Sl.No.	Company Name	Sales (Rs.cr.)	OP to Total Cost%
1	Maple eSolutions Ltd.,	12.21	33.97%
2	Allsec Technologies Ltd	113.28	27.31%
3	Datamatics Financial Services Ltd (Seg.)	2.92	5.07%
4	Rev IT Systems Ltd.,	35.16	24.78%
5	Transworkss Information Services Ltd	197.06	11.98%
6	Cosmic Global Ltd (Seg.)	4.28	11.31%
7	Vishal Infortnation Technologies Ltd	30.6	52.77%
8	Asit C ivlehta Financial Services Ltd (Earlier known as Nucleus Netsoftlz GIS (India) Ltd)	6.34	52.16%
9	Spanco Ltd (Seg.) (Earlier known as Spanco Telesystems & Solutions Ltd)	35	25.81%
10	Ace Software Exports Ltd.	4.95	11.78%
11	Apex Knowledge Solutions Pvt Ltd	6.64	13.31%

12	R Systems International Ltd (Seg.)	17.34	14.35%
13	Flextronics Software Systems Ltd (Seg.)	12.93	8.61%

42. The TPO determined the ALP of the international transaction as follows:

“17.6 Computation of Arms Length Price :

The arithmetic mean of the Profit Leel indicators is taken as the arms length margin (Please see Annexure-B for details of computation of PLI of the comparables). Based on this, the arms length price of the software services rendered by you is computed as under :

Arithmetic mean PLI : 22.47%

Arm’s Length Price

Operating Cost	Rs.7,49,22,871 /-
<i>Arm’s Length margin</i>	22.55% of the Operating Cost
<i>Arm’s Length Price @124.47% of operating cost</i>	Rs.9,18,17,978/-

14.7 Price Received vis-à-vis the Arm’s Length Price:

The price charged by the taxpayer to its Associated Enterprises is compared to the Arm’s Length price as under:

<i>Arm’s Length Price @129.30% of operating cost</i>	Rs.9,18,17,978/-
Price received	Rs.8,67,48,809/-
<i>Shortfall being adjustment under section 92CA</i>	Rs.50,69,169/-

The difference of Rs. 50,69,169/- as determined above is the transfer pricing adjustment u/s. 92CA.”

43. The DRP confirmed the order of the AO. In this appeal, the assessee seeks exclusion of 3 comparable companies out of the 13 chosen by the TPO. The assessee seeks exclusion of Mapel-e Solutions Ltd., Vishal Information Technologies Ltd., and Asit C.Mehta Financial Services Ltd.(earlier known as Nuclueus Netsoft & GIS Ltd.) by

placing reliance on the decision of the ITAT, Bengaluru Bench, in the case of AOL Online India Pvt.Ltd. Vs. DCIT (2016) 68 taxmann.com 235 (Bang-Trib). In the aforesaid decision) rendered in the case of an assessee rendering ITeS such as the assessee in this appeal and in relation to AY 2007-08 in which the TPO in the said case also chose the same comparable companies chosen in the case of the assessee in this appeal, directed vide para 6.2 of the order that Asit C.Mehta Financial services Ltd., cannot be regarded as comparable because it fails Related Party Transaction filter (RPT filter) and is functionally different and engaged in portfolio management services and investment activities and incurs marketing expenses. Maple E Solutions Ltd., was regarded as not functionally comparable being in the area of voice outbound and voice inbound data, having peculiar economic circumstances besides unreliable financials. Vishal Information Technologies Ltd., was regarded as functionally not comparable as it was engaged in providing solution to the print product industry with services like e-publishing, e-book print on demand, data and document management, data conversion, digital library management etc. These three companies are therefore directed to be excluded from the list of comparable companies following the aforesaid decision. We hold and direct accordingly.

44. The TPO is directed to compute the ALP in the ITeS segment in accordance with the directions contained in this order, after affording the assessee opportunity of being heard.

45. The other issue that arises for consideration in this appeal is with regard to ground No.9 which is identical to ground No.9 decided in Assessment Year 2006-07. For the reasons stated therein, the AO is directed to exclude the delivery charges both from the export turnover and total turnover while computing deduction under section 10A of the Act. Moreover, the order of the Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd. in Civil Appeal

No.8489-98490 of 2013 & Ors. dated 24.04.2018. The order of the AO on this issue is therefore reversed and the ground of appeal of the Assessee in this regard is allowed.

46. Common issue in both the AY 2006-07 & 2007-08:

The common issue raised in Grd.No.8 in both the appeals of the assessee is with regard to the addition made to total income on the ground that over and above providing SWD services and ITeS, the assessee also rendered activities like banking functions, treasury operations, customer support operations etc., and earned income in the form of commission from rendering these services.

47. Transactions involving Money transfers : According to the TPO, to whom a reference was made by the AO u/s.92CA of the Act for determination of ALP, the AO on the basis of material available with him following the search of its premises in December, 2006, informed the TPO, that the services rendered by the taxpayer to its AE. First Curacao Ltd. went beyond the software development and IT Enabled services. According to the AO various activities like banking functions, treasury operations, customer support operations etc., were carried by your company. The TPO has mentioned in the order u/s.92CA of the Act, that the AO has given the following, table which is reproduced as under :

<i>TABLE -1</i>	<i>01-05-2005 to 31-03-2006</i>
<i>ED Wire Free</i>	<i>5,085,961.50</i>
<i>ED Wire Free</i>	<i>197,662.00</i>
<i>TOTAL</i>	<i>5,105,72 .750</i>
<i>TABLE-2</i>	<i>01-05-2005 to 31-03-2006</i>
<i>EB Infra</i>	<i>7, 739,945.00</i>
<i>EB Infra</i>	<i>14,853.00</i>

<i>TOTAL</i>	<i>7,754,798.00</i>
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48. According to the AO, the table-1 gives the details of earnings in USDs from wire transfer charges for which almost all the services were offered from Bangalore while the table-2 gives details of the charges for intra-bank transfers for which substantial services were offered through Bangalore. According to the TPO, from the AO's observations, it appears that these services (as shown in the table) do not form part of the software development services and the IT Enabled services covered by the agreement dated 01-06-2001 with AE.

49. The TPO passed on the above information furnished by the AO to the taxpayer. The taxpayer replied that these transactions related to its AE and that the taxpayer had rendered only the BPO services for the AE. The reply of the taxpayer was passed on to the AO who subsequently vide his letter dated 26-10-2009 Sent the copies of the documents seized from the taxpayer's premises during the search. According to the TPO, these copies of documents were also shown to the ARs of the taxpayer and its copies were also given to them for submitting their explanation. One of Authorized Representative of the assessee before the AO was Shri MV Ganesh who was the President E-banking at the time of the search. According to the AO, Sh Ganesh was also shown copy of his statement recorded during the search. In this statement he stated that the taxpayer had not earned any income from 'in bound wire transfers' of money and from processing of 'new Exact Pay debit cards". Sh. Ganesh has, vide order sheet entry dated 28-10-2009, filed an explanation regarding the seized documents. According to the TPO u/s 92CA of the Act he had to determine the Arm's Length Price of the transaction of rendering services acting as Agent of the AE in money transfer activities. In this regard, the TPO observed, as under :

- (a) *As the taxpayer is tendering the services under consideration for its AE which is into banking / money transfer activities, the role of the taxpayer is that of an agent.*

- (b) *The amounts shown in the table , that is. USDs 5,105,727.50 and USDs 7,754,798.00 represent the fee earned by the AE, First Curacao Ltd., as informed by the AR, Shri MV Ganesh, Director, of the taxpayer company vide reply dated 30-09-2009 and the order sheet entry dated 28-10-2009.*
- (c) *As the aforesaid amounts are fee collected by the AE with the help of the taxpayer, what is to be ascertained is only the amount of commission that an uncontrolled entity would have charged for rendering similar services.*

50. The TPO looked for companies which hire agents for facilitating the money transfers, and found a company by name “J.N. Money Transfer” which hires agents and pays them the commission at the rate of 20% of the fee collected. According to the TPO, J.N.Money Transfer was an international banking institution and comparable to the AE of the taxpayer. The TPO applied the rate of 20% by placing reliance on an information regarding the aforesaid rate from the following web page of JN Money Transfer:

<http://www.jnmoneytransfer.com/agent.aspx>

51. The TPO called upon the assessee to explain why it should not be treated as an agent in respect of these money transfers and also vide order sheet entry dated 27-10-2009 to show cause as to why the income of commission as an agent for said money transfers should not be assessed in the taxpayer's hands. In the reply the assessee denied having acted as commission agent of the AE in respect of money transfers and that it did not earn any income on these transactions and that the taxpayer's role was only of a IT Enabled service provider to the AE. The AO however concluded that commission of the taxpayer out of the fee collected by the AE comes to 2572105 USDs, being 20% of the aforesaid amounts of fee. The conversion rate of USD to INR as on 31-03-2006 was Rs. 44.61 and thus, the commission income will work out to Rs. 11,47, 41,604/-. Thus, this amount is the Arm's length Price of the services rendered by the taxpayer.

52. The TPO held that the ALP of the transactions of money transfer referred to by the AO, but not shown by the taxpayer in its Report u/s 10E (3CEB), viz., a sum of

Rs. 11,47,41,604/- was required to be added to the total income of the assessee on account of determination of ALP.

53. For identical reasons, an addition of Rs.8,07,72,255/- was made to the total income of the assessee in AY 2007-08.

54. In its objections before the DRP, the assessee submitted as follows:

The assessee urged before the DRP that

- The assessee provided services to First Curacao Limited and First Curacao International Bank and hence the analogy with the Jamaican company was invalid.
- The comparable identified by the TPO is to a company in Jamaica purely based upon the existence of a website. No details have been provided on the nature of the company (does it really exist), its operations, its scale, etc and to establish a functional comparison between this company and its agents and First Curacao International Bank and the Assessee.
- The TPO merely used a statement from a website of a company located in an unrelated geography (Jamaica). There is no evidence that the company actually even exists or pays the commissions as speculated by the TPO
- It was submitted that web related information are not completely reliable and any assessment suggested on the said basis is liable to be set aside on ground of no factual foundation and is merely on surmise suspicion and devoid of merits.
- There is no evidence that the company actually pays 20% commission apart from what has been stated on the website.
- The TPO did not conduct any TP Study on Indian companies to determine the net margin
- Without prejudice the TPO had clubbed wire transfers and intra account transfers without any justification into a single category without understanding the differences in the back office functions provided for the same.

55. The assessee further provided detailed clarifications to the DRP that all back-office operations were covered under the service agreement between AE and the assessee and that this included for maintaining complete details of commission on wire transfers and intra-account transfers. Maintaining of records as per the request and need of the principal could not by any stretch of imagination lead to an inference that the assessee was entitled to agency commission on such back-office operation. For example, merely because outsourcing is done by the department for processing of returns it cannot be said that the said entity is entitled to a percentage of the tax collected. The assessee urged before the DRP that all transactions by customers of FCIB were initiated directly on the website of FCIB hosted in Paris. All transactions were executed automatically such as Intra Account Transfers, Wire Transfers, etc. the assessee did not host any servers for FCIB and all access was done remotely. Detailed submissions were made with regard to the modus operandi of the AE and the role played by the assessee as an AE in providing purely back-office support and no link with the wire transfers done by the AE bank to its customers. These details are not given for the reasons the DRP accepted the submission of the assessee and concluded that the assessee did not render any service with regard to wire transfers by the AE bank to its customers and this finding of the DRP has not been challenged by the revenue.

56. The DRP upheld the fact that the assessee did not provide agency service. DRP however held that the assessee has not been able to establish with supporting evidence before the panel that the assessee has accounted for any receipt of service charges for the back-office operations performed for maintaining complete details of commission on wire transfers effected by First Curacao International Bank. The DRP consequently held that the 23.08% of the 20% additional income as determined by the TPO should be added as additional income. For e.g., if FCIB had charged USD 40 per wire transfer, the TPO had computed the additional income of the assessee at 20% of the above i.e., USD 8 and

the DRP held that additional income is 23% of USD 8. Against such a direction of the DRP, the assessee has preferred the present appeal before the Tribunal.

57. It was submitted that the assessee was following cost plus method in its billing operation and consequently has added the cost of all back-office employees and claimed the amount from the principal. Thus, there is no justification in DRP holding that no amount has been accounted on such back office operations. The manner of amount determined by the DRP is also without any factual foundation. DRP has adopted the percentage on the transaction value at the percentage of profit adopted for SWD services and ITeS operations. The arrival of any percentage as income from agency service is without any factual foundation.

58. The learned counsel for assessee reiterated submissions made as above. The learned DR relied on the order of the DRP.

59. We have carefully considered the rival submissions. The TPO/AO made addition on the ground that the assessee rendered services in the matter of wire transfer by the Foreign AE and was entitled to a commission on such services. The assessee explained before the DRP, the modus operandi of the Wire Transfer and intra account transfer of funds by the foreign AE and as to how the assessee is not rendering any services whatsoever except the back office support services for which the ALP has already been computed by the TPO. This plea was accepted by the DRP. However, the DRP without any evidence has sustained part of the addition with the following observations:

*“The assessee could have earned commission on wire transfer only if it acted as a bank. For this, it was required to be registered as a bank in India. To hold that the assessee was engaging itself in effecting wire transfers from one client to another surreptitiously appears to be remote because of the regulatory mechanisms involved both at the national and the international level. The transactions of the assessee were also examined by the Reserve Bank of India and Enforcement Directorate and no proceedings have been initiated by them. **Therefore, this panel is of the opinion***

that the AO has not established by evidence his assertion that the assessee was engaged in wire transfer activity. However, the assessee has also not been able to establish with supporting evidence before the panel that assessee has accounted for any receipt of service charges for the back office operations performed for maintaining complete details of commission on wire transfers effected by First Curaco International Bank worldwide. For this reason, this Panel holds that 23.08% [which is the mean operating profit /operating cost of comparables for the segment determined by the TPO for AY 2006-07] and 22.55% [which is the mean rating profit /operating cost of comparables for the BPO segment determined by the for AY 2007-08] of the ALP determined by the TPO in his TP order for the respective assessment years as arm's length price of service charges accruing to the assessee for the back office operations discussed above. Accordingly, this Panel directs the AO to retain 23.08% of Rs.11,47,41,604/-, which is Rs. 2,64,82,362/- for AY 2006-07 and 22.55% of 9,22,26,668/-, which is Rs.2,07,97,113/- for AY 2007-08.”

60. We are of the view that there is no basis whatsoever for the DRP's conclusion. The DRP having accepted the contention of the assessee that no services apart from regular back-office services were provided, cannot come to a conclusion that no evidence has been provided by the assessee to prove that the entire service income from providing back office services has been offered to tax. The DRP has placed onus of proving negative on the assessee. There is no evidence before DRP to come to a conclusion that the entire service income from providing back office service was not offered to tax by the assessee. There is no basis whatsoever for the conclusion of the DRP. The same cannot be sustained and the addition made in this regard is directed to be deleted. Grd.NO.8 in both the appeals are accordingly allowed.

61. In the result, both the appeals are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(B. R. BASKARAN)
Accountant Member

Sd/-
(N.V. VASUDEVAN)
Vice President

Bangalore,
Dated: 22.03.2022.
/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.