IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI J SUDHAKAR RDDY, AM & SHRI. VIJAY PAL RAO, JM

ITA No.7894/MUM/2010
Assessment Year : 2006-2007

M/s. Symantec software Solutions Private Ltd. Unit 430, C-Wing, 4th Flr., Fortune 2000, B.K.C., Bandra (E), Mumbai – 400 051. PAN : AABCH3909H	**Vs.**	A.C.I.T. – 10(1) R.No.455, 4th Flr., Aayakar Bhavan, M.K. Rd., Mumbai – 400 020.
(Appellant)		**(Respondent)**

PAN NO.AABCV2624B

Appellant by : Shri F V Irani/Chetan Rajput
Respondent by : Shri Hemant J Lal/S KSingh/DR

O R D E R

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the assessment order dated 30.09.2010 passed in pursuant to the direction of Dispute Resolution Panel [DRP] dated 27.07.2010 issued u/s.144C of the I.T. Act for the Assessment Year 2006-07.

2. The assessee has raised following grounds in this appeal.

> *"1.* ***General ground challenging the transfer pricing adjustment of ₹ 25,427,043/-***
> *Erred in making transfer pricing adjustment to its international transaction in the nature of marketing support services.*
>
> *2.* ***Appellant already adequately remunerated for its services***
> *Erred in making a transfer pricing adjustment to the international transactions entered into by the Appellant with its associated enterprise in relation to rendering of marketing support services even though, the Appellant had earned more than 50% of the sales revenue generated for associated enterprise during the year ended 31st March, 2006; which did not warrant any transfer pricing adjustment.*
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> *3.* ***Use of contemporaneous data***
> *Erred in computing the arm's length price using the financial information of the comparable companies available at the time*

of assessment, although such information was not available at the time when the Appellant complied with these regulations.

4. ***Use of multiple year data***
Erred in considering the operating margins earned by comparable companies based on the financial data pertaining to the year ended 31st March, 2006 only and rejecting the financial data of comparable companies for prior two years.

5. ***Application of turnover filter for identification of comparable companies***
Erred in rejecting application of turnover filter for identification of comparable companies thereby accepting comparable companies of all sizes irrespective of their scale of operations.

6. ***Adjustment for difference in functional and risk profile of comparable companies vis-à-vis of the Appellant***
Erred in not making any adjustments for differences in functional and risk profile of comparable companies vis-à-vis the Appellant thereby comparing the operating margins of the comparable companies assuming higher business risks with the Appellant's captive risk mitigated operations without making any adjustment for differences in functional and risk profile.

7. ***Applicability of +/-5% range***
Erred in computing the arm's length price as the mean of the comparable companies margins for marketing support and consultancy services without taking into account the lower 5% variation from the mean, which is permitted to and which has also been opted for by the Appellant under the provisions of section 92C(2) of the Act

8. ***Erroneous levy of interest u/s.234B of the Act.***
Without prejudice to the grounds above, if the transfer pricing adjustment is sustained then the learned Assessing Officer has erred in levying interest u/s.234B of the Act to the extent the addition is made based on the updated financial data for the comparable companies.

9. ***Disallowance of bad debts of ₹ 9,128,790/- u/s.36(1)(vii) of the Act.***
Erred in disallowing the bad debts written-off in the profit and loss account
Without prejudice to the above, *the Hon'ble DRP and the learned Assessing Officer should have appreciated hat the claim of bad debts is otherwise allowable u/s.28 as business loss.*

10. ***Disallowance of Profession Tax of ₹ 2,875 u/s.43B of Income Tax Act.***

Erred in not taking cognizance of the fact that the outstanding balance of profession tax was paid on or before filing the return of income and should not have been disallowed u/s.43B of the Act.

Without prejudice to the above, *the Hon'ble DRP and the learned Assessing Officer should have appreciated that no disallowance u/s.43B should arise considering that the profession tax has not been claimed as deductible expenses.*

11. ***Disallowance of sundry balance written-off of ₹ 533,241/-***

Erred in concluding that the sundry balances written-off are in the nature of prior period expense and disallowing the same u/s.37 of the Act.

Without prejudice to the above, *the Hon'ble DRP and the learned Assessing Officer should have appreciated that sundry balances written off is otherwise allowable u/s.28 as business loss."*

3. Ground No. 1 to 8 regarding transfer price adjustment to the international transactions.

3.1 The assessee is engaged in the business of providing technical and marketing, pre-sale and after sales support of Veritas group products in India. The assessee filed its return of income on 29.11.2006 declaring total income of ₹ 75,88,386/-. Since the assessee had international transaction the reference was made u/s.92CA(1) of the Act to the transfer pricing officer for computation of Arms Length Price in relation to international transactions vide order dated 18.08.2008. The transfer pricing officer made transfer pricing adjustment of ₹ 2,54,27,043/- vide order dated 15.10.2009. The Assessing Officer prepared the draft order u/s.143(3)(ii) r.w.s.144C of the I.T. Act dated 27.11.2009 whereby proposed disallowance /addition including transfer pricing adjustment of ₹ 2,54,27,043/-. The assessee filed its objections along with Form No.35A in respect of various additions and disallowance made by the Assessing Officer in the draft order before the

Dispute Resolution Panel (DRP). The DRP after considering the contention of the assessee passed the direction dated 27.07.2010. Pursuant to the direction of the DRP, the Assessing Officer passed the consequential order dated 30.09.2010.

4. Before us the learned AR of the assessee has submitted that during the relevant year the assessee has provided two types of services to its associate enterprises. The services include i) marketing support services, ii) consultancy services to its associate enterprises. The assessee was remunerated at cost plus 2% of the net revenue by its AE for market support services whereas for consultancy services the assessee was remunerated at cost plus 8% mark up. The assessee has benchmarked the transaction of provision of services using TNMM. The AR has pointed out that the assessee selected 12 comparables in Transfer Pricing Study report and made adjustment of ₹ 92,15,556/- in its return of income on account of transaction involving provision of marketing and consultancy services. While making the transfer pricing adjustment the assessee calculated Arm's Length Price (AVP) margin on cost of the 12 comparable by using the data for 3 financial years 2003-04, 2004-05 & 2005-06 and thereby arrived at 9.17% arms length margin. The learned AR further submitted that the transfer pricing officer asked the assessee to furnish the updated single year margins of the comparable selected by the assessee in its Study Report. The single year updated margins of the comparables for the F.Y. 2005-06 is 29.55%. The learned AR of the assessee has submitted that the assessee objected for the transfer pricing officer for considering the single year

updated data of the comparable selected by the assessee instead of 3 years data as taken by the assessee in its transfer pricing study. The learned AR had referred para 5.1.2 of the transfer pricing order for the various objections taken by the assessee for the sake of convenience of the objections are reproduced as under:

> *"5.1.2 In response, the assessee submitted its reply vide letter dated 10.09.2009. The main submissions of the assessee are as follows:*
>
> *a. The assessee has received more than 50% of the sales revenue generated by it for AE in the form of marketing services, which is on the higher side.*
> *b. Conducting an analysis based on information currently available but not available at the time of complying with the regulations is not the intent of the regulations.*
> *c. The use of multiple year data should be allowed since it would capture market cycles and reduce the variability /distortions in the financial results arising from the use of single year data.*
> *d. There is a change in the nature of business activities of Epic Energy Ltd. and Rata Glitter Industries Ltd. during FY 2005-06, due to which these companies cannot be considered to be comparable for FY 2005-06.*
> *e. Turnover filter should be applied for selection of comparable companies in light of the judicial guidance available subsequent to the date of transfer pricing study.*
> *f. Adjustment for differences in functional and risk profile should be granted in view of the fact that the assessee is a captive risk mitigated entity whereas comparables are full fledged risk bearing entities.*
> *g. During the relevant year the assessee had reduced proportionate expenses for upgrading the Oracle software, which is used for accounting purposes. These expenses were incurred in earlier year. This amount was fully debited to Profit & Loss account in the earlier year and as such, in earlier year, the TPO had reduced full amount of expense debited to Profit and loss account while calculating the margins earned by the assessee without accepting the assessee's argument that benefit is expected over the next few years. Thus, the assessee has requested to consider revised margins from its business activities for the year under consideration after eliminating the effect of proportionate software expenses reduced by it for computing operating margins as the entire expenditure was considered by the TPO in earlier year for computing the operating margin.*
> *h. Effect of voluntary transfer pricing adjustment already offered by the assessee in the return of income should be considered in the order.*
> *i. The benefit of +/- 5% should be given to the assessee.*

5. The AR of the assessee has submitted that during the F.Y. under consideration the assessee has received more than 50% of sales revenue generated by it for its AE in the form of marketing services, which is on higher side. He has submitted that the remuneration received by the assessee at cost plus 2% of the net sale revenue generated by its AE comes to more than 50% of the sale revenue of the AE. He has further submitted that the adjustment made by the TPO, over and above, the fee received by the assessee for marketing support and consultancy services would be more than 50% of the sale revenue of the AE and therefore the same is higher than that of third party could have earned in similar business. The learned AR submitted that the adjustment made by the transfer pricing officer is not warranted since the assessee has already earned more than 50% of the sale revenue generated by its AE and offer for tax. The arguments of the ld AR of the assessee are summarised as under:

(a) The assessee first determines the "Most Appropriate Method" in relation to the five methods set out in Rule10B. Rule 10C provides that in selecting the most appropriate method, regard must be given inter alia 'to the availability,... of the data necessary for the application of the method." Thus, it is submitted that the data which is not available for the comparison at the time of preparation of transfer pricing documentation cannot be used afterwards.

The information and documents required to be kept and maintained by the assessee u/s.92B read with 10D of the Rules, shows that records must be maintained of the economic analysis, market analysis, uncontrolled transaction, evaluation of comparability, actual working, etc. This documentation requirement u/s.92B read with Rule 10D(1) is required to be complied with before the due date for filing of the return of income. It is beyond any principle of justice to reject the analysis undertaken by the assessee merely for the reasons that data for same year as the international

transactions has not been used, without realizing the practical difficulties that could arise by such interpretation of law.

(b) The provisions of section 92CA(3) read with section 92C(3), in terms of which the Transfer pricing officer is authorized to determine the arm's length price on the bais of information or document available with him. The various conditions have been specified in section 92C(3), which need to be satisfied in case the Transfer Pricing officer has to determine the information available with him for determining the arm's length price. Thus, even if the Transfer Pricing Officer has to deviate from the analysis conducted by the assessee the same can only be to the extent the assessee has not complied with the transfer pricing regulations for determining the arm's length price and not in any other respect where the assessee has complied with the transfer pricing regulations. In case the contention of the learned Transfer Pricing Officer for use of latest available data is to be accepted then the underlying consideration would be that the assessee has not compiled with the applicable regulations, in which scenario, as explained above, there would be non-compliance by all the assessee since there would be some data for latest year available only post the statutory deadline which would be relevant for determining the arm's length price. It cannot be a legislative intention that the regulations are framed in such a manner that all the assessee are considered non-complaint in all probabilities.

(c) Based on the above, the assessee submits that it had carried out a proper screening of potentially comparable companies in public databases and adopted an objective screening process for identifying comparables and the comparables identified by the assessee were neither insufficient nor had other deficiency.

(d) The trend of operating margins of comparable companies, clearly indicates that operating margin earned by the comparable companies varies from year on year basis with no one side upward/downward direction. In view of the

above, use of multiple year data reduces the variation/distortion of the financial results as well as capture the industry/market cycles.

(e) In light of the above and given the nature of business activities undertaken by assessee, economic conditions and usage of broad range of comparables, the use of multiple-year data would capture market cycles and redce the variability/distortions in the financial results arising from the use of single year data. Singly year data would not adequately capture the market and business cycle of the broad range of comparables. Therefore, the assessee wishes to submit that use of multiple year data for undertaking a comparability analysis will produce better results and hence, use of such data is appropriate. Thus, the learned transfer pricing officer and the learned Assessing Officer have erred in determining the arm's length price using the margins earned by the comparable companies only during FY 2005-06. Thus the learned AR has submitted that by using the updated data/information through only for the F.Y.06-07 as against 3 financial years information taken into account by the assessee, the transfer pricing officer as well as Assessing Officer has added in determining the arm's length price.

(f) The AR of the assessee further contended that the TPO, the DRP as well as Assessing Officer failed to appreciate and considered the contention of the assessee regarding the adjustment for difference in functional and risk profile. The learned AR has submitted that it was clear from the functional analysis submitted to the learned TPO that the assessee is a risk mitigated entity since risks such as market risk, warranty risk, credit and collection risk, etc are not borne by the assessee vis-a-vis the comparable companies which transact with independent entities and are not protected from these risks. Although it is evident from the functional analysis document submitted that the assessee is risk mitigated entity, the same has not been taken into consideration by the learned TPO.

(g) The next contention of the learned AR is regarding turnover filtration. The ld AR of the assessee has submitted that the assessee has taken an objection before the transfer pricing officer for application of the turnover filter while selecting comparables and requested the transfer pricing officer to exclude the comparable having less than 5 crores and more than 50 crores of the

turnover while computing the ALP. He has pointed out that the TPO has not considered and discussed the arguments of the assessee regarding application of the turnover filter on merit but merely brushed them aside by making statement that the assessee itself has selected the comparable in its transfer pricing study without considering the practical difficulty faced by the assessee. The learned AR has submitted that it is settled law as propounded by the Hon'ble Supreme Court as well as this Tribunal in various decisions with TPO should applies the relevant provisions judiciously including the turnover filter while determining the ALP for transfer pricing adjustment. The AR has submitted that operating revenue with respect to turnover i.e. less than Rs.5 crores or significantly high turnover of more than Rs 50 crores should be eliminating as the same cannot be compared with the scale of operation of the assessee.

(h) He has relied upon the decision of Delhi Bench of the Tribunal in the case of M/s Adobe Systems India Private Limited vs. A.C.I.T. dt.21.01.2011 in ITA No.5043/Del/2010, submitted that the inclusion of super normal profit making companies is not justified in the comparable. He has also relied upon the decision of Chandigadh Special Bench of the Tribunal in DCIT Vs. Qurak System Pvt. Ltd. [38 SOT 307], and submitted that even if the assessee has taken a datamatic as comparable in his transfer pricing, the assessee is entitled to point out that above enterprise has wrongly be taken as comparable those have earned extremely high profit and such comparables should not be treated as comparable by tax authorities.

6. The learned AR of the assessee has then advanced the arguments on application for the admitting the addition evidence. The assessee has filed the addition evidence containing the documents from pages 272 to 328 of the paper book. The information contained in the additional evidence e was not available in public domain at the time of TP study of the assessee. He has further contended that the authenticity of the additional evidences cannot be dispute as the assessee has taken the material from the official website of ministry of corporation affairs. He has relied upon the decision of the Hon'ble Jurisdictional

High Court in the case of Smt Prabhavati S Shah vs CIT reported in 231 ITR 1 and the decision of the Hon'ble Supreme Court in the case of Shri K Venkataramiah vs A Seetharama Reddy reported in AIR 1963 (SC) 1526. The ld AR has submitted that the additional evidence is necessary in the interest of justice and for proper adjudication of the dispute involved in grounds of appeal 1 to 3 and therefore, the same may be admitted.

6.1 On the other hand, the ld DR has vehemently objected to the prayer of the assessee for admission of the additional evidence at this stage. He has submitted that Rule 29 does not confer any right on the parties to produce additional evidence. The assessee has filed additional evidence first time before the Tribunal in the form of paper book no.2 without explaining the reasonable cause as to why the said evidence has not been produced before the lower authorities. He has further submitted that the additional evidence filed by the assessee is required to be verified and examined and therefore, facts are required to be investigated, which is not possible at this stage while considering the additional evidence. He relied on the decision of the jurisdictional High Court in the case of Gammon India Ltd vs CIT reported in 214 ITR 50.

7 On merits as regards to grounds of appeal nos. 1 to 7, the ld DR has submitted that the assessee is a capital risk free entity but still incurring loss which is beyond the comprehension. The ld DR further contended that it is beyond imagination as to how the assessee incurring loss when no capital risk is involved in the business of the assessee and the services provided by the assessee to its Associated Enterprises (AE). The ld DR has contended that all the comparables are selected and provided by the assessee itself. The assessee

made an adjustment of Rs. 92,15,556/- in its return of income on account of international transactions in the profit of marketing and consultancy services while calculating its Arm's Length as per Transfer Pricing report. The assessee has taken into account the ALP margin on 12 comparables used at three years data i.e. FYs 2003-04, 04-5 and 05-06 and in this exercise, the assessee has determined the ALP at 9.17% while the margin earned by the assessee has been calculated at loss of 0,87%. The Transfer Pricing Officer (TPO) asked the assessee to furnish the updated single year margin of the comparables selected by the assessee in its Transfer Pricing study report. According to the assessee, the single year updated margin of comparables for the AY 2005-06 is at 29.55%. The TPO issued show cause notice dated 31.1.2009 as to why the ALP margin should not be taken at 29.50% for marketing support and consultancy services of the assessee by considering the single year updated data. The ld DR has pointed out that these comparables were selected by the assessee and the TPO has only taken into account the current year updated data instead of three years un-updated data taken into account by the assessee. Therefore, the assessee cannot be allowed subsequently to take a plea that some of the comparables should have excluded on the ground that they are having abnormal profit due to variation in the turnover in comparison to the assessee's turnover and functional and risk difference. The ld DR further contended that the assessee has raised these objections only when the TPO decided to take the single current year updated data and the assessee was having no such objection, if the data, which has taken into account in the TP study would have been accepted by the TPO. The TPO has not taken into consideration any new comparable but all the comparables selected by the assessee are considered while determining the ALP except using updated current year data of the comparables selected by the

assessee. Thus, the objection taken by the assessee is baseless and an afterthought.

7.1 The ld DR has then referred the asseessee's contention that the assessee is getting cost +2% net revenue of the AE for marketing support services and that would be more than 50% of the sale revenue of the AE and no further adjustment is required. He has emphasized that it is the margin of the assessee on the international transactions, which is relevant and not the percentage of the AE's revenue out of the transactions.

7.2 The ld DR has further pointed out that while determining the ALP, TPO has the power and authority to consider the data which are available at the time of such calculation. The department has not imposed its choice of comparable; but all the comparables were chosen by the assessee. He has referred to the Rule 10B of the I T Rules and submitted that as per sub rule 4 of rules 10B, the data used in analysing comparability of the uncontrolled transactions with the international transactions, shall be the data of the financial year in which the international transaction has been entered into.

7.3 As regards to the proviso to sub.Rule 4 of Rule 10B, the ld DR has submitted that it gives only a liberty to take into account the data relating to the period other than the financial year in which the international transaction has been entered into; but such period should not be more than two years prior to such financial year. The ld DR thus submitted that the proviso to sub. Sec. 4 of Rules 10B has a limited application. He has referred to the provisions of sec

92CA(3) and submitted that the TPO may require any specific point and after taken into account all relevant material, which he has gathered, pass an order in writing to determine the ALP in relation to the international transition. Thus, whatever relevant material the TPO has gathered can be taken into account irrespective of the same was available with the assessee at the time of TP study.

7.4 The ld DR thus submitted that the TPO can gather the material from third party in the process of determining the ALP. The assessee has objected only for two comparables on the ground of turnover filtering when the TPO decided to take into account updated current year data.

7.5 The ld DR then submitted that the assessee never quantified the risk adjustment and first time, the assessee has given some formula before the DRP. Even before the DRP, the quantification was not furnished by the assessee on account of risk and for adjustment for difference in function and risk profile. The ld DR further contended that the assessee has selected those objects to suit the assessee's own interest. The risk profile and functional difference as well as turnover filtering are some of the factors of filtering while comparing the margins. The ld DR has pointed out that why only turnover filtering has been chosen by the assessee when there are other facts like salary, wages, work-in-capital etc. He has further contended that this is not the first year of the TP adjustment and ALP of the international transaction. The assessee was very well aware of the comparables and functional similarity.

7.6 The ld DR thus pointed out that in case of DCIT vs Quark Systems P Ltd reportd in 38 SOT 307, as relied upon by the ld AR of the assessee , the Chandigarh Special Bench of the Tribunal has observed in para 9 that there was an error on account of which the operating expenses of Rs. 579 crores were not taken into account, which resulted an abnormal profit in case of Datamatics Technologies Ltd, one of the comparables. Thus, the Special Bench has held that the said company should be excluded from the comparables. He has pointed out that no such abnormal profit has been pointed by the assessee in case of comparables selected by the assessee and objected before the TPO. Therefore, the objection of the assessee is only to exclude the comparables which are having higher profit margin.

7.7 The ld DR then pointed out that in case of M/s Abode Systems India P Ltd vs ACIT., the Delhi Bench of the Tribunal has observed that some of the cases of the comparables taken into consideration by the TPO are supernormal profit making companies and should be excluded from the comparables set. Whereas in the case in hand, it was not the case of the comparables are having supernormal. He has further pointed out that comparables having higher profit have already excluded by the TPO though on some other criteria. The object of the TP method and procedure as provided in the provisions would be defeated if such criteria is accepted for exclusion of comparables.

8 As regards the $\pm$5 % from arithmetic means as provided under the second proviso to sec. 92C(2). The ld DR has submitted that the proviso as exist at that point of time has been substituted by the Finance Act, 2009. Therefore, this is not the amendment of the provisions but substitution of the provisions. He has

relied upon the decision of the Hon'ble Karnataka High Court in the case of K T Venkatappa & Ors vs K N Krishnappa & Ors reported in 173 ITR 678 and submitted that proceedings pending as on the date of substitution would be governed by the substituted new provision. The ld DR further contended that when the second proviso has been substituted by the new proviso then new proviso supersede all the provisos and the old proviso ceased to exist. Thus, a new proviso has become the part of law just as if the amendment was always been there.

8.1 After considering the rival contention and perusal of the additional evidence filed by the assessee, we note that this additional evidence is in fact not the material first time filed by the assessee before us; but the same was filed by the assessee before the TPO being the updated information/data regarding comparables. The assessee has filed the evidence before us just to support the contention that the same was not available in the public domain and therefore, was not accessible to the assessee at the time of TP study. In view of our finding on the issue of determination of ALP by the AP/TPO and after considering the updated data, we decline the request of the assessee for admitting the additional evidence.

ON MERITS:

9 We have considered the rival submissions made by both the parties and carefully considered the relevant material on record. The expression of international transaction as provided in the provisions of sec. 92B means the transaction between two or more AEs, either or both of whom are Non-Residents.

Such transactions may be in the nature of purchase, sale or lease of tangible or intangible property or provision of services or lending or borrowing money, or any other transactions having a bearing on the profits, income, losses or assets of such Enterprises.

9.1 Section 92C(1) prescribes the computation of ALP in regard to an international transaction and has to be determined by any of the method prescribed in the said sections being the most appropriate method, having regard to the nature of the transaction or class of transaction.

9.2 Section 92F(ii) defines ALP, a price which is applied or proposed to be applied in regard to the transaction between persons other than AE, in uncontrolled conditions.

9.3 Rules 10B (1) of the I T Rules prescribed the manner in which ALP in relation to international transaction has to be determined by applying most appropriate method as prescribed u/s 92C. Rules 10B(1)(e) specifically mentioned the method /manner for determining all the ALPs by applying net Transactional Net Margin Method (TNMM).

> *"(i) the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or ales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base.*
>
> *(ii) the net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;*
>
> *(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the*

differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realized by the enterprise and referred to in sub clause (i) is established to be the same as the net profit margin referred to in sub clause (iii)

*(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transacti*ons."

Thus, as per chapter X r.w r 10B any income arises from the international transaction shall be computed having regard to ALP. An international transaction is required to be tested at ALP irrespective of genuineness of the actual price of the transaction. In the case of international transaction, legislature has shifted the burden of proving from tax authority to the assessee to establish and show that the transaction with the AE was at ALP on the basis of documents maintained and file by the assessee. It is incumbent upon the assessee to satisfy the tax authorities that the transaction with the AE was at ALP and in support of its claim; the assessee has to produce all the relevant records including TP study having margin comparables to arrive at the ALP.

9.4 In order to satisfy the requirement of provisions of law under TNMM method, the comparison has to be made between the net margin realised from the operation of the uncontrolled parties' transaction and net margin derived by the assessee on similar international transactions. Thus, the TNMM method requires the comparison of net margin realised by the AE from the international transactions and not the comparison of operating margin of the AE with the operating margin of comparables at enterprise level. Thus, the comparison

should be between the net margins on transaction basis and not at enterprise level.

10 In the case in hand, though comparables are not segment wise transaction basis but are comparison of operating margin of the assessee from both transactions with operating margin of the comparables at enterprise level. However, the revenue has not raised such objection while determining the ALP and adopting TNMM method, the TPO has accepted the comparables as well as the margins as per the TP report except taken into account the updated data of only current year instead of three years data considered by the assessee in the TP study. Therefore, this issue has not been raised before us and we do not propose to go into the correctness of the comparison of oprating margins of the assessee with the margins of the comparables except the specific issue raised before us.

11 The main objection raised by the assessee before us is against use of financial information of the comparables at the time of assessment but such information was not available at the time of TP study done by the assessee as well as use of financial data of the comparables for the FY 2005-06 instead of three years taken by the assessee. It is to be noted that the updated financial information and data were provided by the assessee during the assessment proceedings and particularly during the proceedings before the TPO. It is not the case where the TPO has gathered some information, which was not relevant for the Assessment Year 2005-06 of the comparables. The information was very much exists, though, the assessee might have no access to the said information at the time of TP study but the information, which was very much related to the

comparables for the FY 2005-06 which was asked by the TPO and provided by the assessee. Therefore, considering the said information by the TPO while determining the ALP, does not amount to violation of any provisions of law.

11.1 Section 92CA(3) empower the TPO to consider such evidence as he may require on any specified point and after taking into account all relevant materials which he has gathered, he shall determine the ALP in relation to the international transaction in accordance with the provisions of sec. 92C. Thus, if the information gathered by the TPO is relevant material for the purpose of determining the ALP in relation to the international transaction then we do not find any wrong in using the updated data when the correctness and relevance of the same is not objected.

11.2 It is not the case of the assessee that the data were not available in the public domain but the objection of the assessee is that the data was not accessible to the assessee at the time of TP study when there is no bar in using the complete data of the comparables for determining the ALP in relation to the international transaction then the objection raised by the assessee is baseless and without any substance. Further, it appears that the assessee raised the objection of using the data because it turnout to be unfavourable to the assessee and when the correctness and authenticity is not doubted, the objection of the assessee is not sustainable.

11.3 As regards the objection for considering the single year/current year data instead of three years taken by the assessee, the ld AR of the assessee has

mainly emphasised the proviso to sub.rule (4) of Rule 10B and submitted that as per the said proviso, the data relating to a period not more than two years prior to such financial year may also be considered.

11.4 The provisions of sec. 92C(iii) authorises the TPO to use the information available to him. The TPO call upon the information from the assessee and the assessee furnishes the same. As per Rule 10B (4) for determining all the ALP u/s 92C, the data to be used in analysing any comparability of uncontrolled transaction with an international transaction shall be the data relating to the Financial Year in which the international transaction has been entered into. Thus, it is manifest from the sub rule (4) of Rule 10B that generally the data of the financial year in which the international transaction has been entered into to be used for analysing comparability of uncontrolled transaction in order to determine the ALP. The proviso to sub. rule (4) of Rule 10B provides the option for considering the data relating to the period other than the financial year in which the international transaction has been entered into; but not being more than two years prior to such financial year. As per proviso to Rule 10B, the data of earlier years reveal facts which could have influence on the current year/single year data of the comparables then the date of other two prior years may also be taken into consideration to determine the TP.

11.5 The proviso to sub. Rule 4 of Rule 10B does not mandate to always consider two more years' data of comparables in such analysis; but has a limited role only when the data of earlier years reveal facts which could have influenced on determination of the TP in relation to the transaction being compared.

11.6 When the assessee has not made out a case taking the data for only current financial year does not present the correct and fair financial result of the comparables then there is no mistake in considering the data for the financial year in which the international transaction has been entered into. There is a rationale for using the data of the comparables pertaining to the same period during which the international transactions took place because it will rule out the effect of difference in economic and market conditions prevailing/exist at different time period. Therefore, we do not find any error or illegality by taking into consideration only the data of the financial year in which the international transaction has been entered into.

12 Next objection of the assessee is regarding turnover filtering as well as difference in functions and risk profile of comparables.

13 The main contention of the ld AR of the assessee is that the comparables having more than 50 crores and less than 5 crores of turnover should be excluded for determining the ALP because the assessee's revenue from marketing support services is about Rs. 20 crores. He has pointed out that as per Rule 10B(3), if there are material difference between the transaction being compared, then, reasonably accurate adjustments should be made to eliminate the material difference. The ld AR asserted that since the TPO has not made any such adjustment; therefore, the comparables, which are having more than 50 crores and less than 5 crores of turnover should be discarded.

14 Undisputedly, the comparables considered by the TPO are selected by the assessee and in its TP study; the assessee did not exclude the comparables on such basis of turnover. The assessee's contention is that the assessee is a risk free entity whereas the comparables are not free from various risks and therefore appropriate adjustment on account of difference in function and risk profile should be made. We note that the assessee did not make any such adjustment of difference in function and risk profile of the comparables in the TP study. It is only when the TPO proposed to exclude some of the comparables as agreed by the assessee and to take only current year updated data into consideration for determining the ALP, the assessee raised these objections. There is no quarrel on the point that if the comparables proposed to be taken into consideration by the TPO are having an abnormal differences of turnover in comparison to the turnover of the assessee, and if it is apparent due to such abnormal difference in the turnover, the operating profits of the comparables is got distorted then in such a case, those comparables should be excluded from the list of the ALP.

15 In the case in hand, the assessee raised these objections only because some of the comparables are having high profit and also high difference in the turnover and not because of the high or low turnover has influenced the operating margin of the comparables. All the objections and contentions raised by the assessee in respect of this issue are general in nature and no specific fact has been brought on record to show that due to the difference in turnover the comparables become non-comparables. The assessee has not demonstrated as to how the difference in the turnover has influenced the result of the comparables. It is accepted economic principles and commercial practice that in

highly competitive market condition, one can survive and sustain only by keeping low margin but high turnover. Thus, high turnover and low margin are necessity of the highly competitive market to survive.

15.1 Similarly, low turnover does not necessarily mean high margin in competitive market condition. Therefore, unless and until it is brought on record that the turnover of such comparables has undue influence on the margins, it is not the general rule to exclude the same that too when the comparables are selected by the assessee itself.

16 As regards the difference in function and risk level adjustment; the assessee has raised this issue without quantification of such adjustment on this account. Even otherwise until and unless such difference results in deflation or inflation of financial result of the comparables, it is not general rule of standard adjustment. The assessee has not brought on record how such functional difference and risk has influenced the result of the comparables with quantified data to the satisfaction of the authorities. The assessee did not quantify the alleged adjustments on account of difference in risk. However, the assessee, first time filed certain calculation before the DRP in support of its claim. The said calculation is also not on the basis of any formula or principle rather it is general in nature. In our opinion, second proviso to sub.sec. 2 of sec. 92C cover and take care of these aspects. Since it is impossible to have a perfect comparable without any difference or variation regarding turnover risk profile and functional differences; therefore, the legislature has provided a margin of $\pm$ 5% while determining the ALP. Therefore, when the assessee is having benefit of choice/option as per the said provision as existed at the relevant point of time,

no separate adjustment is required on account of risk and functional differences. Therefore, we do not find any merit and substance in the claim of the assessee for adjustment in respect of risk and functional differences.

17 Before parting with the issue, we clarify that the margin of the assessee on international transaction is relevant and not the percentage of the AEs revenue in remunerating the assessee. The income from international transaction is computed having regard to only ALP and nothing else. Therefore, the arguments advanced by the assessee that the remuneration for marketing support services is more than 60% of the sale revenue of the AE is totally irrelevant because the ALP is a deemed price as, if the transaction between the two unrelated and uncontrolled parties. The price is compared in the contest of margin/profit of the assessee in relation to international transaction and not the share in the revenue of the AE. If net revenue of the AE is negative then the assessee would get no remuneration, which is however, irrelevant for the purpose of ALP determination. Thus, what is relevant is the margin/profit the assessee earned from international transaction and comparison of the same with the uncontrolled transactions.

20 Next issue relates to applicability of $\pm$ 5% variation from the arithmetic mean of the ALP.

21 The lower authorities denied the claim of the assessee on the ground that the amendment made in the said provision w.e..1.10.2009 is clarificatory and procedural in nature.

22 We have heard the ld AR of the assessee and ld DR and considered the relevant records available on record. Since the provisions has been amended and substituted by Finance Act 2009 w.e.f 1.10.2009; therefore, the legislature has specifically given the date from which the amendment has been effected; however, the same cannot be treated as clarificatory and procedural in nature being retrospective. The Hon'ble Supreme Court in the case of CIT vs Woodward Governor India P Ltd. reported in 312 ITR 254.

> *"Lastly, we are of the view that the amendment of section 43A by the Finance Act, 2002, with effect from April 1, 2oo3, is amendatory and not clarificatory. The amendment is in complete substitution of the section as it existed prior thereto. Under the un-amended section 43A adjustment to the actual cost took place on the happening of change in the rate of exchange whereas under the amended section 43A the adjustment in the actual cost is made on cash basis. This is indicated by the words "at the time of making payment". In other words, under the un-amended section 43A, "actual payment" was not a condition precedent for making necessary adjustment in the carrying cost of the fixed asset acquired in foreign currency, however, under the amended section 43A with effect from April 1, 23, such actual payment of the decreased/enhanced liability is made a condition precedent for making adjustment in the carrying amount of the fixed asset. This indicates a complete structural change brought about in section 43A, vide the Finance Act, 2002. Therefore, the amended section is amendatory and not clarificatory in nature."*

23 Respectfully following the decision of the Hon'ble Supreme Court cited supra and the decision of the Tribunal in the case of M/ Techimount ICB Pvt Ltd vs ACIT in ITA No.7098/Mum/ 2010 vide order dated 25.2.2011 where one of us (Judicial Member) is the party to the decision, we hold that the amendment in the second proviso to sec. 92C(iii) is not retrospective but is prospective from the day from which the amendment is effected i.e. 1.10.2009. The Tribunal in the said decision has held as under:

"*33. We have heard the rival submissions perused the orders of the lower authorities and the materials available on record. We find that this issue is covered by the decision of Sony India P Ltd (supra) relied on by the assessee wherein it has been held as under:*

> *"Circular no. 12 dt 23rd Aug 2001 does not help to solve the problem. The said circular was issued prior to introduction of the proviso. However, it is a settled law that when a proviso is introduced, the Courts have to look at the language in which the proviso is expressed. Only in cases of ambiguity, it is permitted to go beyond the language and consider the intention of the legislation. As far as the first limb of proviso is concerned, the same has general application. The controversy is relating to the second limb/portion of the proviso to sec. 92C(2) where "an option" is given to the taxpayer to take ALP which may vary from the arithmetic mean by an amount not exceeding 5% of such arithmetic mean. Hence again, there is no controversy that taxpayer can take ALP which is not exceeding 5 percent of the arithmetic mean. The 'option', as is clear from the language is to take ALP which is not in excess of 5 percent of the said mean. The word 'option' as per the Law Lexicon is synonymous with 'choice' or 'preference'. Therefore, it is the choice of the assessee to take ALP with a marginal benefit and not the arithmetical mean determined by the most appropriate method. There is nothing in the language to restrict the application of the provision only to marginal cases where price disclosed by the assessee does not exceed 5 percent of the arithmetic man. The ALP determined on application of most appropriate method is only an approximation and is not a scientific evaluation. Therefore, the legislature thought it proper to allow marginal benefit to cases who opt for such benefit. Both in the first as also in the second limb, implications of determination /ALP are the same except for the marginal benefit allowed to the assessee under the second limb. Hence, second limb is applicable even to cases where the taxpayer intends to challenge ALP taken as arithmetic mean and determined through the most appropriate method. Option is given to the assessee as in some cases, variation not exceeding 5 percent of arithmetic mean might not suit the assessee and, therefore, assessee in such cases should not be put to a prejudice. Otherwise, there is no difference between the first and the second limb of the provision as far as right of the assessee to challenge the determined price is concerned. The second limb only allows marginal relief to the assessee at his option to take ALP not exceeding 5 percent of the arithmetic mean. Therefore, benefit of the second limb of the proviso to s. 92C(2) is available to all assesses irrespective of the fact that price of international transaction disclosed by them exceeds the margin provided in the proviso. Development Consultants P Ltd d DCIT (2008) 115 TTJ (Kol) 577 –(208-TII-03-ITAT-KOL-TP) relied on."*

34 Respectfully following the aforesaid decision, these grounds of appeal are allowed. However, in the arm's length price, to be determined by the Assessing Officer, an adjustment is contemplated in the proviso, is to be made at the option of the assessee."

24 In view of the above discussion, we decide the issue in favour of the assessee.

25 Next objection is regarding levy of interest u/s 234B.

26 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. The ld AR has relied on the decision of the jurisdictional High Court in the case of Prime Securities Ltd in Income Tax Appeal no.711 of 2004 and the ld DR on the other hand has submitted that the interest u/s 234B is mandatory and consequential in nature; therefore, the same is levyable.

27 The jurisdictional High Court in the case of Prime Securities Ltd (supra) has held that the interest u/s 234B is not payable when the assessee has paid the advance tax on the estimated income in accordance with law that was in force at that point of time. The relevant portion of the said decision of the jurisdictional High Court in paras 7 to 9 read as under:

"Now, if in the light of these rival submissions the provisions of law are perused, it becomes clear that the appellant would not b liable to pay interest /s 234B of the Act. Section 234B, especially sub.sec. 1 thereof which is relevant for our purpose reads as under:

"234B(1) subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax u/s 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of sec 210 is less than ninety percent of the assessed tax, the assessee shall be liable to pay

simple interest at the rate of (one) percent for very month or part of a month comprised in the period from the 1st day of April next following such financial year (to the date of determination of total income under sub.sec (1) of section 143 (and where a regular assessment is made, to the date of such regular assessment, on an amount) equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.:

Perusal of the above provisions shows that liability to pay interest arises on failure of the assessee to pay advance tax u/s 208 or advance tax payable u/s 210 is paid less than 90%. Perusal of the provisions of sec 208 and 209 shows that for the purpose of payment of advance tax the assessee has to estimate his current income and then he has to calculate income tax on that income at the rate in force in the financial year. Thus, the amount of advance tax is to be decided by the assessee after estimating his current income and then applying law in force for deciding the amount of tax. It is an admitted position in the present case that the date on which the appellant paid the advance tax he had estimated his income and liability for payment f advance tax in accordance with law that was in force. Therefore, it is oblivious that there was no failure on the part of the appellant to pay advance tax in accordance with the provisions of sec 208and 209. So far as the judgment of the Supreme Court in the case of Ghaswaa is concerned, the Supreme Court was concerned with the powers of the Settlement Commissioner in granting waiver of interest and for that pur5psoe the Supreme Court considered the provisions of sections 234A, 234B and 234C. The Supreme Court in no uncertain terms held that the interest is compensatory in nature. The Court read the provisions of section234A, 234B and 234C as mandatory in character holding that after the amendment in the provisions in the Finance Act, 1987, that with the use of the expression "shall" therein the Legislature clearly indicated that its intention to make the collection of statutory interest mandatory. It is for this purpose that the court proceeded to decide that even the Settlement Commissioner who was vested with the vast power had no power to waive the interest payable under these provisions. Going by this interpretation of Sections 234A, 234B and 234C as given by the Constitution Bench of the Supreme Court, it is clear that the interest is payable in case the advance tax is not paid in consonance with the law in force at the time when the advance tax is paid and there is a default. Therefore, for charging interest u/s 234B committing of default in payment of advance tax is condition precedent. Perusal of the judgment of the Delhi High Court, which is relied on by the ld counsel appearing for the respondent, shows that in that case also the Delhi High Court has held that for charging of interest establishment of default in payment of advance tax is necessary. In the present case, it is nobody's case that the appellant at the time of payment of advance tax has committed any default or that payment of advance tax made by the appellant was not in consonance with law. The Division

Bench of this court in its judgment in the case of the appellant, referred to above, has held that the return filed by the appellant was in consonance with law and there was only a formal defect and the moment that defect was cured, the return related back to the original date. In our opinion, when the Supreme Court in Ghaswala's case says that charging of interest u/s 234B is mandatory, what it really means is that once the assessee is found liable to pay interest, then recovery of interest is mandatory and recovery of that interest cannot be waived for any reason. But for charging interest under that section, it has to be established that the assessee as committed default in payment of advance tax. In our opinion, as in the present case it is nobody's case that the appellant has committed default in payment of advance tax when he actually paid it, the appellant cannot be held liable to pay interest u/s 234B In so far as observations in the order of the Tribunal, that the appellant should have anticipated the events that took place in March, 1992, in our opinion, have no substance. In our opinion, it is rightly submitted that it was not possible for the appellant to anticipate the events that were to take place in the next financial year and pay advance tax on the basis of those anticipated events.

In the result, therefore, the present appeal succeeds and is allowed. It is held that in the facts and circumstances of the case the Tribunal was not justified in law in holding that the interest was payable u/s 234B."

28 Since there is no such change in the law which has resulted enhancement of the tax liability of the assessee which would not be in force at the time of payment of advance payment; therefore, the decision of the Hon'ble jurisdictional High Court (supra) relied upon by the assessee would not apply to the facts of the case of the assessee. Accordingly, we hold that the provisions of sec. 234B are mandatory and consequential in nature.

29 Ground no.8 regarding disallowance of bad debts written off of Rs. 91,28,790/-.

29.1 The assessee has written off the bad debts of Rs. 91,28,790/- which represents the commission charged to foreign associate enterprises of the assessee namely VSIL. The AO disallowed the claim of the assessee on the ground that the debts have not become bad. DRP has also confirmed the disallowance made by the AO by holding that no details and supporting evidence has been produced by the assessee with respect to this settlement effected between the assessee and the AE.

30 Before us, the ld AR of the assessee has submitted that the amount written off relates to the VSIL, an Associated Enterprise of the assessee, which was availing the services from the assessee for its product, against which the assessee has eared commission income. The said amount has been written off by the assessee because subsequently it was found that the excess commission was charged by the assessee to its AE. Thus, the ld AR of the assessee submitted that the claim of the assessee is allowable as business loss.

30.1 The ld AR of the assessee further pointed out that since the commission was already taken into account in the P&L account and offered for taxation in earlier year. Therefore, the assessee has otherwise fulfilled the conditions u/s 36(1)(vii) of the I T Act.

30.2 The ld DR on the other hand supported the orders of the authorities below.

31 We have considered the rival arguments of both the parties and perused the relevant material on record. The commission received has been offered by the assessee for taxation was subjected to the provisions of Chapter X and particularly sec 92 for computation of income from international transaction. Therefore, whether the assessee charged the excess commission or less is not relevant and material once the income is subjected to the provisions of Chapter X being related to the international transaction. If the claim of the assessee is allowed, it will defeat the very object and purpose of the provisions of Chapter X. It is irrelevant for the purposes of ALV for international transaction whether the actual price charged by the assessee in relation to the international transaction is less or excessive. The income from international transaction is computed having regard only to the ALP and nothing else. Thus, even if the income from commission received from the AE in relation to the international transaction turnout to be excess, if the same has been computed by applying the provisions of Chapter X, subsequent claim of bad debt or business loss would be against the very purpose and object of the provisions of Chapter X of the Act. Therefore, we hold that the claim of bad debt as claimed by the assessee in respect of the commission from AE subjected to the provisions Chapter X of the I T Act is not allowable. However, we clarify that, if the assessee has claimed the deduction of bad debts after the margins are arrived at on the basis of ALP then the disallowance of the claim is justified. Therefore, the Assessing Officer has to verify and consider whether the margins are determined on the basis of ALP after disallowance of bad debts then no addition can be made on this account.

32 Ground no.10 is regarding disallowance of professional tax.

33 At the time of hearing, the ld AR of the assessee stated that due to smallness of the amount, the assessee does not press this ground and the same may be dismissed as not pressed. The ld DR has no objection, if the ground is dismissed as not pressed.

34 In view of the submission of both the parties, we dismiss the ground as not pressed.

35 Ground no.11 regarding disallowance of sundry balances written off of Rs,.5,33,241/-

36 The assessee has written off a sum of Rs. 8,90,198/- and debited to P&L account. The assessee has submitted before the AO that out of this written off amount of Rs. 8,90,198/- Rs. 3,52,090 has been written off in respect of the compensation paid by the assessee to Wipro Infotech Bangalore due to the services provided by the assessee which were found unsatisfactory and the assessee could not review the defect. The balance amount of Rs. 5,33,241/- represents the difference in closing balance of partywise balances in the books of account because earlier years as due against VSIL. The assessee explained before the AO that the obligation is payable to the creditors on reconciliation of the balance was accepted by the assessee during the year 2006-07 and adjusted in the balance payable to the parties' account therefore, sundry balance has been written off. Since it was accepted obligation due to some omission or error in the balance payable and so to the said expenses as deduction under the Act. DRP allowed the claim of the assessee with respect to Wipro amounting to Rs. 3,52,090/-. However, the balance claim of Rs. 5,33,241/- relates to VSIL was found in the nature of prior period expenses and disallowance was accordingly confirmed.

37 Before us, the ld AR has submitted that the sundry amounting written off by the assessee is based on the adjustment of closing balance with respect to the VSIL which is an obligation accepted by the assessee during the FY 2005-06 and therefore, cannot be treated as prior period expenses. He relied on the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement & Chemical Industries Ltd vs CIT reported in 213 ITR 523.

37.1 The ld DR on the other hand relied on the orders of the authorities below.

38 We have considered the rival submissions made by both the parties and perused the relevant material available on record. We have already discussed the issue of bad debts in respect of commission income from AE of the assessee in relation to international transaction. This claim of the assessee is also pertains to the international transaction and it seems that the same has already been subjected to the provisions of Chapter X of I T Act. In view of our findings on the issue of bad debts, this claim is also disallowed,

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

Order pronounced on this day of 31st May 2011

Sd/	Sd/-
(J SUDHAKAR REDDY)	(VIJAY PAL RAO)
(Accountant Member)	(Judicial Member)

Mumbai,
Dated 31st May 2011

Raj

Copy to:
1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals)- , Mumbai
4. Commissioner of Income Tax, City- , Mumbai
5. Departmental Representative, Bench 'E', Mumbai

//TRUE COPY// BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI