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

BEFORE SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No.7861/Mum/2011
Assessment Year : 2007-08

Capgemini India Private Limited Sep. 2, B 3, Godrej Industries Complex, Eastern Express Highway Vikhroli Mumbai-400 079. PAN No.AAACK 2632 B	Vs.	Asstt. Commissioner of Income tax Range 10(2) Roo No.432, 4th Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Appellant by	:	Shri P.J. Pardiwala
Respondent by	:	Shri Ajeet Kumar Jain

Date of hearing	:	01.02.2013
Date of Pronouncement	:	28.02.2013

O R D E R

PER RAJENDRA SINGH, AM:

This appeal by the assessee is directed against the order dated 14.10.2011 of the AO passed in pursuance of direction of DRP under section 144C(5) of the Income tax Act, 1961. The only dispute raised in the appeal is regarding transfer pricing adjustment made by AO on account of the international transactions.

2. Facts in brief are that the assessee during the assessment year 2007-08 had provided software programming services to the parent company in the US for which the assessee had received a sum of Rs.5,39,40,81,065/-. Since the assessee had entered into an international transaction with an associate

enterprise, the income arising from such transaction in view of the provisions of section 92C has to be computed having regard to arm's length price. Section 92CA prescribes various methods such as comparable uncontrolled pricing (CUP) method, re-sale pricing method, cost plus method, profit split method and transactional net margin method (TNMM) etc. The AO during the assessment proceedings referred the issue of determination of arm's length price to the Transfer Pricing Officer (TPO). The TPO, therefore, issued notice under section 92C to the assessee asking the assessee to give details of transfer pricing study conducted by it to compute arm's length price of the international transaction. The assessee in the transfer pricing study selected TNMM method as the most appropriate method for benchmarking the international transaction with respect to uncontrolled transactions. The assessee selected 11 comparables which were engaged in similar line of business and provided services primarily to the US or European market having sufficient public financial and business information. The assessee computed the weighted average margin of these comparable over three years i.e. financial years 2004-05 to 2006-07 at 13.7% as per table below :-

S.No.	Name of the Company	F.Y.2004-05	F.Y. 2005-06	F.Y. 2006-07	Weighted Average (%)
1.	CG-VAK	3.3	2.6	2.8	2.9
2.	Infosys	28.8	27.3	28.1	28.1
3.	Mascon	11.2	10	10.4	10.5
4.	Mastek	11.2	13.2	12.7	12.4
5.	Orient	9.6	-	-	9.6
6.	Patni	15.4	19	-	17.2
7.	Quintegra	9.1	9.6	-	9.3
8.	Satyam	21	21.4	21.5	21.3
9.	Sonata	4.8	5.9	-	5.3
10.	VJIL	3.7	3.6	-	3.7
11.	Wipro	22.1	21.1	20.1	21.1
	Arithmetic mean				**13.7**

2.1 The TPO pointed out to the assessee that in terms of the provisions of Rule 10B(4) the data to be used for analyzing comparability of uncontrolled transactions with international transactions shall be the data relating to the financial year in which international transaction had been entered into. The section also provided that data relating to a period not being more than two years prior to such financial year could also be considered if such data revealed facts which had influence on determination of transfer prices in relation to the transactions being compared. The assessee could not explain as to how the earlier year's data could have an effect on determining the transfer price of international transactions. The TPO therefore asked the assessee to compute the margin on the basis of current year data. The assessee thereafter submitted updated margins of the comparables for the financial year 2006-07.

2.2 The assessee also submitted that five of the eleven comparables were in fact not comparable to the case of the assessee. It was pointed out that in case of Orient Information Technology Limited (in short Orient), restructuring had taken place in Financial Year 2006 due to which the company had incurred heavy losses in Financial Year 2006 and Financial Year 2007 and therefore was not comparable. In the case of Quintegra Solutions, it was pointed out that it significantly increased its presence in the US during the year by acquisition of a US company which resulted in change in business dynamics. Similarly Sonata Software Solutions had diversified in Europe through an acquisition of significant stake in a German Company which had changed its functional profile. The results of Satyam Computers Pvt. Ltd. could not be relied upon due to massive fraud which had been unearthed in case of the company. In case of VJIL, it was submitted that financial information was not available in the public domain. It was thus submitted that five companies were in fact not comparable. Excluding these five companies, the updated margin in respect of six companies for Financial Year 2006-07 was given as under :-

Sr.No.	Name of Company	Margin in FY 2006-07
1.	CG-VAK	2.8
2.	Infosys Technologies Ltd.	28.1
3.	Mascon Global Ltd.	10.4
4.	Mastek	12.7
5.	Patni Computer Systems Ltd.	19.1
6.	Wipro Technologies Ltd.	20.1

2.2 In the working of margin in the above cases, the assessee had used consolidated results of the comparables for the purpose of comparison. The assessee explained that consolidated financial statements had been adopted because in such statements, the effect on margin due to related party transactions with subsidiaries would be nullified. It was pointed out that comparable companies selected on the basis of consolidated financials were Indian parent companies operating in similar environment as the tested party. The subsidiaries of these companies were nothing but mere extension of the Indian parent. Therefore, it was argued that the consolidated financials had been rightly adopted by the assessee. It was further submitted that stand-alone financials should not be used of companies operating in multiple jurisdictions whether through subsidiaries or branches as these are heavily affected by companies' decisions as to whether to operate internationally through branches or subsidiaries. The AO however did not accept the contentions raised. It was observed by him that under the provisions of Rule 10B(2), comparability of international transactions with uncontrolled transaction has to be judged with reference to functions performed, assets employed, risk assumed and the conditions prevailing in the markets in which respective parties to the transaction operate including geographical locations and size of market, laws and Government orders in force, costs of labour and capital in the market, overall economic development and level of competition and whether the markets are wholesale or retail. Rule 10B(3) further provides that an uncontrolled transaction shall be comparable to international transactions if none of the differences, if any, between the transaction being compared or between enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in or the profit arising from such transactions in the open market or if reasonably accurate adjustment can be made to eliminate the material effects of such difference. Therefore, in view of these rules, the TPO held that it was appropriate to consider comparable companies operating in India i.e. in same geographical and socioeconomic conditions. The consolidated financials included financials of the subsidiaries operating in different territorial jurisdictions and, therefore, do not fulfill comparability criteria. The TPO, therefore, adopted standalone financials for the purpose of comparisons.

2.3 The TPO on examination of financials of different companies also noted that CG-Vak Software & Exports, Mascon Global Limited, Mastek Ltd. and Patni Computer Systems Ltd. had substantial related party transactions exceeding 25% in each case. He, therefore, excluded these companies from the list of comparable cases. In relation to VJIL Consulting Ltd., TPO noted that it had incurred heavy losses i.e. 42.94% during Financial Year 2006-07 and therefore held that it was not comparable to the assessee company which was a cost plus entity. The TPO, therefore, found only two companies comparable i.e. Infosys Technologies Ltd. and Wipro which had margin of 40.26% and 26% respectively on standalone basis.

2.4 The assessee during the proceedings before TPO added three more comparables which had not been taken at the time of preparation of TP study report due to unavailability of financial information. These three companies were as under :-

i) Datamatics Limited;
ii) Mindtree Consulting Limited and
iii) Persistent Systems Private Limited

2.5 The TPO, however, noted that the assessee in TP study report had selected only those companies which were not subsidiaries of another company. However from the annual report of Datamatics Ltd. it was seen that the said company was a subsidiary of Sameer Microtronics Pvt. Ltd.. TPO, therefore, excluded Datamatics Ltd. He however found that Mindtree Consulting Ltd. and Persistent Systems Pvt. Ltd. fulfilled comparability criteria. TPO thus finally selected four comparables which gave an arithmetic mean margin of 27.82% on standalone basis as per details given below:-

Sl.No.	Name of Company	Operating Margin Operating cost Financial Year-06-07
1.	Infosys Technologies Ltd.	40.16%
2.	Wipro Ltd.	26.08%
3.	Mindtree Consulting Ltd.	19.25%
4.	Persistent Systems Private Ltd.	26.01%
	Arithmetic Mean	**27.82%**

2.6 The TPO thereafter computed the operating margin in case of the assessee. It was noted by him that the operating income of the assessee was Rs.557.69 crores and operating expenses were Rs.523.91 crores. This gave operating profit as percentage of operating cost at 6.44% whereas the assessee had taken the operating margin at 13.9%. The TPO noted that the assessee had excluded the one time expenditure on ESOP amounting to Rs.46,41,96,501/- which had been debited to P/L Account and which resulted into increased margin. The assessee explained that Kanbay International (Erstwhile parent company of KSIL) had implemented stock option schemes from time to time staring since 1998 for the eligible employees of KSIL and as per scheme 1/4th of the options granted to the employees vested in July each year. These options were exercisable within a given time frame within 10 years but in most cases individuals chose to substantially defer exercise until well after the vesting date since that defered taxation during a period of expected appreciation in the value of the shares. The assessee estimated that on average vested options would normally be expected to be exercised over at least a five year period. It was pointed out that on February 8th 2007, Kanbay International was acquired by Capgemini Group Worldwide and as per terms of acquisition, employees of KSIL were treated as having exercised all the stock options in Kanbay International for consideration of USD 29 per share resulting in an accelerated exercise of options. The consideration was paid immediately for all options that had vested as on that date which resulted into an exceptional cost of Rs.46,41,96,501/- in the moth of February 2007. Assessee treated the ESOP cost, as exceptional in nature arising out of acquisition. The assessee, therefore, in the TP study excluded these costs for the purpose of computation of margin in case of the assessee and this exceptional cost was amortized over a period of five years starting from Financial Year 2007-08 in TNMM analysis of subsequent years.

2.6.1 TPO however did not accept the claim of the assessee of making adjustment while computing its margin on account of ESOP cost. It was observed by him that any adjustment in this regard had to be made in accordance with rules. He referred to Rule 10B(1)(e)(iii) as per which adjustment on account of any difference between international transaction and comparable uncontrolled transaction or between enterprises entering into such transactions could be made only in case of comparable uncontrolled transactions. The TPO thus concluded that there was no provision for making adjustment in the margin in case of the assessee which had to be computed as per accounting principles. It was further observed by him that the assessee this year had claimed ESOP expenses of Rs.46,41,96,501/- against accelerated ESOP cost in addition to similar expenses of Rs.23,90,49,510/- booked as part of personal cost. The ESOP cost in assessment year 2006-07 was only Rs.10,35,30,274/- and in assessment year 2005-06 it was Rs.36,02,49,446/-. The assessee had placed reliance on the decision of the Pune Bench of the Tribunal in the case of Skoda Auto India Pvt. Ltd. vs. ACIT (30 SOT 319) in support of the claim for adjustment in case of margin of the assessee. The TPO distinguished the case on the ground that in that case it was held that adjustment could be made on account of functional differences but in the present case there was no functional difference between the international transactions or between the enterprises. The TPO further observed that the profit level indicator adopted in case of TNMM has to be an indicator which would be real profit. Any indicator which may indicate increased profit or reduced loss by non-consideration of certain factors will not represent the actual state of affairs and by taking such indicators, any benchmarking done shall have no meaning under law. The TPO, therefore, rejected the claim of the assessee for making adjustment on account of accelerated ESOP cost.

2.7 The assessee also requested for working capital adjustment. The assessee submitted that comparable companies' profitability changes after adjustments on account of relative holding of account payable and account receivable. The more accounts receivable in case of a company would mean relatively lower profitability. Only in cases where all companies hold similar level of account receivable and account payable this factor will have no strong influence on the results. The TPO however did not accept the claim. It was observed by him that the assessee had not asked for any working capital adjustment in TP study report even with respect to comparables selected by the assessee itself. He referred to OECD guidelines as per which working capital adjustment should be considered only when the reliability of comparables could be improved and reasonable accurate adjustments could be made. TPO further observed that the assessee had not been able to give details as to what was representative level of working capital in the hands of comparables. The comparability on the last date of financial year would give skewed results. The TPO thus concluded that reasonable accurate adjustments could not be made on account of working capital and accordingly rejected the claim of the assessee.

2.8 The TPO finally computed arm's length price of the international transaction relating to software programming services at Rs.6,69,67,04,652/- by applying the mean margin of 27.82% on the operating cost of Rs.5,23,91,68,090/-. The TP adjustment was thus computed at Rs.1,11,97,50,424/- (6696704652 – 5576954228). The assessee filed objections against TPO order before Disputes Resolution Panel-I (DRP-I), Mumbai who after hearing the assessee rejected all objections raised including benefit of 5% range as provided under the proviso to section 92C(2). The DRP-I confirmed the order of TPO. The AO therefore made the adjustment of Rs.1,11,97,50,424/- while computing the total income. Aggrieved by the decision of AO, the assessee is in appeal before the Tribunal.

3. Before us, the ld. Sr. Counsel appearing on behalf of the assessee argued that the assessment order suffered from several infirmities such as wrong margin adopted by AO in case of the assessee; mistake in the computation of margin in case of the comparable Mindtree Consulting Ltd. and Persistent System (P) Ltd.; the rejection of the comparables by the TPO; rejection of claim of working capital adjustment; and not considering the four comparable submitted by the assessee before the DRP. It was further submitted that though the assessee itself had selected Infosys and Wipro as comparable but on subsequent analysis, the assessee has found that even these companies were not strictly comparable to the case of the assessee.

3.1 Reverting to the issue of wrong margin adopted by TPO in case of the assessee, it was submitted that AO had wrongly considered the one time

ESOP cost debited by the assessee to the P/L Account while computing the margin. The said ESOP cost had been incurred by the assessee on account of acquisition of KSIL Worldwide by the Capgemini Group on 8.2.2007 resulting into accelerated exercise of ESOP options by the employees which otherwise on average could have been exercised over the subsequent five year period. It was an exceptional item of expenditure incurred by the assessee towards the end of financial year which was duly mentioned by the auditors in their report in para-5 of Schedule-15 as exceptional item pertaining to February 2007. Therefore, deducting such exceptional expenditure would not give the normal business profit which is required to be considered for the purpose of comparison. It was pointed out that it was because of this extraordinary expenditure that ESOP cost during the year had increased to 70.25 crores compared to 10.25 crores in the immediate preceding years. The ld. Sr. Counsel also referred to monthly expenditure on account of ESOP placed at page-6 of the paper book which showed that expenditure varied during the year from nil in January 2007 to maximum of to Rs.6.10 crores in December 2006. It was also pointed out that this extraordinary ESOP cost had been amortized by the assessee over the subsequent 5 year period starting from assessment year 2008-09 which had been reduced from the profit while working out TP adjustments in the subsequent years as was clear from the details given at page-76 of the paper book which had been filed before TPO vide letter dated 28.10.2010. It was further submitted that the exceptional ESOP cost had been claimed by the assessee in the P/L account as same had been incurred during the year and not to reduce any tax liability because assessee was otherwise eligible for exemption under section 10A of the Act.

It was also pointed out that ESOP cost had been treated as perquisite in the hands of the employees on which tax had been deducted at source.

3.1.1 It was thus argued that the assessee had rightly excluded ESOP cost while computing margin which was 16.8% after excluding one time ESOP cost whereas margin adopted by TPO/AO was 6% which was not correct. It was submitted that for making any proper comparison with the comparables, it was necessary that adjustments were made for any abnormal item of expenditure or income in case of the assessee. The TPO had not allowed adjustment on the ground that under provisions of Rule 10B(1)(e)(iii), any adjustment could be made only in case of comparables and not in case of the assessee. It was pointed out that the view taken by the TPO was not correct as there are several cases in which ITAT has allowed adjustment in case of the assessee for extraordinary factors for the purpose of comparison . The cases cited by ld. Sr. Counsel are mentioned below:-

1. 30 SOT 319 (Pune) in case of Skoda India Pvt. Ltd.
2. 49 SOT 610 (Pune) in case of Demag Cranes & Components (India) Pvt. Ltd.
3. ITA No.6083/Del/2010 in case of Transwitch (India) Pvt. Ltd.
4. ITA No.828/Bang/2010 in case of Toyota Kirloskar Motors Pvt. Ltd.

3.2 The Ld. Sr. Counsel further argued that the basic reason for enactment of transfer pricing guidelines was to ensure that multinationals operating in different jurisdictions do not transfer profits to low tax jurisdiction to avoid payment of taxes. But in case of the assessee, there was no reason for the assessee to transfer profits to US where parent company was situated as tax rate in US was high. It was also pointed out that parent company in the relevant year had declared margin of only 8.1%, which shows that the assessee had not transferred any profit to the parent company.

3.3 Coming to the issue of selection of comparables, it was submitted that the assessee had initially selected six comparables in which margin had been computed on the basis of consolidated results. The assessee had adopted consolidated results to eliminate impact of any related party transactions. TPO however, rejected four comparables on the ground of substantial related party transactions and adopted only the stand alone results. It was submitted that stand alone results could not be proper to adopt as the company's international transactions in many cases were carried out through branches and, therefore, the so called standalone result reflected the consolidated results in cases where the company operated in several jurisdiction through branches. It was therefore urged that the consolidated results should be adopted for the purpose of comparison and in case this was done, the margin of the assessee was within the 5% safe labour limit and, therefore, no adjustment was required. The ld. Sr. Counsel further submitted that the TPO had rejected the comparable, VJIL on the ground of losses. The assessee vide letter dated 27.10.2010 had pointed out to the TPO that VJIL was not a persistent loss making company and it was profitable in the assessment years 2005-06 and 2006-07. Therefore, it was submitted that exclusion of the said comparable was not justified as TPO is not permitted to do cherry picking of comparables and that comparables could not be rejected only on the ground of loss without pointing out any specific features which make them non-comparables.

3.3.1 The ld. Sr. Counsel also pointed out that the assessee had selected three new comparables after show cause notice had been issued by the TPO vide latter dated 27.10.10 for rejecting the comparables. The show cause notice had been issued only one week before the time barring date and within this short period, the assessee had given three new comparables i.e. (i) Datamatics Ltd. (ii) Mindtree Consulting Ltd. and (iii) Persistent Systems Pvt. Ltd. Out of the said three comparables, the TPO rejected the Datamatics Ltd. on the ground that it was subsidiary of another company whereas the assessee had used the filter as per which the comparables should not be a subsidiary of another company. The other two comparables were accepted but their margin was wrongly computed by the TPO. The standalone margin taken by the TPO in case of Mindtree Consulting Ltd. and Persistent Systems Pvt. Ltd. was 19.25% and 26.01% whereas as per the assessee the correct margin was 17.69% and 24.10% respectively. The assessee had pointed out the error to the DRP but no action had been taken. It was pointed out that the TPO had not given the basis on which margin had been computed. It was, therefore, requested that TPO may be directed to adopt correct margin in case of Mindtree Consulting Ltd. and Persistent Systems Pvt. Ltd.

3.3.2 The ld. Sr. Counsel further argued that though the assessee itself had selected Infosys and Wipro as comparable, it wanted the same to be excluded because these were cases of extremely high turnover exceeding Rs.13000/- crores in each case whereas the turnover of the assessee was only Rs.558 crores. These companies enjoyed the economy of scale and had better bargaining power and, therefore, these could not be considered as comparable in the case of the assessee. It was argued that transfer pricing subject in India was still in its developing stage and in view of the judgments being delivered by the judicial authorities in this field, the assessee should be permitted to exclude the comparables. It was pointed out that margin in case of Infosys was exceptionally high at 40.16% which if taken would skew the mean margin out of proportion. Wipro also had a very high margin. It was, therefore, urged that turnover filter should be applied to select comparables which had support of the following decision of the Tribunal.

i) 46 SOT 379 (Mum.) Dy. CIT vs. Deloitte Consulting India (P.) Ltd. ,
ii) ITA No.3856/Del/2010 in the case of Aginity India Technologies vs. ITO,
iii) ITA No.1231/Bang/2010 Genesis Integrating Systems India P. Ltd.,
iv) ITA No.1494/Hyd./2010 in the case of M/s. Brigade global Services Pvt. Ltd. and
v) 50 SOT 517 (Mum.) in the case of Frost & Sullivan India Pvt. Ltd.

3.3.3 It was also argued that the assessee had submitted four new comparables before the DRP which had not been considered without giving any reasons. It was pointed out that the TPO in the show cause notice for rejection of comparables had given only one week time and, therefore, the assessee did not have sufficient time to conduct further study and accordingly could not submit all the comparables before TPO. The same were however given before the DRP but were not considered. It was therefore argued that these comparables which meet the comparibility test should also be considered.

3.4 Coming to the working capital adjustment, it was submitted that accounts receivable and accounts payable have an impact on profitability of the company and in case of substantial difference, the two companies can not be considered as really comparable. Only the companies having similar level of accounts receivable and accounts payable could be considered comparable and in case of differences, suitable adjustments are required, which are also permitted by OECD guidelines. Referring to the observations of TPO that the assessee had not been able to give details of representative level of working capital during the year, the ld. Sr. Counsel submitted that as per OECD guidelines relevant portion of which was placed in the paper book,in case, it is found that account receivable/payable on the last date do not give the representative level of working capital over the year, the average may be used if it reflects the better level of working capital over the year. It was, therefore, urged that the average of opening and closing balance in the accounts receivable/payable may be used for the purpose of working out capital adjustment and based on this, the assessee had worked out the working capital adjustment, the details of which have been given at page 104 of the paper book –II. It was, therefore, urged that the working capital adjustment prepared by the assessee should be accepted.

4. The ld. CIT-DR on the other hand defended the order of TPO in rejecting the four comparables CG-Vak Software & Exports, Mascon Global Limited, Mastek Ltd. and Patni Computer Systems Ltd. on the ground of related party transactions. It was submitted that with high level of related party transactions exceeding 25%, the transactions of these companies could not be considered as fully uncontrolled transactions and therefore, they do not remain a good comparable. Objecting to the plea of the ld. Sr. Counsel for adopting consolidated results, it was submitted that consolidated results

included operations in different jurisdictions which may not be comparable. He referred to Rule 10B(2)(d) as per which comparability had to be decided after considering the prevailing market conditions including the geographical location and size of markets, cost of capital and labour etc. Considering these factors, the consolidated results which included operations in different market conditions in different jurisdictions could not be considered as comparables. He referred to annual reports of the four comparables having related party transactions to point out that in case of Mascon Global Limited, 75% of the revenue came from USA, Moscow and UK and only about 25% from India. Similarly in case of CG-Vak Software & Exports, 75% of the revenue came from other jurisdictions. In case of Patni Computer Systems Ltd., 61% of revenue came from USA, UK, Germany and Brazil whereas in case of Mastek Ltd., substantial part of the revenue came from other countries. It was therefore urged that it was not safe to consider the consolidated results. He placed reliance on the decision of the Tribunal in the case of American Express (India) Pvt. Ltd. in ITA No.4240/Del/2009 in which case the TPO had taken the consolidated results to nullify the effect of related party transactions but ITAT did not allow the same on the ground that substantial revenue came from other markets which were not comparable.

4.1 Coming to the case of VJIL, it was submitted that it was an abnormal loss case and in view of para 3.65 of OECD guidelines loss making uncontrolled transactions should be further investigated and in case loss does not reflect normal business conditions or reflects the level of risk that is not comparable, it should be rejected. The guidelines provide that the comparable should not be rejected on the sole basis of loss if it satisfies comparable analysis. He referred to the annual report of the company which showed that out of total debts of Rs.9.42 crores, the assessee had made provision for doubtful debt /advance of Rs.6.61 crores. Further auditor report mentioned that operations of the company were affected due to differences in management which were pending before the High Court and loss had been incurred because of fall in revenue and provision for doubtful debts. Because of these abnormal conditions, the case could not be considered as comparable and it therefore had rightly been rejected by the TPO. As regards Datamatics Ltd., one of the three new comparables given by the assessee before TPO, it was submitted that it was a subsidiary of Sameer Microtronics Pvt. Ltd. and therefore, as per filter adopted by the assessee, this had to be rejected. The rejection was as per the assessee's own selection criteria for selection of comparables.

4.2 In relation to Infosys and Wipro, the ld. CIT-DR submitted that these were assessee's own comparables. The assessee had raised no objection or any plea for their exclusion either before TPO or before DRP. It was only at the level of ITAT that the request was being made for their exclusion. It was argued that the assessee should not be allowed to exclude its own comparable because it does not give a favourable result. He referred to the decision of the Tribunal in case of Kansai Nerolac Paints Ltd. in ITA No.3858/M/2006 in which case also the assessee wanted to exclude certain comparables selected by it as per the TP study but the same was not allowed by the Tribunal.

4.3 Coming to the arguments of the ld. Sr. Counsel that Infosys and Wipro had exceptionally high profit and turnover and therefore should be excluded, it was submitted that the comparable could not be excluded only on the ground of turnover. It was pointed out that the argument based on economy of scale was not relevant in case of a service company. It was relevant only in case of manufacturing concern where the cost per unit product increased with rise in turnover, and therefore, profitability rises with rise in turnover which is not a case in service providing companies where fixed costs are nominal. He referred to decision of the Tribunal in case of Symantic Software Services Pvt. Ltd. in ITA No.7894/M/2010 in which the Tribunal did not accept the plea of exclusion on the ground of difference in turnover. The Tribunal observed that in a competitive market, high turnover was associated with low margin and low turnover did not necessarily mean high margin. The ld. CIT-DR placed on record graph plotted between margin and turnover in respect of comparables selected by the assessee in this case which was placed on record which showed that there was no linear relationship between margin and turnover. For instance, in case of Persistent Systems Pvt. Ltd. margin was 24.1% on turnover of Rs.294.56 crores whereas in case of Mindtree Consulting Ltd. margin was 17.69% on turnover of Rs.446.41 crores. Referring to the argument of the ld. Sr. Counsel that Infosys and Wipro had substantial on-site work in foreign jurisdiction which involved substantial dead cost as the employees sometimes could not be utilized fully as can be done in the home country, the ld. CIT-DR pointed out that the dead cost in case of on-site work would only reduce the margin and therefore, Infosys and Wipro could not be excluded on this ground. It was therefore urged that the turnover should not be adopted as basis for excluding comparables. It was also submitted that the assessee was one of the top 50 companies of the world as per NASSCOM data base and therefore, there was no reason that its margin should not be comparable to Infosys and Wipro.

4.4 As regards the argument advanced by the ld. Sr. Counsels that tax rate in US was more than that in India and therefore assessee had no advantage in transferring the profit to the parent company which was also clear from the fact that profit margin of the parent company was only 8%. Ld. CIT-DR submitted that such arguments have already been considered by the Special Bench of the Tribunal in the case of Aztek Software Technologies Services Ltd. (107 ITD 141) and not accepted. Similar plea has also been rejected by the Tribunal in case of 24/7 Customers.com Pvt. Ltd. in ITA No.227/Bang/2010 in which the Tribunal held that the argument that the parent company had incurred loss was not relevant.

4.5 In regard to working capital adjustment, the ld. CIT-DR submitted that the assessee had not made any working capital adjustment in TP-study made by it. The plea was taken only when the TPO rejected the comparables and therefore, there was no merit in the plea and it was only an afterthought to reduce the margin. It was also submitted that as per OECD guidelines, such adjustment should be made only if it is expected to increase the reliability of the comparable and it can be made accurately. It was pointed out that there was no material to show that accurate adjustment could be made which will increase reliability.

5. We have perused the records and considered the rival contentions carefully. The dispute raised in this appeal is regarding transfer pricing adjustment made by the AO in relation to international transaction entered into by the assessee with the associated enterprise i.e. the parent company in the US. In view of the provisions of section 92C, the income arising from international transactions with associated enterprises has to be computed having regard to arm's length price. Section 92C prescribes various methods such as comparable uncontrolled price (CUP) method, resale price method, cost plus method, profit splitting method and transactional net margin method (TNMM) etc. The AO referred the computation of the arm's length price to the TPO who had asked the assessee to give detailed information regarding transfer pricing study made by it for making the transfer pricing adjustment. The assessee in the transfer pricing study, details of which have been placed on record, noted that the CUP method was most appropriate but there was no internal CUP available as the assessee did not sell services to any outside party and no information was available for application of external CUP. Cost plus method was also found not applicable as data was not available. Re-sale method was not suited to the facts of the case. The assessee, therefore, selected TNMM method which was applied for benchmarking the international transaction against comparable independent transactions. The TPO has also accepted the TNMM method. Therefore, there is no dispute on method applied by the assessee for computation of transfer pricing adjustment.

5.1 The dispute between the parties is regarding selection of comparables including additional comparables brought on record by the assessee at the level of DRP, working capital adjustment, exclusion of certain comparables selected by the assessee, and computation of margin in case of the assessee and the comparables.

5.2 We first deal with the issue of computation of margin in case of the assessee for the purpose of comparison with the comparables. The TPO computed the margin as per profit declared in P/L account which gave net margin of 6%. The case of the assessee is that in the P/L Account, a sum of Rs.46,41,96,501/- had been debited on account of extraordinary ESOP cost. This extraordinary ESOP cost had been incurred in the month of Feb.'2007 on account of acquisition of KSIL Worldwide by Capgemini Group on 8.2.2007 which resulted into accelerated exercise of ESOP options by the employees which otherwise could have, on average, been exercised over subsequent five year period. It was, therefore, urged that this being an exceptional item should be excluded from P/L account for the purpose of computation of margin. The authorities below have not accepted the request of the assessee on the ground that, under the provisions of Rule 10B(1)(e)(iii), an adjustment could be made only in case of comparables and not in case of the assessee. No dispute has been raised by the authorities below or ld. CIT-DR that this was a one-time cost incurred by the assessee due to acquisition. We also note from the monthly expenditure on ESOP cost for the relevant year that normal ESOP cost fluctuated between nil cost in January 2007 to the maximum of Rs.6.1 crores in December 2006. We further note that total ESOP cost in the immediate preceding year was only Rs.10.25 crores and only because of exceptional item this year, ESOP cost had gone up to Rs.70.25 crores. There cannot be any dispute that comparison of margin between assessee and comparables has to be made under identical conditions. No case has been made by the revenue before us that any of the comparables, have claimed, any extraordinary item of expenditure on account of ESOP cost. Therefore, in our view, for the purpose of making proper comparison of the margin, one-time ESOP cost incurred by the assessee due to acquisition by Capgemini group towards the end of the year i.e. in Feb.2007 has to be excluded. There is nothing in the Rules that prohibits adjustment in the margin of the assessee to remove impact of any extraordinary factors.

5.2.1 The ld. Sr. counsel for the assessee has also brought to our notice several decisions of the Tribunal in which adjustments made in case of the assessee (tested party) has been upheld. These case have been listed in para-3.1 earlier. In case of Skoda India Pvt. Ltd. (supra), it was found that it was the first year of operation in case of the assessee in which import content of the raw material was as high as 98.55% whereas in case of comparables it varied from 26% to 56.83%. The Tribunal held that no comparison was possible unless impact of high import duty was eliminated. The matter was, therefore, restored to the AO. This decision of the Tribunal was followed by the Pune Bench of the Tribunal in case of Demag Cranes & Components India Pvt. Ltd. (supra), in which the Tribunal held that the margin in case of the assessee was required to be adjusted to take into consideration high import cost as difference on account of higher import had resulted into lower profit in case of the assessee. Similarly, in case of Transwitch India Pvt. Ltd. vs. DCIT (supra), the operating cost in case of the assessee was adjusted to exclude the abnormal expenses relating to office re-allocation, payment of additional rent and salary for unproductive and idle hours due to shifting of office which has been upheld by the Tribunal. Similar was the position in case of M/s.

Toyota Kirloskar Motors Pvt. Ltd. (supra) in which adjustment made in case of the assessee on account of special warranty of Rs.15.90 crores which was found to be extraordinary expenditure of non-recurring nature to overcome the defects in the exhaust system, was upheld by the Tribunal.

5.2.2 Therefore, the view taken by the lower authorities that no adjustment could be made to the margin of the assessee on account of any extraordinary factors can not be upheld. It is also pertinent to point out here that the assessee has amortized this one-time ESOP cost over the subsequent five year period which was reduced from the profit of the assessee for the purpose of computation of transfer pricing adjustment. We, therefore, do not agree with the action of authorities below in not excluding the one time ESOP cost and accordingly direct the AO to exclude the one time ESOP cost while computing margin in case of the assessee. The margin after excluding ESOP cost is stated to be 16.6% which may be verified by the AO.

5.3 The next issue on which dispute has arisen is selection of comparables and method of computation of margin in their cases. The assessee in terms of transfer pricing study conducted by it selected eleven comparables which were engaged in similar line of business, providing services primarily to US or European markets, having sufficient public financial and business information and excluding the cases which were subsidiaries of another company. The study gave eleven comparables details of which have been given in para-2 earlier. However, subsequently during the proceedings before the TPO, the assessee submitted that five of the eleven comparables were not comparable to the case of the assessee for the various reasons mentioned in para-2 of the order earlier. The details of six comparables which as per assessee were found comparable has been tabulated in para-2.2 earlier. The TPO, however, after detailed examination of these companies noted that four out of these six comparables i.e. Mascon Global Limited, Mastek Ltd., Patni Computer Systems Ltd. and CG-Vak Software & Exports were not comparable as these cases had related party transactions exceeding 25% in each case. The TPO therefore, excluded these comparables and thereafter only two comparables i.e. Infosys and Wipro were found comparable.

5.3.1 The assessee during the proceedings before the TPO, on receipt of show cause notice for rejection of comparables, submitted three more comparables i.e. Datamatics Ltd., Mindtree Consulting Ltd. and Persistent Systems Pvt. Ltd. The TPO rejected the case of Datamatics as it was subsidiary of another company and therefore was against the selection criteria adopted by the assessee itself. The TPO however accepted the other two comparables. The TPO thus finally selected four comparables out of the comparables selected by the assessee. The TPO computed the margin in case of these comparables on standalone basis against margin on the basis of consolidated results taken by the assessee. This gave the mean margin of 27.82% as per details given below :-

Sl.No.	Name of Company	Operating Margin Operating cost Financial Year-06-07
1.	Infosys Technologies Ltd.	40.16%
2.	Wipro Ltd.	26.08%
3.	Mindtree Consulting Ltd.	19.25%
4.	Persistent Systems Private Ltd.	26.01%
	Arithmetic Mean	**27.82%**

5.3.2 The assessee objected to the rejection of comparables by the TPO as well as margin adopted by him, before the DRP and at that stage, the assessee submitted four more comparables for the consideration of DRP i.e. Goldstone Technologies, (ii) Lanco Infotech, (iii) SIP Tech and L&T Infotech. DRP has not considered these comparables without giving any reasons. The ld. Sr. counsel argued that TPO had given notice for rejection of comparables only one week before passing of the order. Therefore, the assessee did not have enough time for selecting more comparables. It has therefore been requested that these comparables may also be considered. In addition, it has also been argued that Infosys Technology and Wipro though these were assessee's own comparables, should be excluded as these were extreme cases of high turnover and profit and thus not comparable to the case of the assessee. Reliance has been placed on several decisions of the Tribunal as mentioned earlier in which turnover filter has been applied for selection of comparables. In addition, it has also been argued that in case high profit cases were selected, case of VJIL which was initially excluded by the assessee before TPO on the ground that financial information was not available in public domain and was rejected by the TPO on ground of losses, should also be included. It has been further argued that consolidated results of the companies should be considered for the purpose of computation of margin as consolidated results neutralize results of related party transactions. It has been pointed out that in case standalone results are taken, these may not be comparable as some of the comparables may have overseas branches. It has also been pointed out that in case, Datamatics is rejected on the ground of being subsidiary of another company, the same treatment will have to be given to L&T Infotech, which was subsidiary of L&T.

5.3.3 We first deal with the pleas raised by the ld. Sr. Counsel for using consolidated results for the purpose of comparison of margins. The ld. CIT-DR has pointed out that the four comparables having substantial related party transactions i.e., CG-VAK, Mascon Global Limited, Mastek Ltd. and Patni Computer Systems Ltd. have substantial revenue's from overseas market and, therefore, the consolidated results which have profit from different markets will not be comparable. It was pointed out in case of Mascon Global Limited, 75% of the revenue came from USA, Moscow and UK and in case of CG-VAK 75% of the revenue came from other jurisdictions. In case of Patni Computer Systems Ltd., 61% of the revenue came from USA, UK, Germany and Brazil whereas in case of Mastek Ltd. substantial part of the revenue came from other countries. These claims of ld. CIT-(DR) which were based on the annual reports of the companies which were placed on record were not disputed by the ld. Sr. Counsel. Under the provisions of Rule 10B(2)(d), comparability of transactions has to be considered after taking into account the prevailing market conditions including geographical locations, size of market and cost of capital and labour etc. Therefore, we agree with the ld. CIT-(DR) that the consolidated results which include profit from different overseas jurisdictions having different geographical and marketing conditions will not be comparable. No material has been brought on record by the assessee to show that any of the comparables were having branches abroad in addition to subsidiaries. We also note that in case of American Express (India) Pvt. Ltd. (supra), the TPO had taken consolidated results to nullify the results of related party transactions but the Tribunal in a similar situation had not allowed the same on the ground that substantial revenue came from other markets which were not comparable. We, therefore, uphold the view taken by the authorities below to adopt standalone results for the purpose of comparison of margins. Consequently we also uphold the order of TPO for rejecting the above mentioned four comparables which have substantial related party transactions because the transactions in these cases could not be considered as fully uncontrolled.

5.3.4 We now take up the arguments advanced on behalf of the assessee that extreme profit and loss cases should be excluded or in case extreme profit cases are included, the case of losses should also be included. This argument is particularly relevant in relation to VJIL which has margin of -42.94% on turnover of 13.02 crores and also Infosys Technologies and Wipro which are extreme profit cases. The ld. Sr. Counsel has argued that VJIL had been initially excluded by the assessee on the ground of lack of financial information in the public domain and since information was now available, this should be considered. It has also been pointed out that VJIL was not a persistent loss making company and was profitable in assessment years 2005-06 and 2006-07. Therefore, it has been argued that this should also be included in case Wipro and Infosys Technologies are considered. In our view, comparable cases cannot be rejected only on the ground of extremely high profit or loss. In case the companies satisfy the comparability criteria, and do not involve any abnormal business conditions, the same can not be rejected only on the ground of loss or high profit. The OECD guidelines also provide that loss making uncontrolled transactions should be further investigated and it should be rejected only when the loss does not reflect the normal business conditions. Thus the comparable could not be rejected on the sole basis of loss. Ld. CIT-DR has pointed out that VJIL had abnormal business conditions. It had incurred loss of Rs.10.43 crores on turnover of Rs.13.1 crores and had claimed provision for doubtful debt /advances of Rs.6.61 crores out of total debtors of Rs.9.42 crores. Further auditors report also mentioned that operations of the company were effected due to difference in management which were pending before the high court. We agree with the ld. CIT-DR that these facts represent highly abnormal conditions. Therefore on the facts of the case rejection of VJIL as comparable is justified not on the basis of loss but on the basis of abnormal business conditions.

5.3.5 The arguments have also been advanced at length by ld. Sr. Counsel for excluding certain comparables on the basis of turnover. Reliance has been placed on some decisions of the Tribunal in support of the plea for applying turnover filter for selection of comparables which have been mentioned in para 3.3.2 earlier. It has been particularly requested that Infosys and Wipro, which are cases of extremely high turnover should be excluded. We have carefully perused the decisions of the Tribunal cited by the ld. Sr. Counsel. The various reasons given for applying the turnover filter for comparison of margins are economy of scale, greater bargaining power, more skilled employees and higher risk taking capabilities in cases of high turnover companies, which increase the margins with rise in turnover. However, in the Tribunal decisions cited, no detailed examinations have been made as to how these factors increase the profitability with rising turnover.

The concept of economy of scale is relevant to manufacturing concerns, which have high fixed assets and, therefore, with the rise in volume, cost per unit of the product decreases, which is the reason of increase in margin as scale of operations goes up because with the same fixed cost there is more output when the turnover is high. The same is not true in case of service companies, which do not require high fixed assets. In these cases employees are the main assets, who in the case of the assessee are software engineers, who are recruited from project to project depending upon the requirement. The revenue in these cases is directly related to manpower utilized. With rise in volume cost goes up proportionately. Therefore, as rightly pointed out by the ld. CIT-DR the concept of economy of scale could not be applied to service oriented companies. The ld. CIT-DR has also placed a graph plotted between margin and turnover in case of the comparables selected by the assessee, which shows no linear relationship between margin and turnover. In fact, the graph shows that the margin has come down with the rise in turnover in some cases. Such detailed study was not available before the various Benches of the Tribunal mentioned earlier, who have applied the turnover filter. Therefore, in view of the fresh material, in our view, the decisions of the Tribunal can be followed.

5.3.6 The manpower requirement of software companies vary from project to project and, therefore, all the companies engaged in this line recruit employees depending upon the nature of project as per required skills and abilities. Therefore, it cannot be said that only the high turnover companies have skilled employees. Moreover, in case of high skilled employees, cost of employee also increases along with output and, therefore, margins are not much effected. As for the risk, all the comparable companies have similar levels of risk as they operate in the same field and similar environment. Under the provisions of rule 10B(2), comparability of international transactions with uncontrolled transactions has to be judged with reference to functions performed, asset employed and risk assumed but the functions performed by all comparable companies are same as it is because of same functions, they have been selected by the assessee as comparables. The asset employed has two dimensions i.e. quantity and quality. More employees would mean more turnover but as we have seen earlier, there is no linear relationship between margin and turnover. As regards quality of employees, this will depend upon the nature of projects and since the comparables are operating in the same field having similar nature of work, and employee cost being more in case of more skilled manpower, it will not have much impact on the margins. As for the bargaining power, the assessee is part of a multinational group and well established in the field and, therefore, it can not be accepted that it has less bargaining power than any of the India Companies, however big it may be. Therefore, in our view, it would not be appropriate to apply turnover filter for the purpose of comparison of margins. In case of Genesis Integrating System (I) Pvt. Ltd. (supra), relied upon by the ld. Sr. Counsel in support of turnover filter, the Tribunal had accepted the turnover range of Rs.1 crores - 200 crores; 200 cr. – 2000 cr and greater than 2000 crores for the purpose of comparison of margin. The said classification made by the Tribunal was on the basis of classification made by Dun and Bradstreet. We, however, find that Dun and Bradstreet had made the classification according to size of the company i.e. large, medium and small. The classification was not made on the basis of margin as there is no empharical evidence to suggest that margin is directly related to turnover. We, therefore, reject the argument advanced by the Ld. Sr. Counsel for applying turnover filter for selection of comparables for the purpose of comparison of their margins with that of the assessee.

5.3.7 However, we may make it clear that for the purpose of comparison, the turnover would be relevant only from the limited purpose to ensure that the comparable selected is an established player capable of executing all types of work relating to software development as the assessee is also an established company in the field. In other words, it must have a certain critical mass to compete successfully in the market, which can be decided by the minimum quantum of work it must have done. Therefore, the filter can be applied to select comparables having a minimum turnover and, thereafter, their margins can be compared provided they meet the comparability test and there are no other material differences, which impair the comparability. It has been argued by the ld. Sr. Counsel that Infosys and Wipro have substantial income from sale of branded software but the argument based on volume as pointed out earlier is not relevant for the purpose of margin nor any material as been produced before us to show that the margin was very high in case of sale of branded software. The assessee, a multinational, is an established player in the field, capable of selling software developed by it as a branded product but instead of doing that, it is supplying the same to the parent company and that is the reason TP adjustments are required to be made. The ld. Sr. Counsel has also pointed out that Infosys and Wipro have substantial revenue, 51.7% in case of

Infosys, and 45.3% in case of Wipro from on-site work done overseas at the site of clients whereas the onsite work in the case of the assessee is just 5%. It has been pointed out that the employees if sent overseas have certain dead hours, which cannot be properly utilized as can be done in the home country. But this argument as rightly pointed out by the ld. CIT-DR does not support the case of higher margin in case of onsite work because dead hours would mean less output with the same employee cost, which would in fact reduce the margin. No material has also been placed before us to show that the margin in case of on site work is higher.

5.3.8 We also note that Infosys and Wipro were the comparables selected by the assessee itself on the basis of its own transfer pricing study. The assessee was fully aware of its work profile, while selecting Infosys and Wipro as comparables. The assessee raised no plea either before the TPO or DRP for excluding these comparables though it had added some more comparables. The assessee, therefore, cannot raise any grievance before the Tribunal to exclude these comparables, without giving any cogent and convincing reason. The reasons given by the assessee have been examined and as held earlier, are not found convincing. The assessee, therefore, cannot be permitted to exclude Infosys and Wipro which were its own comparables. This issue is also supported by the decision of the Tribunal in the case of Kansai Nerolac Paint Ltd. (supra), which has been relied upon by the ld. CIT-DR in which it has been held that the assessee itself having selected the comparables, it can not turnback and say that they are not comparables without giving any cogent and convincing reasons.

5.3.9 Reverting back to the new comparables submitted by the assessee at the level of DRP, we find substance in the submissions by the ld. Sr. Counsel that TPO had not given sufficient opportunity for study and selection of new comparables as order was passed within a week of issue of show cause notice. Therefore, the new comparables selected at the level of DRP should have been considered. DRP has not considered the new comparables without giving any reason. In our view, it would be appropriate to take as many comparables as possible so that the mean margin is closer to the correct margin because no two companies can be said to be exactly identical and small differences, if any, could be eliminated by increasing number of comparables. These new comparables, therefore, in our view have to be considered. We, however, note that one of the comparables, i.e. SIP Tech has only revenue of 3.6 crores. Obviously, the company has some problems as it is not able to procure enough orders and cannot be considered as established player in the field. It is, in our view, has to be excluded outright. The new comparables also include L&T Infotech and as has been pointed out by the ld. Sr. Counsel this is a subsidiary of L & T, which is against the filter applied by the assessee that the comparable should not be a subsidiary of another company. We find that, on this ground, we have already excluded Datamatics Ltd. Therefore, this company has to be excluded outright. We are thus left with only two new comparables submitted at the level of DRP i.e. Goldstone which has turnover of 41.03 crores and Lanco Infotech, which has turnover of 45.56 crores. As we have held earlier, the comparables must have certain minimum size as these have to be compared with well established players in the field. In our view on the facts of the case, minimum turnover of Rs.100 crores has to be fixed and considering this, these two comparables have also to be rejected.

5.3.10 We are thus left with four comparables i.e. Infosys, Wipro, Mindtree and Persistent which are the comparables selected by the assessee and which have been accepted by the TPO/AO. We, therefore, uphold the selection of comparables by TPO/AO. The turnover and margin of Infosys and Wipro are higher than that of the assessee whereas turnover of the other two comparables are lower. As we have observed earlier, the assessee is a part of a multinational group, well established in the field and has been rated as one of the top 50 companies in the world as per NASSCOM database. Therefore, there is no reason that its margin should be lower than any Indian company, how big it may be. Its margin on operating cost in the immediate preceding year was about 30%. However, if some small differences remain with respect to Infosys and Wipro, these shall be eliminated while taking the mean margin as the margin of the other two comparables is much lower than the above two comparables. The assessee has however, disputed the computation of margin in case of Mindtree and Persistent by the AO/TPO. The AO is therefore, directed to verify the margin of these comparables after hearing the assessee.

6. The assessee has also requested for working capital adjustment. The case of the assessee is that working capital does have an impact on the profitability of the company and more accounts receivable in case of a company would mean relatively lower profit. Therefore, the companies could be considered as fully comparable if they hold the same level of account

receivable and account payable. The TPO has, however, rejected the claim of working capital adjustment which has been upheld by the DRP. The reason given by the authorities below is that the assessee had not made any claim for working capital adjustment in its TP study and that it is not possible to make accurate adjustment on this account as it is difficult to find the account receivable/payable at different points of time during the year. The ld. Sr. Counsel has referred OECD guidelines as per which if the account receivable/payable on the last date do not give a representative level of working capital for the whole year, average may be used if it reflects the better level of working capital over the year. In our view, working capital adjustments are required to be made because these do impact the profitability of the company. Rule 10B(2)(d) also provides that the comparability has to be judged with respect to various factors including the market conditions, geographical conditions, cost of labour and capital in the market. Accounts receivable/payable effect the cost of working capital. A company which has a substantial amount blocked with the debtors for a long period cannot be fully comparable to the case which is able to recover the debt promptly. In our view, the average of opening and closing balance in the account receivable/payable for the relevant year may be adopted which may broadly give the representative level of working capital over the year. Even if there is some difference with respect to the representative level, it will not effect the comparability as the same method will be applied to all cases. Working capital adjustment can not be denied to the assessee only on the ground that the assessee had not made any claim in the TP study if it is possible to make such adjustment. In our view, working capital adjustment will improve the comparability. We, therefore, direct the AO/TPO to make the working capital adjustment after necessary examination in the light of the observations made above and after allowing opportunity of hearing to the assessee.

7. Before parting, we have to deal with another argument advanced by the ld. Sr. Counsel that the basic reason for enactment of transfer pricing guidelines was to ensure that multinationals in different jurisdictions do not transfer profit to lower tax jurisdiction to avoid payment of tax and therefore, in case there is no transfer of profit to low tax jurisdiction, no adjustment should be made. It has been pointed out that the parent company was situated in US where tax rate was high and therefore there was no reason for the assessee to transfer profit to the parent company. It has also been pointed out that parent company had declared margin of 8.1% which also showed that assessee had not transferred any profit to parent company. We are however unable to accept the arguments advanced. We find that this aspect has already been considered by the Tribunal in case of 24/7 Costomers.com Pvt. Ltd. (supra), in which the Tribunal held that arm's length price of international transaction has to be calculated with respect to similar transaction with an unrelated party as per the method prescribed and the revenue is not required to prove tax avoidance due to transfer of profit to lower tax jurisdiction. The Tribunal therefore held that the argument that parent company was incurring loss or had shown lower margin was not relevant. These arguments had also been earlier considered by the Special Bench in case of Aztek Software Technologies Services Ltd. (supra), and not

accepted. We therefore, reject the arguments advanced by the ld. Sr. Counsel.

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

Order pronounced in the open court on 28/02/2013.

Sd/-	Sd/-
(VIJAY PAL RAO)	**(RAJENDRA SINGH)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated: 28/02/2013.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.