

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

**IT (TP) A No.265 (Bang) 2011
(Assessment year 2006-07)**

M/s Nirvana Business Solutions Pvt. Ltd.,
Nirvana Towers, Sigma Technologies Park,
No.7, Whitefield Main Road,
Bangalore-560 066

Pan No.AABCN5508L

Appellant

Vs

The Income Tax Officer,
Ward-12(1),
Bangalore

Respondent

**Assessee by: Shri Anand Murthy, B.N.
Revenue by: Shri P. Chandrashekar, CIT**

**Date of hearing : 04-05-2016
Date of pronouncement: : 17-06-2016**

O R D E R

PER SHRI A.K.GARODIA, AM

This is assessee's appeal directed against the order of AO dated 18-11-2010 and DRP dated 27-09-2010 for assessment year 2006-07.

2. The assessee has raised the following grounds:

"1. On the facts and circumstances of the case, there is no justification for the AO to make an addition of Rs.9,41 .68.778 representing adjustment to the arms length price in respect of international transactions of the assessee with its AE ..

2 The learned Transfer Pricing Officer (TPO) and the AO erred in not appreciating that:

a. Chapter X of the Act only provides for computation of income;

b. there is no amendment to the definition of the term "income" to include amounts computed under chapter X;

c. The charging or computation provisions relating to income under the head "Profits & gains of business or profession" do not refer to or include amounts computed under chapter X'.

d. There is no provision in chapter X indicating that it would override the computation provisions of business income or normal understanding of the term "income".

e. The charging section and computation provisions together constitute an integrated code. If the charging section is not attracted, income will be outside the ambit of taxation. When there is a case to which the computation provisions cannot apply, such a case is not intended to fall within the charging section and therefore cannot be brought to tax.

3. The learned AO and TPO erred in not appreciating that the assessee is eligible for claiming benefits under section 10A of the Act and thus has no motive of tax evasion and therefore chapter X founded on the premise of tax evasion and labeled as 'anti avoidance' provisions is not attracted.

4. On the facts and circumstances of the case, there is no justification for the AO to disregard the operating costs furnished by the assessee in respect of its international transactions with its AEs amounting to Rs. 10,50,45,6951- and substitute the same with a sum of Rs. 17,63,93,967 vide order under section 92CA of the Act passed by the TPO. In terms of agreement entered into with AE, the net cost directly attributable or allocated to the transactions of AE will constitute the cost base for determination of consideration payable by it. AE does not compensate the assessee for costs incurred by it for other customers orders or the idle/unproductive costs. The TPO and AO erred in not appreciating the contentions of the assessee that it had significant idle and unproductive costs which cannot be considered as a part of cost base incurred in respect of international transactions with its AE and proceeding to compute the same based on total costs and proportion of turnover with AE total turnover. Idle time and unproductive costs do not represent the costs of execution of any particular order but a loss incurred by an assessee on account of inadequate orders in relation to the infrastructure set up by it.

5. On the facts and circumstances of the case the TPO erred in rejecting the transfer pricing study conducted by the

assessee and adopting one sided criteria in selecting companies as comparable, based n parameters set by him. The TPO and AO erred in not appreciating the contentions of the assessee that companies selected by them as comparable perform significantly more complex function as compared to it. The companies selected by them are independent software technology and BPO companies who perform wide varieties of functions as compared to the assessee. These independent companies are fully responsible for sales and marketing of software, technology and BPO services. On the other hand, the assessee does not perform any sales or marketing activity of its own and has no sales or marketing team of any kind. No adjustments have been made by the TPO for differences in functions performed, assets employed and risks assumed between the assessee and these independent software, technology and BPO companies.

6. On the facts and circumstances of the case, there is no justification for the TPO and AO to adopt one sided turnover filter by eliminating companies with turnover below one crore but at the same time including large companies with scale and size of operations as comparable. The comparability analysis carried out by the TPO is vitiated and flawed.

7. On the facts and circumstances of the case, there is no justification for TPO to arrive at Rs.21,49,71,327/- as the arms length price in terms of the transaction net margin method followed by him. The arms length price determined by the assessee is fair and ought not to have been disregarded by the AO and TPO.

8. On the facts and circumstances of the case, there is no justification for the TPO and AO for not granting the benefit of 5% in terms of the proviso to sec.92CA of the Act.

9. On the facts and circumstances of the case, there is no justification for the AO to levy interest u/s 234C of the Act amounting to Rs.50,17,245/.

Your appellant seeks leave to add, to amend any of the foregoing grounds as and when considered necessary/at the time of hearing”.

3. The assessee has also raised three additional grounds which are as under;

“1.The lower authorities have erred in selecting Maple eSolutions Ltd despite its financials being unreliable due to tainted management during the year under consideration.

2. The lower authorities have erred in selecting Datamatics Financial Services Ltd., (Seg.) despite the company having substantial related party transactions during the year under consideration; and

3. The lower authorities have erred in selecting Vishal Information Technologies Ltd., as comparables despite it being functionally different from the appellant”.

4. This appeal was fixed for hearing for the first time on 13-03-2013 and thereafter, the appeal was fixed for hearing on several dates such as 10/06/2013, 21/10/2014, 05/02/2015, 24/06/2015, 05/11/2015 and on all these dates, the hearing was adjourned on the request of the learned AR of the assessee except on 05/11/2015, when the hearing was adjourned for want of time. This is a very old appeal and so many opportunities were provided to the assessee and therefore, the request of the ld. AR of the assessee for adjournment on this date i.e. 04-05-2016 was rejected and the appeal of the assessee was heard ex-parte qua the assessee.

5. The ld. DR of the revenue supported the orders of the lower authorities. He also submitted that as per the chart submitted by the ld. AR of the assessee on 05-02-2015, he has objected to inclusion of 5 comparables out of the total 13 comparable selected by the TPO i.e. M/s Maple eSolutions, M/s Datamatics Financial Services Ltd.(Seg.) and M/s

Vishal Information Technologies Ltd, M/s Goldstone Infratech Ltd (Seg.) and M/s Apex Knowledge Solutions Pvt. Ltd. He submitted that there is no merit in any of these objections.

6. We have considered the submissions of the Id. DR of the revenue and have gone through the orders of the authorities below and the chart available on record having been submitted by the Id. AR of the assessee on 05-02-2015. We find that as per tax payers profile noted by the TPO in para-2 of his order, the assessee provides back office and call centre services to the costumers of NBS International in accordance with statement of work issued by NBS International from time to time. As per this chart, the TPO has selected 13 comparables out of which the assessee is pleading for exclusion of one comparable i.e. M/s Maple E-Solutions Ltd. on this basis that the management is tainted and the assessee is also pleading for exclusion of M/s Datamatics Financial Services Ltd (Seg.) on this basis that this company fails in RPT filter, but in the TPO's order, the percentage of RPT over sales of M/s Datamatics Financial Services Ltd.,(Seg.) is noted at 4.33% and therefore, the same is less than 15% and therefore, on the basis of this filter, this company cannot be excluded from the list of comparables and there is no other argument for exclusion of this company. Therefore, the request for exclusion of M/s Datamatics Financial Services Ltd.,(Seg.) is rejected.

7. Regarding M/s Maple E-Solutions Ltd., rreliance has been placed on the following Tribunal orders in support of his contention that the

management of the company is tainted and therefore, this company cannot be considered as a comparable;

Comparable at Sl.no.1 (Maple) is to be rejected due to tainted management in view of following decision:-

1. ITO Vs CRM Services India Pvt.Ltd.,(2011) 14 Taxmann.om 96 (Delhi)(AY: 06-07)
- 2.Stream International Services Pvt.Ltd. Vs ADIT ITA No.899/Mum/2010(AY:06-07)
3. CES Pvt.Ltd. Vs DCIT TS-322-ITAT-2013(Mum)-TP(AY: 06-07)
4. Avineon India Pvt.Ltd. Vs DCIT TS-165-ITAT-2014(Hyd_-TP(AY:06-07)5.
5. HSBC Electronic Data Processing Pvt.Ltd.Vs ADdd.CIT TS-174-ITAT-2013(Hyd)-TP(AY:06-07)
6. M/s First Advantage Offshore Services Pvt.Ltd.ITA No.IT(TP)A No.1086/Bang/2011
7. M/s Capital IQ Information Systems (Ind.) Pvt.Ltd. ITA No.1961/Hyd/2011

8. These Tribunal orders are available in the compilation of case laws. In the case of M/s Stream International Services Pvt.Ltd(Supra), the Mumbai Bench of the Tribunal had considered two Tribunal orders rendered in the case of M/s CRM Services India Pvt.Ltd.,(2011) and M/s Capital IQ Information Systems (Ind.) Pvt.Ltd (Supra) and in line with these two Tribunal orders of Delhi and Hyderabad Benches respectively, it was held by the Mumbai Bench of the Tribunal in the case of M/s Stream International Services Pvt.Ltd.(Supra) that this comparable should be excluded from the final list of comparables. In the case of M/s CRM Services India Pvt.Ltd.,(2011, it was held that in view of the question mark on the reputation of the owner of M/s Maple E Solutions it would be unsafe to take their results for comparison of the profitability of the assessee company. Hence, respectively following the Tribunal orders of Mumbai Bench, Delhi Bench and Hyderabad Bench, we hold that in the

present case also, this company i.e. M/s Maple E-Solutions Ltd. should be excluded from the final list of comparables.

9. In the same chart, ld. AR of the assessee has pleaded for the exclusion of three companies on the basis of functional dissimilarities. These three companies are M/s Vishal Information Technologies Ltd., M/s Goldstone Infratech Ltd (Seg.) and M/s Apex Knowledge Solutions Pvt.Ltd. In support of this contention, reliance has been placed on a Tribunal order rendered in the case of M/s Stream International Services Ltd.(Supra) in ITA No.8997/Mum/2010, copy available on pages 23 to 43 of the paper book in respect of exclusion of two companies i.e. M/s Vishal Information Technologies Ltd and M/s Goldstone Infratech Ltd(Seg.) and for inclusion of remaining company M/s Apex Knowledge Solutions Pvt.Ltd., reliance has been placed on the Tribunal order rendered in the case of Ms/s Google India (P)Ltd Vs DCIT 55 SOT 489, copy available on page no. 9 to 22 of the paper book.

10. Now we examine the applicability of these judgments.

10.1 First we examine the Tribunal order rendered in the case of M/s Stream International Services Pvt. Ltd (Supra) and we find that para 19 to 21 of this Tribunal order are relevant regarding M/s Vishal Information Technologies Ltd. and regarding this company, it was held by the Tribunal that the matter is restored back to the file of the AO/TPO for a fresh decision as per various observations in the Tribunal order. These paras are reproduced below for the sake of ready reference.

“19. Last case which the ld. AR ants to be excluded is that of Vishal Information Technologies Ltd.(VITL). The ld. Counsel for the assessee contended that the assessee is engaged in the business of providing IT enabled services at its own, whereas VITL was outsourcing such services for provision to its customers. This argument was sought to be tendered on the strength of Annual accounts of VITL showing Data entry charges and Vendor payments to the tune of Rs.11.49 Crore as against the ‘Personnel cost” at Rs.32.01 lakh. These figures in the opinion of the ld. AR amply demonstrated that VITL was outsourcing the IT enabled services. Relying on an order passed by the Mumbai Bench of this Tribunal in the case of ACIT Vs Maersk Global Services Centrs (Ind.) Pvt.Ltd. (2012) 145 TTJ (Mum) (SB) 64). The learned AR contended that the Tribunal in this case has held that since VITL outsourced a considerable portion of its business, the same was to be ignored when the assessee in that case was carrying on entire operations by itself. Similar view was shown to have been taken by the Bangalore Bench of the Tribunal in 2417 Customer. Com Pvt. Ltd. v. DCIT [IT ANo.227IBang/2010] directing the exclusion of VITL's case. The Bangalore Bench also followed the decision rendered by the Mumbai Bench in the case of Maersk Global Services Centres (India) Pvt. Ltd. (supra) to direct the exclusion of the case on the ground that VITL was outsourcing the services. Similar view was shown to have been taken by the Hyderabad Bench of the Tribunal in the case of Brigade Global services Pvt. Ltd.(ITANo.1494/Hyd/2010). Vide order dated 26.11.2012, the Bench has directed the exclusion of the

case of VITL for the same reason. In the opposition, the learned DR submitted that the case of VITL should be allowed to remain in the list of comparables for the two reasons. First, that the assessee itself included this case in its transfer pricing study and second. Hyderabad Bench of the Tribunal in the case of *Deloitte Consulting India Pvt.Ltd. Vs DCIT(ITA No.1082/Hyd/2010)* directed the inclusion of the case of VITL in the list of comparable companies. The ld. DR argued that when an entity outsources the services, its profit is likely to be less vis-à-vis an entity which renders such services at its own. Going by that logic, the ld. DR stated that the case of VITL should continue to be included as it is likely to show lesser percentage of profits than the assessee, which is rendering the services at its own.

20. Having regard to the facts and circumstances of the instant case, we find that the predominant view taken by the various Bench of the Tribunal including Mumbai, Bangalore and Hyderabad is to exclude the case of VITL on the reasoning that profit margin in self-provision and outsourcing the services is different. The ld. DR has focused on the inclusion of this case on the ground that the profit margin in the case of entities outsourcing services is less than that of the providing in house services. In our considered opinion the contention of the ld. DR has the effect of changing the very criterion for selection of comparable cases. Comparability is judged primarily by seeing the functional similarity and then the capital employed and risks undertaken. Higher or lower profit rate is not and can never be a relevant criteria to judge the comparability. In fact, under the TNMM, it is the eventful profit which is sought to be

determined at an arm's length by considering all the relevant comparable cases. It is the similarity of the functional profile which needs to be taken into consideration as a first step in the process of selection of comparable cases. If the two companies are functionally different and incapable of comparison, then the similarity of the order factors is of no consequence.

21. The relevant factor in choosing comparable cases is to find out similarity in the nature of services rendered. In that view of the matter a case in which services are outsourced and then provided to its customers cannot be compared with the rendering of in-house services. The pertinent criteria for selection of comparable cases lower margin of profit in one case vis-à-vis the other. As there is a vast difference in the cases where the services are outsources or provided in-house, in our considered opinion, there cannot be any comparison between such types of cases. We, therefore, follow the view taken by the Mumbai Bench of the Tribunal in the case of Maersk Global Service Centres (Ind.) Pvt.Ltd. (Supra) the Bangalore Bench in the case of 24/7 Customer.com Pvt.Ltd and Hyderabad Bench in the case of Brigade Global Services Pv.Ltd. In so far as the contention of the ld. DR for not permitting the exclusion of this case because of the assessee voluntarily including this case in the list of comparables is concerned, we refuse to accept the same because of discussion made above in para-16 of this order. Resultantly the assessment order on this comparable case is also set aside and the matter is directed to be decided afresh by the AO/TPO in consonance with our ibid observations.

11. In line with this Tribunal order, in the present case also, we restore the matter back to the file of the AO/TPO for a fresh decision with similar directions in respect of claim of exclusion of M/s Vishal Information Technologies Ltd.

12. Regarding M/s Goldstone Infratech Ltd (Seg.), the Tribunal decision is contained in para-14 to 16 of this Tribunal's order wherein it was held by the Tribunal that the matter should be decided afresh by the AO/TPO keeping in mind the filter of companies whose export revenue's are more than 25% of the revenue. For the sake of ready reference, these para-14 to 16 are reproduced here under;

"14. The inclusion of second case objected to by the ld. AR is that of Goldstone Infratech Limited (Seg) (earlier known as Goldstone Teleservices Limited). Here it is relevant to note that the TPO, inter ITA No.8997/Mum/2010. M/s.Stream International Services Pvt.Ltd. 12 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 breakup 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`.

15. At this stage it is relevant to mention that the assessee earlier included the case of Goldstone Infratech Limited within its Transfer pricing study and the TPO also included the same in his final list of comparables. The learned Counsel for the assessee contended that this case was inadvertently included by the assessee in its list of comparables, which deserves to be excluded. The ld. DR opposed this contention by stating that it is not open to the assessee to argue for the exclusion of any case from the list of comparables, which was included by the assessee itself in such list.

*16. Having heard the rival submissions and perused the relevant material on record, we find that the purpose of income tax assessment is to determine correct income of the assessee. As the Revenue cannot allow an assessee to depress his income, in the same manner, it is not permissible to the Revenue to take advantage of the ignorance or mistake of the assessee in offering more than due income. It is trite that no tax can be collected except as per law. Circular No. 14(XI-35) of 1955 dated 1.4.1955 cautions the Officers of the Department from taking advantage of ignorance of an assessee as to his rights. The Hon'ble Bombay High Court in court in the case of *Nirmala L. Mehta v. A. Balasubramaniam*, CIT [2004] 269 ITR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India clearly provides that no tax shall be*

levied or collected except by authority of law. Similar view has been taken recently by the Hon'ble jurisdictional High Court in Sancheti Software and Solutions P. Ltd. VS. CIT (2012) 349 ITR 404 (Bom). In our considered opinion there can be no escape from the proposition that the assessee is entitled to argue at least before the appellate authorities that a wrong stand taken at the time of filing the return of income should be allowed to be modified. The ld. AR has rightly relied on order passed by the Mumbai bench of the Tribunal in the case of M/s A.M.Tod Company India Pvt. Ltd. v. ITO (ITA No.492/Mum/2006). Vide order dated 24.06.2009, the Tribunal accepted the assessee's contention for exclusion of certain cases ITA No.8997/Mum/2010. M/s.Stream International Services Pvt.Ltd. 14 which were wrongly included in the Transfer pricing study but were actually not comparable. It is observed that the Special Bench of the Tribunal in the case of DCIT v. Quark Systems (P) Ltd. [(2010) 132 TTJ (Chd.) (SB) 1] also allowed the assessee to claim exclusion of certain cases from the list of comparables which were inadvertently included by it in its transfer pricing study. In view of the afore-noted discussion and the ratio of the these precedents, we direct the AO / TPO to examine the correctness of the figures placed on record by the assessee in support of its contention that the case of Goldstone Teleservices Limited was wrongly included by it in the list of comparables, which is actually not comparable. We want to make it clear that the above discussion made by us considering the figures given by the learned AR is only for a prima facie ascertainment as to whether this case is passing through the filter chosen by the TPO. The AO / TPO in the

fresh proceedings will decide the question of inclusion or exclusion of this case afresh independent of our above observations, albeit keeping in mind the afore-quoted filter of 'Companies whose export revenues are more than 25% of the revenues'.

13. In line with this Tribunal's decision, we hold that in the present case also, the matter regarding this company i.e. M/s Golstone Infratech Ltd.,(Seg.)(Supra) is to be decided afresh by the AO/TPO keeping in mind the directions of tribunal in that case.

13.1 The last comparable for which objection has been raised by the assessee in the chart is M/s Apex Knowledge Solutions Pvt.Ltd. This company has been objected on the basis that it is functionally different and in support of his contention, reliance has been placed on tribunal order rendered in the case of M/s Google India Pvt.Ltd. About this company, decision is available in para-16 of this Tribunal order rendered in the case of M/s Google India Pvt.Ltd.(Supra. For the sake of ready reference, para-16 of this Tribunal order is re-produced below;

"16. As far as (4) Apex Knowledge Solutions Pvt.Ltd is concerned, we find that the assessee had taken objections before the TPO that it is functionally different, as it provides services such as E-publishing knowledge based services etc. But TPO has rejected the objection on the ground the assessee has not considered the verticals or functional lines during the search process conducted by it and, therefore, it is not proper to make any objection on this basis now. We are not able to agree with the finding of the TPO as confirmed by the DRP on this issue. Merely because, the assessee itself has not considered the said filter while making its TP study; it cannot be said that it cannot raise such an objection before the TPO. It is

the TPO who has adopted this company as comparable. On such adoption, the assessee has every right to raise the objections as regards the functional differences between the assessee and comparable. It is the bounden duty of the TPO to consider the said objections in accordance with law. As brought out by the assessee, the assessee is in the IT enabled services, whereas the said company Apex Knowledge Salutation Pvt. Ltd., is in the business of E-publishing which cannot be said to be in the same line of business. The functional differences are likely to affect the profit making capacity of both the companies. In view of the same, we are of the opinion that this company is also to be excluded from the list of comparables. As regards the other two comparables i.e. (5) Datamatics Financial because there were extraordinary events during the financial year, without demonstrating as to how these extraordinary events have influenced the profit margin of the company, they cannot be excluded from the list of comparables, but the adjustments for such extraordinary events have to be made to the profits of the companies to bring them on par with the assessee before comparing them with the assessee. Therefore, we remand this issue to the file of the AO to consider the adjustments to be made to these two comparables before arriving at the ALP. Needless to mention that the assessee shall be given a fair opportunity of hearing”

14. From the above para, it is seen that it was held by the Tribunal in this case that M/s Apex Knowledge Solutions Pvt.Ltd. is in the business of e-publishing which cannot be said to be the same line of business. because, in this line of business, the profit making capacity of the company is different and therefore, this company is excluded from the list of comparables.

15. In the present case, the assessee company provides back office and call centre services to the customers of M/s NBS International hence and hence, in our considered opinion, in the present case also, this company i.e. M/s Apex Knowledge Solutions Ltd is functionally different and therefore, should be excluded from the final list of comparables. We hold accordingly.

16. As against the objection of the ld. AR of the assessee in the chart for exclusion of five comparables, we have held in the above paras that M/s Maple E-Solutions should be excluded and similarly, M/s Apex Knowledge Solutions Pvt.Ltd should also be excluded whereas we have rejected the claim of the assessee regarding exclusion of M/s Datamatics Financial Services Ltd(Seg.) and for remaining two companies i.e. M/s Vishal Information Technologies Ltd., and M/s Golstone Infratech Ltd (Seg.), we have held that the matter should be decided afresh by the AO/TPO in line with the directions of the Tribunal in the case of M/s Stream International Services Pvt. Ltd(Supra). There is no other objection of the ld. AR of the assessee in the chart available on record.

17. In the result, the appeal of the assessee stands partly allowed in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

Bangalore:
D a t e d : 17/06/2016
am*

Sd/-
(A.K. GARODIA)
ACCOUNTANT MEMBER

Copy to :

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- 2 Respondent
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- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

AR, ITAT, Bangalore

1.	Date of Dictation
2.	Date on which the typed draft is placed before the dictating Member
3.	Date on which the approved draft comes to the Sr. P. S.
4	Date on which the order is placed before the dictating Member for pronouncement
5.	Date on which the order comes back to the Sr. P.S.
6.	Date of uploading the order on website
7.	If not uploaded, furnish the reason for doing so.....
8.	Date on which the file goes to the Bench Clerk
9.	Date on which order does for Xerox & endorsement
10.	Date on which the file goes to the Head Clerk.....
11	The date on which the file goes to the Assistant Registrar for signature on the order.....
12	The date on which the file goes to the dispatch section for dispatch of the Tribunal order.....
13	Date of dispatch of order.....