

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: "I-2" NEW DELHI**

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER  
AND  
SH.L.P.SAHU, ACCOUNTANT MEMBER**

**I.T.A .No.-1626/Del/2011  
(ASSESSMENT YEAR- 2002-03)**

DCIT, Circle-3(1), New Delhi  <b>(APPELLANT)</b>	vs	Comverse Network Systems India Pvt. Ltd., 2 <sup>nd</sup> Floor, DLF Infinity Tower A, DLF Cyber City, Phase-II, Gurgaon PAN-AABCC3425B  <b>(RESPONDENT)</b>
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**C.O.No.-144/Del/2011  
(In I.T.A .No.-1626/Del/2011)  
(ASSESSMENT YEAR- 2002-03)**

Comverse Network Systems India Pvt. Ltd., 2 <sup>nd</sup> Floor, DLF Infinity Tower A, DLF Cyber City, Phase-II, Gurgaon PAN-AABCC3425B  <b>(APPELLANT)</b>	vs	DCIT, Circle-3(1), New Delhi  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh.G.C.Srivastava, Adv. &amp; Sh. Anubhav Jain, Adv.</b>
<b>Respondent by</b>	<b>Sh. Sarabjeet Singh, Sr. DR</b>

<b>Date of Hearing</b>	<b>16.12.2015</b>
<b>Date of Pronouncement</b>	<b>09.02.2016</b>

**ORDER**

**PER DIVA SINGH, JM**

The present appeal has been filed by the assessee assailing the correctness of the order dated 30.12.2010 of CIT(A)-XX, New Delhi pertaining to 2002-03 assessment year on the following grounds:-

1. The Ld.CIT(A) has erred on facts and in law in deleting addition of Rs.9689294/-made by the AO on account of Arm's Length Price u/s 90CA(3) ignoring.

a) the detailed reasons mentioned by the TPO for each comparable, in that either the comparable is engaged in manufacturing while the assessee is engaged in providing services or that either the comparable is engaged in manufacturing while the assessee is engaged in providing services or that some comparable is involved in execution of turnkey projects which is not what the assessee is doing.

b) The Ld.CIT(A) has erred in relying upon para 2.62 of the OECD guidelines to allow such comparables to be introduced into the set of comparables. Nowhere do the OECD guidelines permit that simply because TNMM is being used as a method, a service provider can be compared to a manufacturer or one who is engaged in execution for turnkey projects.

c) The Ld.CIT(A) has erred in allowing a merciful approach to the assessee by stating that since this is the first year of transfer pricing a "more lateral comparability search can be accepted". The standard of comparability will not change given the stage of the transfer pricing regime in a particular jurisdiction.

2. The appellant craves leave for reserving the right to amend, modify, after, add or forego any grounds of appeal at any time before or during the hearing of this appeal."

**2.** The assessee has filed a Cross Objection on the following grounds:-

1. "That the learned Commissioner of Income Tax [Appeals]-XX, New Delhi ("CIT-A") erred in not holding the order passed by the learned Deputy Commissioner of Income tax, Circle 3(1), New Delhi ("AO") and the. learned Joint Commissioner of

*Income tax, Transfer Pricing Officer - I, New Delhi ("TPO") as being contrary to the facts, law and the principles of natural justice.*

2. *That the CIT -A erred in law in not holding that the AO did not meet the preconditions for making reference to the TPO under section 92CA(1) of the Act and erred in not providing an opportunity of 'being heard' to the Respondent before referring the transfer pricing issues to the TPO.*

3. *That the CIT -A erred in law in not holding that the order of the TPO is bad in law and contrary to the principles of natural justice since 'no sufficient opportunity' was provided to the Respondent while concluding the assessment under section 92CA(3) of the Act in respect of determination of arm's length price.*

4. *That the CIT-A did not adjudicate on whether the TPO has erred in not providing the benefit of the arm's length range as provided under proviso to Section 92C of Act for purposes of computing the arm's length price under Section 92F of the Act.*

5. *That the CIT-A erred in law and on facts in not accounting for differences in risks assumed by the Respondent vis-a-vis comparable companies, while determining the arm's length price for the impugned transaction.*

6. *That the above cross objections are mutually exclusive & without prejudice to each other.*

7. *That the Respondent craves leave to add, alter, amend and / or modify any of the cross objections either before or during the course of the appellate proceedings."*

**3.** At the time of hearing, the Ld. AR stated that his client has instructed him not to press the above ground raised in the Cross Objection filed and instead has instructed him to seek permission

for admitting additional ground wherein exclusion of two comparables is sought. It was his submission that all necessary facts for deciding the additional ground if admitted are on record and no fresh evidence is required to be filed.

**3.1.** The additional ground sought to be admitted reads as under:-

*“On the facts and in the circumstances of the case and in law, the learned Deputy Commissioner of Income tax, Circle-3(1) (“AO”)/ Commissioner of income Tax (Appeals) XX, New Delhi (“CIT(A)”)* have erred in including certain companies listed below to the final set of comparables, even though these companies are non-comparable to the appellant on various grounds, to benchmark the impugned transactions pertaining to provision of support services, namely:-

- *Scal Services Limited; and*
- *Wartsila Operations & maintenance India Limited.”*

**4.** For the sake of completeness reliance was placed on the following decisions in support of the prayer for admitting additional/supplementary grounds. It was submitted that the judicial precedent laid permitted the admission of the additional ground:-

- i) CIT vs Krishak Bharti Co-operative Ltd. 266 ITR 208;*
- ii) CIT vs South India Bank Ltd. 249 ITR 304;*
- iii) CIT vs Keshri Metal Pvt.Ltd. 237 ITR 165.*

**5.** The prayer for admission of additional ground was not objected to by the Ld.Sr.DR. Accordingly after considering the material on record and the stand of the respective parties before the Bench alongwith the judicial precedent relied upon the additional ground raised by the assessee in its Cross Objections is admitted. The original grounds raised in the Cross-objection are dismissed as not pressed.

**6.** The relevant facts of the case are that the assessee in the year under consideration returned an income of Rs. 74,55,720/- by way of filing its return on 30.10.2002. The said return was selected for scrutiny after issuance of notice u/s 143(2) etc. of the I.T. Act. It was referred by the AO to the Transfer Pricing Officer (hereinafter referred to as "TPO") for determining the arm's length price (hereinafter referred to as "ALP") wherein the TPO considering the international transaction as per Form 3CEB as annexed with the return proposed Arm's Length Adjustment (hereinafter referred to as "ALP") u/s 92CA(3) of the Income Tax Act, 1961. Taking this into consideration the assessment order was passed.

**6.1.** The record shows that the TPO considering the fact that the ALP of the Market Support Services (hereinafter referred to as "MSS") provided by the assessee to its principle was to be determined at

Rs.15,57,30,294/- as against Rs.14,60,41,000/-, the price charged by the assessee proposed an addition by way of an adjustment of Rs.96,89.294/- resulting in concluding the assessed income at Rs.1,73,45,016/-.

**7.** Aggrieved by this, the assessee went in appeal before the CIT(A). The CIT(A) considering the explanation filed deleted the addition holding as under:-

*17.8. "I have carefully examined the above issue and also considered the submissions made by the Appellant and all other relevant material placed on record.*

*ON the matter of comparability, I place reliance on the OECD Guidelines (Para 2.62) which provides as under:-*

*"One strength of the Transactional Net Margin Method is that net profit indicator (e.g return on assets, operating income to sales, and possibly other measures of net profit) are less affected by transactional differences than in the case with price, as used in comparable uncontrolled price method. Net Profit Indicators also may be more tolerant to some functional differences between the controlled and uncontrolled transactions."*

*Given that this is first year of transfer pricing and the Databases were not robust enough for indentifying exact comparable companies, a more lateral comparability search can be accepted. Hence, light of the above, I am of the view that all the*

*companies selected by the Appellant in the Transfer Pricing Documentation are performing services similar to one another and broadly similar to the services provided by the appellant. Hence, the TPO has erred in rejecting the above mentioned 7 companies.*

*17.9. It is also observed that out of the 15 companies, two companies, namely Hindustan Housing Co. Ltd. and Dodsai Private Limited have significant related party transactions. Hence these companies are removed from the set of 15 comparable companies.*

*17.10. Further, it is observed that one company i.e Vulcan Engineers Ltd. has persistent losses and hence is removed from the set of comparable companies.*

*18. In light of the above discussion, the arm's length price of the impugned international transaction is determined on the following basis:-*

*i) The 7 companies rejected by the TPO are accepted. Thus, total 15 companies are accepted. However, Hindustan Housing Co. Ltd., Dodsai Private Ltd. and Vulcan Engineers Ltd. are to be excluded from the list of comparables (for reason mentioned above) to be used at the arm's length price.*

*19. On the above criteria the average net margin of the comparable companies is arrived at as under:-*

<i>S.No.</i>	<i>Name of Company</i>	<i>Working capital adjusted OP/TC (Multiple year Data)</i>
<i>1.</i>	<i>Ador Technologies Ltd.</i>	<i>(-) 8.73%</i>
<i>2.</i>	<i>Artson Engineers Ltd.</i>	<i>(-)1.82%</i>
<i>3.</i>	<i>Choksi Laboratories Ltd.</i>	<i>12.32%</i>

4.	<i>Enviro Technology Ltd.</i>	4.73%
5.	<i>Isgec Covema Ltd.</i>	(-) 14.68%
6.	<i>Scal Services Ltd.</i>	20.53%
7.	<i>Thermax Engineering Construction Ltd.</i>	(-) 0.10%
8.	<i>Utility Powertech Ltd.</i>	5.97%
9.	<i>Vijay tanks &amp; Vessels Ltd.</i>	4.86%
10.	<i>Vimta Labs Ltd.</i>	14.27%
11.	<i>Wartsila Operations &amp; Maintenance India Ltd.</i>	43.93%
12.	<i>Yashmun Engineers Ltd.</i>	5.49%
	<i>Mean</i>	7.23%

20. *The (-) 5 percent of the mean margin of the comparable companies is 1.86 percent. Accordingly, since, the net operating margin of the appellant of 5 percent on operating cost from the impugned transaction falls within the (-) 5 percent range as permitted under the law, the impugned transaction of the appellant is held to be at arm's length. Although appellant has not specifically raised the ground of adjustment of +/- 5%, but during the course of appellate proceedings in its submission dated 27th Feb, 2006 the appellant had incorporated in their submission with respect to ground 2. This Matter was also remanded to the TPO where in the TPO (vide remand report dated 28-12-2005) in principle accepted that the benefit of +/- 5% shall only be granted if the appellant fell within the +/- 5% range. However, since the margin of the appellant was outside the -5% range, the benefit of the +/- 5% range was not provided by the TPO.*
21. *Accordingly, the addition of Rs.96,89,294 made by the AO /TPO stands deleted.”*

**8.** Aggrieved by this, the Revenue is in appeal before the ITAT on the above-mentioned grounds and the assessee in its cross-objections relying upon the additional/supplementary grounds requests for direction to exclude the two specific comparables referred to in the ground raised.

**9.** The Ld. SR.DR in the said background inviting attention to the finding recording in para 17.8 submitted that the reasons taken by the CIT(A) to delete the addition namely that this was the first year of the transfer pricing and data bases were not robust has concluded that all the comparables selected by the assessee having broad similar services should be included. Referring to the said finding which was strongly objected to by the Revenue, it was his prayer that the issue needs to be restored setting aside the impugned order as the finding is generalistic and casual. Inviting attention to para 17.7 of the impugned order wherein the CIT(A) has brought out the reasons of the TPO for rejecting the objections of the assessee qua the seven comparables excluded by the TPO it was submitted the finding does not address the specific objections of the assessee nor does it bring out the reasons for accepting the prayer except general observations. For ready-reference the relevant chart addressing the

factual position brought out in the impugned order is reproduced hereunder:-

**Arguments of the Appellant**

17.7. "The appellant argued that the TPO has erred in rejecting 7 out of the 15 companies considered comparable by the appellant in the transfer pricing documentation. A summary of the arguments of the appellant against the contentions of the TPO for accepting the 7 companies is as under:-

S.No.	Name of comparable company	TPO's argument for rejection company on non-comparability	Appellant's counter-argument
1.	Ador Technologies Ltd.	Execution of projects and supply of equipment	Appellant is also engaged in execution and implementation of projects. Also supply of equipment is less than 25 percent of the total income of Ador.
2.	Dodsals Private Ltd.	Engaged in engineering projects and not telecom projects	The TPO has proposed a very strict comparability criteria,. IF that being the case, none of the companies selected by the TPO are engaged in telecom projects.
3.	Thermax Engineering Construction Ltd.	Execution of turnkey projects	Appellant is also engaged in execution and implementation of projects.
4.	Utility Powertech Ltd.	Engaged in renovation of power projects	Appellant is engaged in providing maintenance and warranty support services. Hence, renovation services are similar to the services provided by the Appellant.
5.	Vijay tanks &	Execution of projects	Appellant is also engaged

	<i>Vessels Ltd.</i>		<i>in execution and implementation of projects</i>
6.	<i>Vulcan Engineering Ltd.</i>	<i>Engaged in manufacturing and not services</i>	<i>For purpose of comparability analysis the “Engineering services” Segment has been considered which has earned entire income from services.</i>
7.	<i>Yashmun Engineers Ltd.</i>	<i>Erection of transmission towers and lines</i>	<i>Appellant is also engaged in installation and commissioning of projects.</i>

*Further, the Appellant submitted that since the Appellant is not a party to the agreement between the associated enterprise and the customers of the associated enterprises in India, the Appellant does not have access to such agreements. The same has also been submitted by the Appellant vide submission dated 22 November 2010.”*

**9.1.** In these circumstances it was his submission that in all fairness the CIT(A) should have discussed and come to a finding considering each of the specific comparables on the specific facts on record and justified his decision on the basis of acceptable principles to bring out why a specific comparable should be retained or excluded. The CIT(A) instead it was submitted has given very sweeping broad based generalistic arguments taking curiously emotional reasons for justifying the exclusion of all the comparables.

For the said purpose, attention was invited to para 17.8 of the impugned order and these findings it was submitted are strongly objected to by the Revenue. IT was his argument that the decision being vague, general and biased is no decision and cannot stand in the eyes of law.

**10.** The Ld. AR, Mr. G.C. Srivastava unable to defend the sweeping observation made in para 17.8 in support of the impugned order submitted that infact eight comparables were excluded by the TPO. These eight comparables *in toto* were not included by the CIT(A). Referring to para 7.9 it was submitted that the CIT(A) upholding the order of the TPO only excluded Dodsai Pvt.Ltd. It was his submission that if the record is considered this comparable was excluded by the TPO also thus to this extent Revenue cannot be said to be aggrieved.

**10.1.** Inviting attention to Vulcan Engineers Ltd., it was submitted that its exclusion was objected to by the assessee. The assessee's objection it was submitted was not accepted by the CIT(A). Thus the exclusion of this comparable as held by the TPO has been retained as would be evident from para 17.10 of the impugned order.

**10.2.** However, the CIT(A) it was submitted has directed the exclusion of Hindustan Housing Co. Ltd. which comparable was offered by the assessee and retained by the TPO. This comparable

was directed to be excluded by the CIT(A). Accordingly it was his submission that notwithstanding the reasons given the grievance of the Revenue at best could be very limited.

**11.** Not agreeing with the manner in which the Ld.AR presented its case, the Ld. SR. DR inviting attention to para 18 of the impugned order stated that sub-para 18.1 would show that the CIT(A) has infact made a confusing reference to the fact that in total fifteen companies are accepted however three comparables are excluded thus it is an exercise in confusion as to what exactly the CIT(A) intended.

**11.1.**The ld. AR considering the contrary finding was also unable to clarify exactly what the CIT(A) intended. Further though reliance was placed on the order to the extent of the grievance posed by the Revenue however he was unable to support the reasoning adopted. Accordingly on considering the conflicting and the confusing findings and also considering the broad sweeping general reasons set out justifying the relief granted which is challenged in the departmental appeal, both the parties after deliberating at length on the pros and cons of the finding on record and also considering the prayer made by way of the additional grounds in the Cross-objections posed by the assessee finally agreed that for the sake of correctness and

clarity on the issues involved the case may be restored to the TPO restricting him to give a finding on the issues wherein the two comparables sought to be excluded by the assessee namely *WARTSILA Operations & Maintenance India Ltd.* and *Scala Services Ltd.* which were as per record introduced by the assessee and accepted by the TPO were opposed to for the first time before the CIT(A) which remain unconsidered by the CIT(A). The fact that it's retention was objected to before the CIT(A) it was submitted would be borne out from Paper Book page 550 wherein the assessee has brought to the notice of the CIT(A) that *WARTSILA Operations & Maintenance India Ltd.* as per information available in the public domain had amalgamated and on the date it ceased to exist thus it could not be treated as a comparable. The issue it was submitted was not examined by the CIT(A) as such may be restored.

**13.** Similarly in regard to the other comparable i.e. *Scala Services Ltd.* sought to be excluded by the assessee it was submitted by the Ld.AR that this comparable though was introduced by the assessee, however as per data in public domain it was noticed that 50% of its Revenue was from air conditioning and 50% from services and the segmental details were not available. Thus the TPO it was submitted may be directed to examine the fact and following the precedent that

in the absence of segmental details the comparable ceases to be a comparable the TPO may be directed to exclude the comparable following the precedent. The Ld. Sr.DR had no objection if the issues are set aside taking note of the departmental objections.

**14.** We have heard the rival submissions and perused the material available on record. It is seen that as per the profile considered by the TPO Comverse Network Systems India Pvt. Ltd. (CNSI) was incorporated in July 1999. It is seen that its share capital is held by two individuals and the company was in the process of transferring the same to Converse US (CU). The assessee is a member of the Converse Group headquartered in the USA. The ultimate parent company of the group is Converse Network Systems Inc. USA. Converse group is engaged in designing, developing, manufacturing, marketing etc. of telecommunication equipments (with embedded software) used primarily by cellular operators in 3G multimedia messaging, mobile internet, prepaid GPRS service and speech portal. The majority of research and development activities and manufacturing of products is undertaken by Converse Limited, Israel. The assessee, Converse India is primarily engaged in providing sales support and post-sales support services in respect of Converse products. Its services comprise of marketing of Converse

products, their installation, commissioning and acceptance test procedures, their day to day maintenance (including fault repair. Problem resolution, spare part, support etc.) training in their respect etc. The contract for supplies of services is entered between the customers and Comverse group companies, the performance of services is sub contracted by Group companies to the assessee. The assessee is compensated on cost plus 5% basis for such services. Such remuneration comprised majority of revenues of the assessee. The assessee is a service provider and assumes all the risks of a service provider. The details of the risk assumed and assets employed by the assessee have been given on page 25-33 of the Transfer Pricing Report and at this stage need not be adverted to in detail.

**14.1.**The following international transactions were disclosed by the assessee in the year under consideration:-

<i>S.No.</i>	<i>International transaction</i>	<i>Method</i>	<i>Value (In Rs.)</i>
1.	<i>Provision of support services</i>	<i>TNMM</i>	<i>1,46,041,000</i>
2.	<i>Reimbursements</i>	<i>TNMM</i>	<i>7,697,814</i>
3.	<i>Import of Capital Equipment</i>	<i>TNMM</i>	<i>1,500,414</i>

**14.2.** It is seen that the assessee adopted TNMM as the most appropriate method. Taking Operating margin over the total cost as the profit level indicator, the assessee made itself the tested party and compared its margins with other comparable companies engaged in India in similar functions. The TPO accepted TNMM with OP/TC as PLI. The fifteen comparables companies taken by the assessee after carrying out adjustment in the working capital adjustments of the comparables selected considering their average OP/TC of 4.55% as against its own OP/TC ratio of 5.00% considered the transaction within arm's length. The said position was not accepted by the TPO.

**14.3.** The TPO considered the assessee's selection process of the comparables as defective. It was found that the companies with turnover of less than Rs.1 crore have been eliminated on the ground of having high research development expenses, high fixed assets to sales ratio and engaged in significantly different business activity. Considering the final set of 15 companies identified by the assessee as comparables and their Operating Profit Margin over total cost (OP/TC) he found that the assessee carried out working capital adjustments as per para 5.1 stating that the amount of capital required to support the functions varied greatly, because the level of

inventories, debtors and creditors measured as a percent of sales varies. The assessee is found to have justified its action on the reasoning that the effect on profits from investing in different levels of net working capital must be taken into account. Therefore, in the analysis appropriate adjustments were stated to have been carried out. The TPO found that as a result of this exercise sale of each comparable company was reduced. In this manner, the assessee is found to have justified carrying out adjustments for the differences in its own working capital funds and that of the comparables. The selection was held to be defective.

**14.4.**The TPO noticed that the final set of companies arrived at by the assessee after carrying out the working capital adjustment had the following OP/TC margins:-

*“After carrying out the working capital adjustment the final set of comparables arrived at by the assessee had the following OP/TC margins:-*

<i>Name of the Company</i>	<i>Adjusted OP/TC (%) (after working capital adjustment)</i>
<i>Hindustan Housing Co.Ltd.</i>	<i>15.00</i>
<i>Scal Services Ltd.</i>	<i>20.53</i>
<i>Wartsila Operations &amp; Maintenance India Ltd.</i>	<i>43.93</i>
<i>Vulcan Engineers Ltd.</i>	<i>(19.98)</i>

<i>Choksi Laboratories Ltd.</i>	<i>12.32</i>
<i>Adar Technolgoies Ltd.</i>	<i>(8.73)</i>
<i>Arsan Engineers Ltd.</i>	<i>(1.82)</i>
<i>Dodsal Pvt.Ltd.</i>	<i>(13.52)</i>
<i>Isgec Convema Ltd.</i>	<i>(14.68)</i>
<i>Thermax Engineers Constructions Co. Ltd.</i>	<i>(0.10)</i>
<i>Yashroan Engineers Ltd.</i>	<i>5.49</i>
<i>Vjay Tanks &amp; Vessels Ltd.</i>	<i>4.86</i>
<i>Enviro Technology Ltd.</i>	<i>4.73</i>
<i>Utility Powertech LTd.</i>	<i>5.97</i>
<i>Vimta Labs Ltd.</i>	<i>14.27</i>
<i>Average OP/TC</i>	<i>4.55%</i>

**14.5.**The assessee having calculated its OP/TC ratio at 5% when compared with the average OP/TC of 15 comparable companies at 4.55% claimed that the transactions with the AE were at arm's length. The TPO taking note of the fact that the major international transactions entered into by the assessee were in respect of provision of support services to Converse Israel, one of the associated enterprises. The total value of the services provided to the AE was Rs. 14.60 crores which was almost 91% of the total revenue from the said activity. The assessee was found to have been compensated with the services referred by it at a predetermined rate. Considering the fact that the assessee is in the service industry. The TPO held as under:-

7.1. *“The assessee is in the service industry and the profits in service industry are directly proportionate to the efforts gone into provision of services. The assessee is primarily rendering services to its AE and since no two services can be considered as similarly services to any other entity can be considered as comparable. Hence it is apt to use Transaction Net Margin Method (TNMM) with Operating Profits over the total cost of the Profit Level Indicator. Since the assessee has also used OP/TC as the PLI, the choice of method the assessee is not disputed.”*

**14.6.**The TPO required the assessee to explain why the following seven comparables out of the fifteen comparables introduced by it should not be excluded in view of the following facts:-

#### **8. ANALYSIS OF THE COMPARABLES OD THE ASSESSEE**

*“The assessee is engaged in providing highly technical service. The products/equipments are directly sent by the overseas AE to the client/consignee and as such the assessee is neither manufacturing nor does it acquire or hold any inventor for trading. In light of the same on an analysis of the comparables used by the assessee it was observed that :*

- **Valcun Engineers Ltd.** is primarily a manufacturing concern and doing work on Turnkey basis. The Balance sheet of the company clearly shows heavy consumption of raw material in the years 2000 and 2001 which means that company is engaged in manufacturing.

- **Ador Technologies Ltd.**-The company is primarily into execution of projects further an analysis of the Balance Sheet of the company suggests that it is actually purchasing certain raw materials and consuming the same in execution of projects. It has purchased welding equipments amounting to Rs.1.24 crores which is approximately 29% of the total cost for the year ending 31<sup>st</sup> March 2012. IT indicates that this company is engaged in supply of equipment i.e it derives income from other than service activity.
- **Dodsal Pvt.Ltd.**-The company is mainly engaged in engineering projects and not in telecom projects, as is the case of assessee.
- **Thermaz Engineering & Construction Co.Ltd.**- This company is also engaged in execution of turnkey construction projects.
- **Vijay Tanks & Vessels Ltd.**-This company is engaged in execution of turnkey design/engineering & construction projects.
- **Utility Powertech ltd.**-This company is engaged in renovation of power projects belonging mainly to its group companies i.e. NTPC and BSES.
- **Yashmun Engineers Ltd.**-The profile of this company includes erection of transmission towers and transmission lines and also sale of engineering projects manufactured by it. Accordingly, on 10.01.2005, the assessee was requested to explain as to why the above stated companies may not be taken out of the list of the comparables.”

**(emphasis provided)**

**14.7.** The assessee in support of retaining the said comparables as per record is found to have made the following submissions:-

8.1. *The assessee in its reply vide letter dated 18.01.2005 submitted as under:-*

- *“Vulcan Engineers Ltd. Is engaged in design, engineering, manufacturer, erection and commissioning of custom built industrial furnaces and kins.*
- *Ador Technologies- Designing, procuring, erecting and commissioning of combustion systems and equipments.*
- *Dodsal Pvt. Ltd.-engineering procurement and implementing pipelines.*
- *Thermax Engineering-Supply and erection of site of boiler accessories, spares and utility facilities.*
- *Vijay Tanks & vessels Limited-Design, engineering, procurement, construction and commissioning of atmospheric storage tanks, cryogenic storage tanks, high pressure spheres etc.*
- *Utility Powertech Limited-Maintenance of power projects including renovation and modernization.*
- *Yashmun Engineers-Maintenance services to power companies and erection of transmission towers and transmission lines.*

*The assessee also stated that on a broader spectrum, the identified companies are engaged in designing, engineering, installation, commissioning and maintenance services and perform functions and assumes risk to those of assessee.”*

**14.8.** The TPO considering the absence of relevant facts where no contract or agreement between the assessee and the client for the entire range of the services provided by the assessee to the clients on behalf of the AE was provided and considering the claim made was that the services were performed at the instance of the AE where despite queries the assessee failed to provide information as to what the AE charged from the clients for the services provided in the circumstances the TPO was of the view that the veracity of the claim of cost plus 5% model in the absence of actual quantification left the issue unverifiable and open to speculation. Thus the claim that remuneration received was adequate and at arms length was held to be not proved. The TPO further found that considering the employee costs details provided by the assessee the employees were found to be highly qualified, technically competent and handsomely paid with frequent training periods abroad for updating their expertise. The comparables offered were on the other hand found to be manufacturing companies having very low level skilled employees engaged in routine mechanical activities. Thus the selection of comparables was faulted with. For ready-reference, the relevant reasoning is extracted hereunder:-

8.3. *“It is pertinent to mention that for the entire range of services provided by the assessee to the clients on behalf of the AE, there exists no contract/agreement between the assessee and the client. The assessee performs its functions as the instance of the AE and on behalf of it. It has not quantified the actual amount charged by the AE from the clients for such services despite being specifically asked. It has maintained its stand that the cost plus 5% model followed by the assessee is adequate and comparable with other service providers. The basis of such adequacy and comparability has been left for the department to speculate upon.*

8.4. *Further, from the details of the employee cost submitted by the assessee vide its submission dated 18.02.2005. it was observed that the employees of assessee are highly qualified, technically competent and handsomely paid. Out of a total headcount of 55, only one employee is a technician. The remaining employees are either having BE (Electronics & Communication) or a higher degree. Moreover, these engineers have been regularly trained abroad for updating their expertise. On the other hand, the above stated comparables are engaged in manufacturing or trading activity which requires a very low skilled set of employees, for undertaking routine mechanical job. Such difference in the skill set of employees also signifies the difference in the nature of activities of assessee and above stated comparables. It will also be apt to mention here that the lower end construction and manufacturing activity will have a lower operating, margin as compared to a service requiring high degree of technical competence and skill.”*

**14.9.**The TPO accordingly on the facts as marshalled exclude the following comparables setting out the following reasons for justifying their exclusion:-

8.2. *“The submissions of the assessee were carefully analysed. It could be seen that for Vulcan Engineers Ltd., Ador Technologies, Vijay Tanks & Vessels Limited, Dodsai Pvt. Ltd. & Thermax Engineering. The assessee has itself stated that these companies are engaged in designing, manufacturing or procuring and commissioning of various engineering equipments. The assessee.....and in no way procures or manufactures or distributes any product installed or serviced by it. The fact that the above stated comparables are in some manner engaged in manufacturing or trading suggest that functions of these companies are significantly different from that of assessee. Hence, based on the difference in functions, these comparables are rejected.*

*For Utility Powertech Ltd. The assessee has not replied to our contention of services to related parties i.e NTPC & BSES and has merely stated that it is engaged in maintenance of power projects. This company has been rejected on the basis of non comparability owing to related party transactions.*

*Yashmun Engineers are also engaged in trading of goods. This fact is evident from Profit & Loss Account for the years 2000 & 2001, which shows purchase of finished goods. Further, from the “prowess Database” it was also found that the company is not only engaged in trading, but also*

*has plants at Hadaspur Industrial Estate near Pune, which is engaged in manufacturing engineering products. Hence this company is also rejected.”*

**14.10.** As a result thereof he found that the average OP/TC was of the following eight comparables retained was 11.78% which was to be considered for proposing the arm’s length adjustments:-

**9. DETERMINATION OF ARM’S LENGTH PRICE**

*Hence, after eliminating the above stated companies the final set of comparables and their OP/TC offer working capital adjustment is as under:-*

<i>Name of the Company</i>	<i>Adjusted OP/TC (%)</i>
<i>Hindustan Housing Co.Ltd.</i>	<i>15.00</i>
<i>Scal Services Ltd.</i>	<i>20.53</i>
<i>Wartsila Operations &amp; Maintenance India Ltd.</i>	<i>43.93</i>
<i>Choksi Laboratories Ltd.</i>	<i>12.32</i>
<i>Arsan Engineers Ltd.</i>	<i>(1.82)</i>
<i>Isgec Convema Ltd.</i>	<i>(14.68)</i>
<i>Enviro Technology Ltd.</i>	<i>4.73</i>
<i>Vimta Labs Ltd.</i>	<i>14.27</i>
<i>Average OP/TC</i>	<i>11.78%</i>

**14.11.** Consequently, the arm’s length price was worked out in the following manner:-

9.3. *“The arm’s length price of the international transactions entered into by the assessee with its AE is worked out as under:-*

*Total cost of provision of services by*

*Rs.150,879,653*

<i>the assessee (as provided by the assessee)</i>	
<i>Margin @ 11.78% of the above</i>	<i>Rs.17,773,623</i>
<i>Operating Profit of the assessee</i>	<i>Rs.8,084,329</i>
<i>Difference</i>	<i>Rs.9,689,294</i>

*This difference is to be added to the amount received from the AE for provision of support services to arrive at the arm's length price of this transaction.*

<i>Amount received for provision of support services</i>	<i>Rs.146,041,000</i>
<i>Arms Length price to be charged from the AE</i>	<i>Rs.155,730,294</i>

**14.12.** As extracted in the earlier part of this order it is seen that the CIT(A) considering the submissions on behalf of the assessee proceeded to exclude Hindustan Housing Co. Ltd. etc. on general broad based sweeping reasoning that a certain level of leeway needs to be given as the data in the first few earlier years was not robust. The said casual approach of the CIT(A) in the face of the specific discussion carried out by him addressing the TPO's reasoning in para 17.9 of the impugned order makes the general sweeping reasoning incapable of standing judicial scrutiny. The said casual and generalistic approach to decide the issue at hand cannot be accepted and warrants that the impugned order be set aside. Accordingly, in view of these patent shortcomings in the impugned order, the issue is restored back to the TPO in terms of the prayers of the parties before us in the light of the above mentioned facts with the direction to verify the claims made. The arguments based on information available in the public domain which the assessee may

chose to place before the TPO for verification is directed to be considered and examined as per judicial precedent. The TPO accordingly is directed to pass a speaking order in accordance with law in terms of the above mentioned direction on the issues set out herein above. Accordingly ITA No.1626/Del/2011 is allowed for statistical purposes.

**15.** In view of the above the issues raised in the Cross Objection by way of additional ground are also restored to the TPO for verification on facts.

**16.** In the result, the appeal of the Revenue is allowed for statistical purposes and the C.O of the assessee is also allowed.

**The order is pronounced in the open court on 09 of February 2016.**

**Sd/-**

**(L.P.SAHU)  
ACCOUNTANT MEMBER**

**Sd/-**

**(DIVA SINGH)  
JUDICIAL MEMBER**

Dated: 09/02/2016

*\*Amit Kumar\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI