

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH 'H' BENCH

**BEFORE SHRI B.R.MITTAL(JUDICIAL MEMBER) AND
SHRI RAJENDRA (ACCOUNTANT MEMBER)**

ITA No.3333 & 3334/Mum/2010
Assessment Years: 2004 -05 & 2005-06

ACIT, 8(1), Mumbai.	Vs.	M/s. Genesys International Corporation Ltd., 73-A, SDF-III, SEEPZ, Andheri(E), Mumbai-096 PA No.AAACA 4528 L
(Appellant)		(Respondent)

ITA No.2972/Mum/2010
Assessment Year: 2005-06

M/s. Genesys International Corporation Ltd., 73-A, SDF-III, SEEPZ, Andheri(E), Mumbai-096 PA No.AAACA 4528 L	Vs.	ACIT, 8(1), Mumbai.
(Appellant)		(Respondent)

Assessee by : Shri J.D.Mistry & Satish Mody
Revenue by: Shri Ajit Kumar Jain & Shri Pavan Ved

Date of hearing: 17.7.2012
Date of pronouncement: 31.8.2012

ORDER

Per B.R.Mittal, JM:

These appeals filed by the department for assessment year 2004-05 and 2005-06 being I.T.A. No.3333/M/2010 relates to assessment year 2004-05 and cross appeals being I.T.A. No.3334/Mum/2010 filed by department and appeal being I.T.A. No.2972/M/2010 filed by assessee relate to assessment year 2005-06 are heard together and are being disposed of by this consolidated order for the sake of convenience and brevity.

2. Firstly, we take up the appeal of department for assessment year 2004-05 being I.T.A. No.3333/M/2010 disputing the order of Id CIT(A) to delete the addition of Rs.66,75,078 made by the Assessing Officer on account of adjustment made by the TOP/AO under section 92CA of the Act with regard to computation of Arms Length Price in respect of international transactions entered with Associated Enterprises.

3. The relevant facts are that assessee is a wholly own subsidiary of Genesys Enterprises Inc. It provides Onsite IT Consultancy Services as well as GIS. Its non trading branch office located at Denver in USA is engaged in marketing activities for its head office. Genesys India has production facilities in Denver (Aerial film Scanning/Image processing), Bangalore (photogrammetry/Remote Sensign) and Mumbai (AMFM/GIS Mapping, IT). Broadly the services provided are as under:

- i) IT Solutions. It provides technical solutions client needs like solutions for improving profitability enhanced customer relationship and running the business efficiently. It provides application development, implementation services and technical support in client/server and web based environment.
- ii) Geospatial Services. It offers deptch and breath of expertise in Photogrammetry, Remote sensing, Data Conversion, and IT programming consulting.

4. The assessee filed its return of income declaring total loss of Rs.2,92,83,328. The AO made a reference under section 92CA(1)of the Act for computation of Arms Length Price (ALP) in relation to the international transactions.

5. Assessee filed requisite details to the Transfer Pricing Officer (TPO) in respect of its international transactions which are summarized by the TPO in para 3 of his order as under:

R.No.	Nature of transaction	Amount (in Rs.)	Method used
1.	Technical services rendered	5,87,85,108	TNMM
2.	Scanning service availed of	53,76,310	TNMM
	Total:	6,41,61,418	

6. TPO accepted the transactions pertaining to payment for offering scanning services and not picked up for adjustment. However, in respect of technical services rendered, TPO stated that assessee has bench marked its transaction on TNMM method. The assessee has given its comparables in its TP report which is reproduced by the TPO in para 4 as under:

Company	Operating Margin Ratio (%)		
	2002	2003	2004
Ace Software Exports Ltd.	14.31	8.53	-0.69
Central Mine Planning & Design Institute Ltd.	2.48	0.91	-
FI Sofex Ltd	2.49	-41.04	-
Nucleus Netsoft and GIS India Ltd	-12.42	- 20.00	14.43
Orpine Systems Ltd.	17.13	-	-
Scanpoint Graphics Ltd	-17.22	-32.98	5.76
Zigma Software Ltd	14.21	0.47	14.14
Grand Average	-	-	2.91
Genesys India	-	-	9.64

6.1. The assessee submitted before TPO that the application of the most appropriate arm's length methodology supports the pricing of assessee's international transactions. However, TPO stated that assessee has taken three year's average which is not allowable under Indian TP Regulations. TPO stated that no data was available for the financial year 2003-04 for CMPDI, FISOFEX, ORPINE Systems Ltd. Besides, FI Sofex Ltd., has gone bust. The assessee company is eating into its assets and hardly has any business. Therefore, its results were rejected as extreme outlier case.

6.11. TPO has further stated that Scan Point Graphics Ltd., was rejected because it is primarily into business of advertising, publishing, printing and packaging. It also does digital printing for outdoor displays. Moreover, its results were extreme outline.

6.111. However, TPO selected WTI Advanced Technology Ltd as comparables but assessee rejected the selection of TPO on the ground that no AEs transaction was evident from the Capitaline Software. TPO selected fresh list of comparable based on one year average i.e. F.Y. 2003-04 and arrived at average margin of 13.3% as against assessee's margin of Arms Length Price of 8.85%, details of which are given in para 4.3

of TPO's order. Accordingly, TPO made an adjustment of Rs.66,75,078 as per calculation made in para 4.4 of his order.

6.iv Consequently, AO while passing the assessment order made adjustment of an amount of Rs.66,75,078 to the total income of the assessee. Being aggrieved, assessee filed appeal before the first appellate authority.

7. On behalf of assessee, it was contended that assessee has in actual practice followed CUP method in arriving at ALP even though it had in its return of income filed as well as in its submissions made before the TPO stated that it followed TNMM method. It was contended that assessee during the period 1.4.2003 to 31.3.2004, provided services to its AEs in USA and UK and similar services were provided to third parties in the same geographical region. It was contended that for determining the arm's length charge received from AE, assessee had documented the rates charged to its AE as well the rates charged to independent third parties operating in the same geographic region and availing similar services. Assessee submitted copies of certain invoices and the comparable chart of rates charged to AE and Non-AE, which is tabulated and reproduced by Id CIT(A) in para 7.8 and relevant tables are as under:

A.Y. 2004-05

DETAILS OF COMPARATIVE SERVICES & RATES

Sr.No.	Invoice date	Types of services	Rate charged per unit (in USD)			
			AE		NON -AE	
			UK	US	UK	US
1.	31.7.03	Tax Parcel updates		0.8		
2.	31.8.03	Tax Parcel updates		0.8		
3.	30.9.03	Tax Parcel updates		0.8		
4.	31.10.03	Tax Parcel updates		0.8		
5.	31.11.03	Tax Parcel updates		0.8		
6.	31.12.03	Tax Parcel updates		0.8		0.81
7.	31.7.03	Tax Parcel updates				0.09
8.	30.9.03	Tax Parcel updates				0.75
9.	30.9.03	Tax Parcel updates				0.85
10.	31.10.03	Tax Parcel updates				0.85
11.	31.10.03	Tax Parcel updates				0.65

12.	31.10.03	Tax Parcel updates				0.65
13.	31.10.03	Tax Parcel updates				0.75
14.	30.11.03	Tax Parcel updates				0.10
15.	31.12.03	Tax Parcel updates				0.65
16.	31.12.03	Tax Parcel updates				0.40
17.	31.12.03	Tax Parcel updates				0.90
18.	31.12.03	Tax Parcel updates				0.75
19.	31.1.04	Tax parcel updates				0.90
20.	31.7.03	Maps		9.52		
21.	31.8.03	Maps		9.52		
22.	31.10.03	Maps		9.52		
23.	30.11.03	Maps		9.52		
24.	31.1.04	Maps		9.52		
25.	30.9.03	Maps				6.25
26.	31.10.03	Maps				6.00
27.	31.10.03	Maps				6.25
28.	30.11.03	Maps				6.25
29.	30.11.03	Maps				4.65
30.	30.11.03	Maps				6.00
31.	31.12.03	Maps				6.25
32.	31.12.03	Maps				4.65
33.	31.1.04	Maps				6.25
34.	29.2.04	Maps				6.25
35.	31.3.04	Maps				6.25

IT SERVICES:

Sales made to:	<u>Subsidiary</u>		Third party
	<u>US</u>	<u>UK</u>	
Normal projects	9,410,635	0	14,262.463
Total IT sales invoiced (incl.exchange gain/loss)	9,410,635	0	14,262,463
Production hours			
Total hours	12,066	0	19,462

Total No. of production hours	12,066	0	19,462
Avg.rate/hr-Rs.	780	0	733
Avg.rate/hr-\$	\$16.96	\$0.00	\$15.994

8. It was contended that assessee has not charged its AEs a rate less than that it charged to a third party for similar work type & size and more importantly in the same region. It was submitted that TPO has also not given any instance in his order where the assessee has charged its AEs a rate less than the market rate. It was also contended that assessee is carrying out same business transaction and in subsequent year, it has bench marked its transactions by adopting CUP method and same was accepted by the TPO in respect of technical services rendered by the assessee. Relying on the decision of ITAT in the case of ACIT vs. MSS India Pvt Ltd., 25 DTR 19, it was submitted that TNMM method is to be treated as a method of last resort and is to be pressed into service only when the "Standard method" which are also termed as "traditional methods" (i.e. CUP method, Resale method, cost plus method) cannot be reasonably applied. It was contended that assessee's AEs are in USA and UK and the Third Party too is in the same geographical region and, therefore, application of CUP method squarely fits in the case of the assessee. However, TPO has arrived at ALP of international transaction and services to AEs by just adding the difference in the profit margin on totality basis to the total value of services to AEs. He has failed in understanding the fact that assessee company's total service income is not to AEs only but assessee has transactions with the third party and same is approximately 71.19%(wrongly stated 78% of total turnover of the assessee company. Thus, the difference if any in the profit margin between comparable companies and the assessee company should be apportioned between AE & Non-AE transactions.

9. Without prejudice to above, it was also contended that TPO failed to apply the proviso to section 92C(2) of the Act. He determined ALP average margin of 13.3% on the cost as against 8.85% determined by the AO and, therefore, the difference between ALP as adopted by the assessee and the arithmetical mean as determined by TPO is less than 5% range. Hence, no adjustment is required to be made.

10. Ld CIT (A) considered the submissions of assessee. Ld CIT(A) has held that it is a fact that assessee has in actual practice adopted CUP method to benchmark its related

party transactions and demonstrate its Arms Length Price. However, at the time of TP Audit before the TPO, it needlessly tried to make out a case that the prices charged by it to AE's are justifiable under the TNMM method. Ld CIT(A) relying on the decision of ITAT in the case of ACIT Vs. MSS India Pvt. Ltd (supra) held that AO/TPO has not made out any case let alone a proper case for disregarding the CUP method which was adopted by the assessee. Ld CIT(A) has stated that the OECD guidelines also tend to put more emphasis on comparison of conditions or facts and circumstances obtained in comparable uncontrolled transaction and not the outcome or the financial results. If an entity is unable to earn adequate profits on account of legitimate business exigencies and not due to manipulation of transaction by the AEs then such an entity cannot be penalized. Ld CIT(A) has stated that assessee has demonstrated that the losses are due to start up in the Pune Unit which is in nascent stage with large idle capacity. Moreover, there are no transactions with AEs from Pune Unit of the assessee which could have raised doubts or suspicion manipulation of price with the AEs. Ld CIT(A) has held that the ALP demonstrated by the assessee does not require any adjustment. Besides above, Ld CIT(A) has stated that average margin of 13.30% determined by the TPO on the entire cost incurred by the assessee which includes cost of transactions with Non-AEs as well. The AO ought to have confined himself to applying it on cost incurred on transactions with AEs and excluded the cost incurred on transaction with Non-AEs. Further, Ld CIT(A) has also accepted the contention of the assessee that the difference between the average margin of assessee as declared at 8.85% on cost as per TPO and average margin as determined by TPO at 13.30% on cost is within 5% range of ALP. Hence, ALP as adopted by the assessee should not be disturbed.

11. In view of above, Ld CIT(A) deleted the adjustment of Rs.66,75,078 made by the AO as per TPO's order. Hence, this appeal by the department.

12. Ld D.R. submitted that assessee itself marked its transactions on TNMM in the report to TPO. He submitted that the dispute relates to only technical services rendered by the assessee and adjustment has been made by TPO in regard thereto. Ld D.R. submitted that 8 comparables selected by the assessee give margin of 9.64% but TPO accepted 4 comparables and rejecting remaining comparables on account of non-availability of data. He submitted that TPO added one of party namely WTI Advanced Technology Ltd, and also accepted four comparables selected by the assessee and arrived at mean profit at 13.8% as against 8.85% arrived at by the assessee. He

submitted that the adjustment suggested by TPO and consequently addition made by the AO is in accordance with the provisions of the Act and same should be confirmed.

13. Ld A.R. without going into other aspects of the orders of authorities below submitted that even if comparables as selected by TPO are accepted, the arm's length margin determined by him comes to 13.30% as against margin of 8.85% of the assessee. He submitted that as per proviso to section 92C(2) of the Act, no adjustment is required to be made if the transaction mean does not exceed 5%. He submitted that if said plea of the assessee is accepted, other issues involved remain academic and need not to be considered . Ld. D.R. did not dispute to above submission of the assessee.

14. We have considered submissions of Id representatives of parties and orders of authorities below. Proviso to Section 92C(2) as applicable to assessment year 2004-05 reads as under:

"Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five percent of such arithmetical mean."

15. We observe that assessee has worked out its margin of 8.85% and TPO has worked out the margin at 13.30%, and as is evident from the proviso to Section 92C(2) of the Act that if the variation between the ALP and the actual transaction price does not exceed 5% of the latter , the transaction price is to be accepted and no adjustment is required to be made. Since the difference in the Arm's length margin as determined by the TPO and the actual transaction price does not exceed five percent, we hold that no adjustment is required to be made as it is within 5% range of ALP. Therefore, order of Id CIT(A) to delete the said adjustment is to be confirmed on this very ground and, accordingly, we do not go into other aspects as rest of the issues become academic. Hence, we uphold the order of Id CIT(A) and reject grounds of appeal taken by department.

16. Now, we take up appeal filed by department for assessment year 2005-06 being **I.T.A. No.3334/M/2010.**

17. The department in its appeal has disputed the order of Id CIT(A) to delete the addition of Rs.4,66,29,104 made on account of adjustment made by the AO/TPO under section 92CA of the Act.

18. The assessee filed return of income for assessment year 2005-06 declaring loss of Rs.86,39,503. The AO made reference to TPO u/s.92CA(1) of the Act. In response to notice issued u/s.92CA(2) of the Act, assessee submitted details of international transactions with AEs during the relevant financial year 2004-05 as under:

Sr.No.	Nature of transaction	Amount(in Rs.)	Method used
1.	Technical services rendered	3,71,02,131	TNMM
2.	Scanning services availed	2,99,065	TNMM
3.	Reimbursement of expenses	1,36,04,860	TNMM
	Total	5,10,06,056	

19. Assessee filed a transfer pricing report benchmarking its international transactions. It is relevant to state that TPO has stated that there have been no transactions in IT services segment and only segmental data for GIS segment shall be considered for bench marking. For benchmarking its transactions in respect of GIS services, assessee has considered comparable uncontrolled price (CUP) method as the most appropriate method. Assessee has bench marked its transactions on the basis of the per hour charge received by it from unrelated parties and charged received from associated parties for similar transactions. Assessee also considered TNMM as the most appropriate method to supplement its bench marking of CUP method. Assessee submitted the rates charged by it from their AEs vis-a-vis rates charged to independent third parties operating in the same geographical region and availing similar services, details of which are given by TPO in para 5.1 of his order as under:

Sales invoiced on	Subsidiary		Third party
	US	UK	
Normal projects	32,792,705	-	119,013,535
Engg			618,500
ASL	-	2,194,951	-
Total GIS sales invoiced	32,792,705	2,194,951	119,632,035
Production hours			
Seepz	70,962	-	277,745
Engg			1,600
Bangalore	8,841	4,528	97,802
Total No. of Prod Hrs	79,803	4,528	377,147
Avg Rate / Hr - Rs	411	485	317
Avg Rate / Hr - \$	\$ 9.13	\$ 10.77	\$ 7.05

19(i). TPO has stated that on perusal of above table, it is observed that ASL services have not been rendered to any third parties and, therefore, no CUP is available in respect their of. He has further stated that as far as the normal projects are concerned, assessee has not explained whether third parties belong to the USA or some other geographical location. Further, assessee has benchmarked the man hour rate and not the services as such. It has not been able to illustrate as to how the services are rendered to all the parties were exactly the same. A CUP analysis cannot be made on averages. TPO stated that an activity employs a number of persons of different rank. The hourly rate of a senior executive/a senior technician may be much higher than that of a junior clerk/worker. Therefore, for proper cup analysis you need to match such activities where the proportion of the services rendered by similar ranked people are matching. An average hourly rate mixing the higher and the lower rates cannot justify the bench marking under CUP.

19(ii). For benchmarking under TNMM method, assessee has taken the following comparables:

- Ace Software Exports Ltd
- Central Mine Planning and Design Institute Ltd.
- Nucleus Netsoft and GIS India Ltd.
- Scan Point Graphics Ltd and
- Zigma Software Ltd.

19(iii). However, TPO has not accepted said comparables and stated that on perusal of PLI, it is observed that assessee has taken multiple year data for working the PLI. The only contemporaneous data, i.e. data relating to 2004-05 should have been considered. Previous year data can be considered only if they have been used as a basis for price fixation at the time of giving the quotation, which is not the case of the assessee. TPO has also stated that assessee has considered the comparison on an entity basis although it has not rendered any services to its AEs under the ITES segment. TPO stated that benchmarking has not been in accordance with the provisions of section 92C(1) of the Act. TPO selected the following companies as comparables and arrived at the margin of 28.17% as against loss of 0.19% given by the assessee, are as under:

COMPANY	Sales	Op.Cost	Op.Profit	Op/Sales	Op/OpCost
N I I T Gis Ltd.	47.9	30.87	17.03	35.55	55.17
Central Mine Planning & Design Institute Ltd.	151.97	149.19	2.78	1.83	1.86
W T I Advanced Technology Ltd.	11.64	9.13	2.51	21.56	27.49
TOTAL				58.95	84.52
AVERAGE				19.65	28.17

8. The segmental results of the assessee are as under:

	GIS	ITES	TOTAL
REVENUE	164,060,835	11,948,716	176,009,551
PBIT	-317,224	-2,647,354	-2,964,578
COST	164,378,059	14,596,070	178,974,129
Op/Sales	-0.19	-22.16	-1.68
Op/OpCost	-0.19	-18.14	-1.66

9. Considering that the majority of internal transactions are by way of rendering of services and it is the income part that requires benchmarking, OP/ Cost is taken to be the Profit Level Indicator. Since the PLI of assessee is lower than that of comparables, and adjustment will be made as under:

REVENUE		164,060,835		210,689,939	
AE	37,102,131		83,731,235		46,629,104
NON-AE	126,958,704		126,958,704		
COST		164,378,059		164,378,059	
OPERATING PROFIT		-317,224		46,311,880	
OP/TC		-0.19		28.17	

19(iv). In view of above, TPO considered adjustment of Rs.4,66,29,104, and stated that it is outside the 5% safe harbour. Accordingly, AO made the said addition to the income of the assessee. Being aggrieved, assessee filed appeal before Id CIT(A).

20. On behalf of assessee it was contended that TPO was not justified in not considering CUP method adopted by the assessee and instead wrongly used TNMM for bench marking the transactions with AEs. It was contended that assessee provided services to its AEs in USA and UK and similar services were provided to Third Parties in the same geographical region. The assessee for determining arm's length charge received from AEs, documented the rates charged to its AEs as well as the rate charged to independent Third Parties operating in the same geographical region and availing similar services. Assessee submitted certain invoices to substantiate its above submission, which are tabulated by Id CIT(A) at page 5 of the impugned order as under:

A.Y. 2005-06						
DETAILS OF COMPARATIVE SERVICES & RATES						
Sr.No.	Invoice Date	Type of Services	Rate charged per unit (in USD)			
			AE		NON-AE	
			UK	USA	UK	USA
1	30-Jun-04	Maps		\$9.52		
2	31-Jul-04	Maps		\$9.52		
3	31-Aug-04	Maps		\$9.52		
4	30-Sep-04	Maps		\$9.52		
5	30-Apr-04	Maps				\$2.50
6	30-Apr-04	Maps				\$4.65
7	31-May-04	Maps				\$8.00
8	31-May-04	Maps				\$8.00
9	31-Oct-04	Maps				\$6.25
10	19-Aug-04	Image rectification, Mosalcing	\$30.00			
11	9-Sep-04	Image rectification, Mosalcing	\$30.00			
12	21-Jun-04	Image rectification, Mosaicing			\$25.00	
13	14-Sep-04	Image rectification, Mosaicing			€ 25.00	

The Appellant also submitted the summarized chart of the average rates charged to AE and Non-AE during the year as reproduced below:

A.Y. 2005-06

Sales invoiced on	Subsidiary		Third party
	US	UK	
Normal projects	32,792,705	-	119,013,535
Engg			618,500
ASL	-	2,194,951	-
Total GIS sales invoiced	32,792,705	2,194,951	119,632,035
Production hours			
Seepz	70,962	-	277,745
Engg			1,600
Bangalore	8,841	4,528	97,802
Total No. of Prod Hrs	79,803	4,528	377,147
Avg Rate / Hr – Rs	411	485	317
Avg Rate / Hr - \$	\$ 9.13	\$ 10.77	\$ 7.05

* Exchange rate assumed at 1USD = INR 45.2

20(i). It was contended that it could be seen from above table that assessee has not charged its AEs a rate lesser than what it has charged to a third party for similar work type & size and more importantly in the same region. It was contended that the losses were only due to Pune Unit where there are no transactions with AEs. It was also contended that TPO has not given any instance where the assessee has charged its AE a rate less than the market rate.

21. Ld CIT(A) considered above submissions of assessee and stated that assessee has adopted CUP method to benchmark its related party transactions and demonstrate its ALP while the AO has not made any effort to demonstrate that the companies which have been taken for comparison purposes are in fact comparable. Ld CIT(A) relying on the decision of ITAT in the case of MSS India Pvt Ltd (supra) held that on a conceptual note the TNMM method is to be treated as a method of last resort and is to be pressed into service only when the "standard methods" which are also termed as "traditional methods" (i.e. CUP method, Resale price Method, Cost Plus method) cannot be

reasonably applied. It is relevant to reproduce para 8.2 of order of Id CIT(A) which reads as under:

"8.2. In the case of "ACIT Vs. MSS India Pvt. Ltd." reported in 25 DTR (19)' the Hon'ble ITAT has held that on a conceptual note the TNMM method is to be treated as a method of last resort and is to be pressed into service only when the "standard methods" which are also termed as "traditional methods" (i.e CUP method, Resale Price method, Cost Plus method) cannot¹ be reasonably applied. The Bench has further held that in a situation in which the Assessee has followed one of the standard methods of determining ALP, such a method cannot be discarded in preference over transactional profit methods (i.e TNMM and Profit Split method) unless the revenue authorities are able to demonstrate the fallacies in application of standard methods. In any event any preference of one method over the other method must be justified by the TPO on the basis of cogent material sound reasoning. The Hon'ble ITAT has observed that the only factor which has prevailed on the TPO in rejecting the method adopted, or canvassed, by the Assessee is the fact that the Assessee has incurred loss in the relevant previous year, but, such a consideration is wholly irrelevant. The Hon'ble ITAT has also observed that the ultimate profit or Loss of the Assessee is not a relevant factor in this exercise. Unlike in a Transaction / profit method, in which the basis of determination of ALP is comparability of the profit margin on independent transactions, the basis of determination of ALP in a traditional or standard method is the Price of the product or the Mark up over costs of sales in independent transactions. Whether or not the additional costs are to be passed on to the AE is a business decision, which may or may not be relevant in an ALP determination on the basis of Transactional profit methods, but when traditional methods of ALP determination are being pressed into service, such considerations are wholly irrelevant."

22. Ld CIT(A) has further stated that assessee's AE's are in UK & USA and the third party too is in the same geographical region. Since the nature of services are also the same, there is a strong and viable case for CUP method as adopted by the assessee. He has stated that average hourly rate billing in Dollars is a standard practice in IT industry. In view of above, Id CIT(A) stated that AO/TPO has not made out any case let alone a proper case for disregarding the CUP method as adopted by the assessee. Ld CIT(A) also considered OECD guidelines and, accordingly, held that ALP as demonstrated by the assessee does not require any adjustment. Ld CIT(A) has further stated that ALP of international transaction of services to AEs has been arrived at by TPO by just adding the difference in the profit margin (on totality basis) to the total value of services to AEs without considering the fact that total service income is not to AEs and assessee has transactions with third parties is approximately 71.83% of the total turnover of the assessee.

23. Hence, Id CIT(A) deleted the adjustment made by the AO. Being aggrieved, department is in appeal before the Tribunal.

24. During the course of hearing, Id D.R. while supporting the order of TPO submitted that assessee has not shown whether third party with whom assessee has transactions are in the same region or not. It is also not established that the services rendered are same or not. Ld D.R. relying on the OECD guidelines submitted that ALP may vary across different markets even for transactions involving the same property or services. He submitted that to apply CUP method & to achieve comparability, it requires that market in which independent and AEs operate should not have any difference. Ld D.R. submitted that the economic circumstances are necessary to be considered to determine the market comparability and same include geographical location, size of the markets, extent of competition in the markets. He submitted that all the relevant facts is a factual question. Ld D.R. submitted that Id CIT(A) has merely applied the decision of ITAT in the case of MSS India Pvt Ltd (supra) to follow CUP method without considering as to whether the market in which assessee had transactions with the Third party are in the same region or not. He submitted that assessee provided services in other region apart from UK and USA, which Id CIT(A) failed to consider. Ld D.R. also referred the decision of ITAT in the case of M/s. Intervet India Pvt Ltd vs. ACIT, 2010-TII-12-ITAT-MUM-TP and also the decision of ITAT in the case of ACIT vs. Dufon Laboratories, 2010-TII-26-ITAT-MUM-TP and submitted that while applying CUP method, adjustment relating to economic and market condition in different geographical locations have to be made because the geographical situation effects/influence the transfer pricing. Ld D.R. submitted that the matter requires to be reconsidered by the TPO and, therefore, the matter be restored to him for his fresh consideration.

25. Ld A.R. supported the order of Id CIT(A) and submitted that TPO while making the ALP adjustment, added the difference in the profit margin on totality basis to the total value of services of AEs and failed to consider that assessee's total service income is not to AEs only. That assessee has transactions with Third Party which is approximately 71% of total turnover of the assessee. He further referred to para 9 of the order of Id CIT(A) and submitted that Id CIT(A) has accepted CUP method as adopted by the assessee and stated that other issues become academic. Ld A.R. referred page 5 of the order of Id CIT(A) and submitted that nature of services rendered by assessee to AEs as well as to Non-AEs were of similar nature in the same

geographical region. He submitted that assessee also stated before TPO as well as before Id CIT(A) that it rendered similar kind of work and charging to AEs are at a higher rate than what it charged to third party for similar services. He referred page 9 of PB and submitted that assessee made a detailed working of the nature of transaction rendered and the rate charged and the same were furnished to the TPO. However, TPO without disputing the facts stated before him rejected the most appropriate method i.e. CUP and applied TNMM. Id A.R. submitted that the order of Id CIT(A) is correct and the same should be confirmed.

26. We have considered submissions of Id representatives of parties and orders of authorities below. We observe that assessee in its transfer pricing study to TPO stated that it has selected CUP method as the primary method in AL analysis. It was also stated that the rate charged to its AEs are same to the rates charged to independent third party who operate in the same geographical region availing similar services. We observe that assessee furnished details of the said working to the TPO. Moreover, Id CIT(A) has also tabulated in para 7.8 at page 5 of the impugned order the details of comparable services and rates charged by the assessee from its AEs and Non-AEs in the relevant financial year. The details of which we have also reproduced hereinabove in para 20. We observe that assessee charged higher rate from its AEs than what it charged from third party. The department has also not brought any evidence on record to controvert the submissions of assessee that the services rendered to the AEs and third parties are of similar type and operate in the same geographical region. Id D.R. contended that while working out the ALP, the geographic market is one of the economic circumstances that has to be considered while considering comparability. In this regard, Id D.R. also placed the decision of ITAT in the case of M/s. Intervet India Pvt Ltd vs. ACIT and also the decision of ITAT in the case of ACIT vs. Dufon Laboratories (supra). We agree with Id D.R. that the geographical consideration have to be kept in mind while considering the rates and to determine the ALP while applying CUP method. We observe that in the case before us, assessee has submitted before the TPO as well as before the authorities below that AEs as well as third party are located in the same region and availing similar services and the department has not brought any evidence on record to controvert the same contention of assessee. Therefore, above contention of Id D.R. support the case of the assessee. Hence, Id D.R. has no merit to find fault with the order of Id CIT(A) that CUP method as adopted by the assessee is not justifiable. In view of above facts, we hold that Id CIT(A) has rightly held that AO/TPO

has not brought out a case for making any adjustment on account of ALP. Therefore, we uphold the order of Id CIT(A) and reject grounds of appeal taken by department.

27. Now we take up appeal filed by assessee being I.T.A. No.2972/M/2010 for assessment year 2005-06.

28. The assessee has disputed the order of Id CIT(A) on following two grounds:

"1. The Id CIT(A) has erred in confirming Id AO's order of not allowing the appellant company to set off the loss of Rs.1,01,69,294 from one of the 10A unit against the taxable profits from the other 10A units and non 10A unit.

2. Ld CIT(A) has erred in confirming AO's order of not allowing the appellant company to adjust the brought forward loss/unabsorbed depreciation of Rs.1,89,43,596 from preceding year against the taxable profits of current year."

29. In respect of Ground No.1 of appeal, relevant facts are that assessee has three units/undertakings at Mumbai, Bangalore and Pune, all of which qualifies for deduction u/s.10A as separate undertakings. The assessee has profit from Mumbai and Bangalore Units and loss from Pune Units. The assessee set off the loss incurred in the Pune Unit from the income after deduction u/s.10A of Mumbai and Bangalore Units as well as its income from other sources. AO stated that the incomes to the extent exempt are not included in the total income of the assessee for computation of total income. Since the income of a unit eligible for deduction u/s.10A of the Act does not form part of total income and also considering the decision of Hon'ble Madras High Court in the case of S.S. Thyagarajan, 129 ITR 115(Mad) held that the loss incurred by the assessee from a source of income which is exempt, cannot be set off against the income from other units and income from other sources. Accordingly, the loss of Pune Unit of Rs.1,01,69,294 claimed by the assessee was not allowed to adjust against the profits derived from other units and also against any other sources of income. Being aggrieved, assessee filed appeal before the first appellate authority.

30. Ld CIT(A) confirmed the action of AO vide para 12 of the impugned order, which reads as under:

"12) I have perused the assessment order and the written submission of the appellant. The AO has addressed this issue at length in its order between pages 2 to 12 of the order. He has also taken into account the history of the legislation so far it applies to Section. 10A as well as rules of interpretation. The appellant has wrongly set off the loss incurred in the Pune unit from the surplus income

after deduction u/s. 10A from the Mumbai and Bangalore units as well as income from other sources against the scheme of the Act.

12 .1 The provisions of section 10A are placed under Chapter III which only relates to :-

- a) Income which do not, form part of total income.
- (b) The word 'such 'refer to the profits and against of the undertaking which is engaged in the export of articles or things or computer software
- (c) The word 'an' which qualifies the word 'undertaking' means that it refers to a single undertaking.
- (d) The provision of section 10A do not form part of the sections mentioned in section 29. "

31. Hence, assessee is in further appeal before the Tribunal.

32. Ld A.R. submitted that the provisions of section 10A provides deduction and not exemption particularly after the amendment to section 10A(6) by Finance Act, 2003 with retrospective effect from A.Y. 2002-03. He submitted that assessee is entitled to set off the loss incurred by Pune Unit against the profits after claiming deduction u/s.10A of its Mumbai and Bangalore Units as well as its income from other sources as per provisions of section 70 to 74, while computing its taxable income. Id A.R. submitted that similar issue has been considered by Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd vs DCIT, 325 ITR 102(Bom) which was followed by ITAT Pune in the case of Patni Computer Systems Ltd vs DCIT, 60 DTR 113 (Pune). He further submitted that Hon'ble Bombay High Court again considered the similar issue in the context of Section 10A by its order dated 9.4.2012, (copy filed and is placed on record) in an appeal filed by department being Income tax Appeal Lodging No.1237 of 2011 in the case of CIT vs. Black & Veatch Consulting Pvt Ltd.

32. On the other hand, Id D.R. supported the orders of authorities below and submitted that section 10A after the amendment by Finance Act 2003, talks of deduction but AO has rightly interpreted it as exemption provision. Further, deduction allowed under section 10A is not 100% of the eligible unit. He submitted that all unit is an independent undertaking and, therefore, the loss of eligible undertaking whose income

is exempt cannot be set off against the taxable income. He submitted that order of Id CIT(A) be confirmed.

33. We have considered submissions of Id representatives of parties and orders of authorities below. We observe that the issue involved is squarely covered by the decision of Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd (supra), which was decided in the context of section 10B of the Act. In the said case, assessee had four units which were eligible for deduction u/s.10B of the Act. Three units had returned a profit during the course of assessment year, while the Crab Stick Unit had returned a loss. It was held that assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth Unit could be set off against the normal business income. The Pune Bench of ITAT in the case of Patni Computer Systems Ltd (supra) by following the decision of Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd (supra) has held that while computing the income, assessee was entitled to set off of loss sustained by section 10A eligible unit against the normal business income. We also observe that Hon'ble Jurisdictional High Court recently by its order dated 9.4.2012 (supra) while considering the issue as to whether the brought forward unabsorbed depreciation and losses of the unit the income which is not eligible for deduction under section 10A of the Act could be set off against current profit of the eligible unit for computing deduction u/s.10A of the Act, held vide para 3 as under:

"Section 10A is a provision which is in the nature of a deduction and not an exemption. This was emphasized in a judgment of a Division Bench of this Court while construing the provisions of Section 10B in Hindustan Unilever Ltd Vs. Deputy Commissioner of Income Tax . The submission of the Revenue placed its reliance on the literal reading of Section 10A under which a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive Assessment Years is to be allowed from the total income of the assessee. The deduction under Section 10A, in our view, has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of Section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions

of the Chapter, the deductions specified in Sections 80C to 80U. Section 80B(5) defines for the purposes of Chapter VI-A "gross total income" to mean the total income computed in accordance with the provisions of the Act, before making any deduction under the Chapter. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under Section 10A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof, such an approach cannot be accepted. In the circumstances, the decision of the Tribunal would have to be affirmed since it is plain and evident that the deduction under Section 10A has to be given at the stage when the profits and gains of business are computed in the first instance. So construed, the appeal by the Revenue would not give rise to any substantial question of law and shall accordingly stand dismissed. There shall be no order as to costs."

34. Hence, above issue is squarely covered in favour of assessee by the decisions of Hon'ble Jurisdictional High Court (supra) and, accordingly, Id CIT(A) was not justified to confirm the action of AO in not allowing the set off in respect of Pune Unit of Rs.1,01,79,294 against taxable profit from other 10A units and income from other sources. Therefore, we allow ground No.1 of appeal taken by assessee.

35. In respect of Ground No.2 of appeal, there was no submission from assessee's side. We also observe that there is no discussion in the assessment order as well as the order of Id CIT(A) on above issue. Hence, we reject ground No.2 of appeal taken by assessee.

36. In the result, both the appeals of department for assessment years 2004-05 and 2005-06 are rejected and while appeal of assessee for assessment year 2005-06 is allowed in part.

Pronounced in the open court on 31st August, 2012

Sd/- (RAJENDRA) Accountant Member	Sd/- (B.R. MITTAL) Judicial Member
---	--

Mumbai, Dated 31st August, 2012
Parida

Copy to:

1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals),15, Mumbai
4. Commissioner of Income Tax, 8, Mumbai
5. Departmental Representative, Bench 'H' Mumbai

//TRUE COPY//

BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI