

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH " B "

BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER AND  
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T. (T.P) A. No.145/Bang/2015 (Assessment Year : 2010-11)		
Dy. Commissioner of Income Tax, Circle 5(1)(2), Bangalore.	Vs.	M/s. Parametric Technology (India) Pvt. Ltd., 4 <sup>th</sup> Floor, Phoenix Towers, 16, Museum Road, Bangalore-560 025 PAN <b>AABCP 2629J</b>
Appellant		Respondent.

I.T. (T.P) A. No.226/Bang/2015  
(Assessment Year : 2010-11)  
(By Assessee)

Assessee By : S/shri Ajith Tolani & Darpan Kirpalani, C.As.  
Revenue By : Dr.P.K. Srihari, Addl. CIT (D.R.)

Date of Hearing : 04.09.2015.

Date of Pronouncement : 28.10.2015.

**O R D E R**

**Per Shri Jason P. Boaz, A.M. :**

These are cross appeals, by the assessee and revenue, directed against the order of assessment for Assessment Year 2010-11 passed under Section 143(3) rws 144C of the Income Tax Act, 1961 (in short 'the Act') in pursuance of the directions of the Dispute Resolution Panel ('DRP') issued under Section 144C(5) of the Act vide order dt.28.11.2014.

2. The facts of the case, briefly, are as under :-

2.1 The assessee, a wholly owned subsidiary of Parametric Holdings Inc., USA which in turn is a subsidiary of Parametric Technology Corporation, USA, renders software development services to its Associated Enterprises ('AEs'). For the year under consideration, the assessee's operations were classified under the following three business segments :-

(i) Distribution of Software Licenses.

(ii) Market Support Services.

(iii) Global Support Services.

The assessee also had third party local sales in the domestic business segment.

2.2 For Assessment Year 2010-11, the assessee filed its return of income on 29.3.2011 admitting total income of Rs.1,14,70,596. The return was processed under Section 143(1) of the Act and the case was subsequently taken up for scrutiny. Reference under Section 92CA of the Act was made by the Assessing Officer to the Transfer Pricing Officer in respect of the international transactions reportedly entered into by the assessee. The TPO after examining the matter passed an order under Section 92CA of the Act dt.31.1.2014 proposing the following TP adjustment to the international transactions entered into by the assessee in the period under consideration :-

S.No.	Particulars	Amount Rs.
1.	Market Support Services	1,34,48,859
2.	Global Support Services	54,56,263
Total Adjustment u/s.92CA		1,89,05,122

2.3 On receipt of the TPO's order under Section 92CA of the Act, the Assessing Officer passed the draft assessment order under Section 143(3) rws 144C(13) of the Act dt.28.2.2014 wherein the assessee's income was determined at Rs.3,03,75,718 which included the proposed T.P. Adjustment of Rs.1,89,05,122.

2.4 Aggrieved by the draft assessment order for Assessment Year 2010-11 dt.28.2.2014, the assessee filed its objections thereto before the DRP, which disposed off the matter by issuing its directions under Section 144C(5) of the Act vide order dt.28.11.2014, allowing the assessee partial relief. Consequent thereto, the Assessing Officer passed the final order of assessment under Section 143(3) rws 144C of the Act vide order dt.30.12.2014, wherein the assessee's income was determined at Rs.2,68,55,668; which included T.P. Adjustment of Rs.1,53,85,072 to the returned income.

3. Aggrieved by the order of assessment for Assessment Year 2010-11 dt.30.12.2014, both the assessee and revenue have preferred appeals before the Tribunal raising the following grounds :-

3.1 The Grounds raised in the assessee's appeal are as under :-

1. That the order of the learned Deputy Commissioner of Income Tax, Circle- 5(1)(2), Bangalore ("Assessing Officer" or "the learned AO") to the extent prejudicial to the Appellant, is bad in law, contrary to the facts and circumstances of the case and is liable to be quashed.
2. That on the facts and circumstances of the case, the learned AO and the learned Dispute Resolution Panel erred in upholding the approach of the learned Transfer Pricing Officer and the adjustment of INR 1,53,85,072 to the transfer price of the Appellant's international transactions in relation to provision of marketing support services and global support services to its Associated Enterprises ("AEs").
3. That, on the facts and circumstances of the case, the learned AO/ learned Panel erred in rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant under Section 92D of the Act by invoking Section 92C(3)(c) of the Act and holding that the information or data used in the computation of the arm's length price is not 'reliable or correct' and accordingly proceeded to determine the arm's length price.

4. That the learned AO/ learned Panel erred in law and on facts in disregarding the application of multiple-year data while computing the mark up on operating mark up on cost of the comparable companies.
5. The learned AO/ learned Panel has erred in law in using data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation.
6. **Transfer pricing adjustment in relation to provision of marketing and sales support services**
  - 6.1. The learned AO/ learned Panel erred in rejecting the comparability analysis undertaken by the Appellant in its TP documentation in accordance with the provisions of the Act read with the Income-tax Rules, 1962 (“the Rules”).
  - 6.2. The learned AO/ learned Panel erred in rejecting companies functionally similar to the Appellant while providing its directions on the comparability analysis undertaken by the learned Transfer pricing officer (‘learned TPO’).
  - 6.3. The learned AO/learned Panel erred in the computation of the arm’s length operating mark-up on cost and accordingly erred in determining the arm’s length price of the international transactions entered into by the Appellant with its AEs.
7. **Transfer Pricing adjustment in relation to provision of global support services**
  - 7.1. That the learned AO/learned Panel erred in disregarding that the compensation model and peculiar economic circumstances of the Appellant in relation to rendering global support services.
  - 7.2. The learned AO/ learned Panel erred in upholding the fresh set of comparables adopted by the TPO in relation to the provision of global support services by the Appellant to its AEs which did not satisfy the test of comparability.
  - 7.3. That the learned AO/learned Panel erred in rejecting the additional comparability analysis undertaken by the Appellant at the time of the assessment proceedings and thereby arbitrarily rejected the comparable companies similar to the Appellant, as identified by the Appellant itself.
8. That the learned AO/ learned Panel erred in not providing an adjustment for the differences in the working capital position of Parametric India vis-à-vis that of the comparable companies, for the purposes of determination of the arm’s length price.
9. That the learned AO/ learned TPO, despite the directions of the learned Panel, erred in limiting the risk adjustment to 1% without any reasons and not providing the risk adjustment based on the actual differences in the risk profile between the Appellant and the comparable companies for the purpose of determining the arm’s length price for the international transactions entered into by the Appellant.
10. The learned Assessing Officer/learned TPO erred in not providing the benefit of the +/-5% range as per second proviso to Section 92C(2) of the Act, while determining the arm’s length price in relation to the international transaction entered into by the Appellant.

3.2 The Grounds raised in Revenue's appeal are as under :-

- "1. Whether the DRP is correct in excluding the comparables while the comparables were qualifying all the qualitative and quantitative filters applied by the TPO.
2. Risk adjustment is not required in this case as assessee facts significant political risks, foreign exchange risks, and indirectly facts market risks too. Payments made by AE to assessee on time, depends on financial health of AE. AE is exposed to market risks. Hence indirectly assessee is also exposed to such risks. Also, DRP has erred in not mentioning the method in which risk adjustment is to be computed and has given a nominal value of 1% towards risk adjustment.
3. These and any other grounds that may be urged at the time of hearing, the Hon'ble ITAT is pleaded to quash the directions of Dispute Resolution Panel."

### TRANSFER PRICING ISSUES.

4.1 Before proceeding to deal with the Grounds raised in the cross appeals (supra), the facts related to the T.P. issues are summarized hereunder :-

For the period relevant to Assessment Year 2010-11, the assessee had reported the following international transactions :-

S.No.	International Transactions	Amount Paid (Rs.)	Amount Received (Rs.)
1.	Purchase of Software Licenses for resale	3,97,49,959	
2.	Cost of Maintenance Services	2,82,82,466	
3.	Receipts for Global Services		1,26,95,558
4.	Receipts for marketing and Sales Support Services		8,90,24,836
5.	Reimbursement of Expenses Paid.		28,60,570

4.2 The financial results reported by the assessee, at the entity level, during the year under consideration are as under :-

S.No.	Particulars	Amount (Rs.)
1.	Operating Revenue (OR)	29,22,74,797
2.	Operating Cost (OC)	28,88,32,520
3.	Operating Profit (OP)	34,40,277
	OP/OC	1.19%

The assessee had also produced the segmental details for various business segments before the TPO.

4.3 The assessee conducted its T.P. Study for its international transactions by adopting TNMM as the Most Appropriate Method ('MAM'). Based on the comparability analysis conducted by the assessee and on the set of comparable companies selected by the assessee in its T.P. Study, it concluded that the international transactions of the assessee were at arm's length.

4.4 The TPO examined and analysed the T.P. Report submitted by the assessee and rejected the same for the various reasons enumerated in the TPO order under Section 92CA of the Act. In the course of T.P. proceedings, the TPO required the assessee to benchmark each of its three segments separately and furnish revised segmental details with break up of cost for each segment, with the basis for allocation. The TPO then conducted his own search process adopting various criteria / filters and finally selected his own comparable companies. After considering the objections raised by the assessee, the TPO finalized the T.P. audit for the various segments as under :-

#### 4.4.1 Distribution of Software Licenses

The TPO accepted and held that the international transactions in respect of this segment are treated at arm's length.

#### 4.4.2 Market Support Services

The TPO adopted TNMM as the MAM and selected the following companies as the final set of comparables.

Sl.No.	Name of the Company	OP/Cost (%)
1.	Asian Business Exhibition & Conferences Ltd.	58.64
2.	Cyber Media Research Ltd.	19.52
3.	HCCA Business Services Pvt. Ltd.	19.11
4.	Hindustan Housing Co. Ltd.	19.59
5.	ICC International Agencies Ltd.	13.27
6.	Killick Agencies & Marketing Ltd.	16.77
	Average	24.48%

The TPO computed the arm's length price (ALP) of this segment as under :-

Operating Cost	Rs.8,23,21,413
Arm's Length Mean Margin	24.48%
Arm's Length Price (124.48% of Operating Cost)	Rs.10,24,73,695
Price Received	Rs.8,90,24,836
Shortfall being adjustment u/s.92CA	RS.1,34,48,549

#### 4.4.3 Global Support Services

The TPO adopted TNMM as the MAM and selected the following companies as the final set of comparables :-

Sl.No.	Company Name	Sales	OP	OC	OP/OC	OP/Sales %
1.	Best Mulyankan Consultants Ltd.	1.42	0.14	1.28	10.94	9.86
2.	G K Consultants Ltd.	1.25	0.14	1.11	12.61	11.20
3.	HDO Technologies Ltd.	16.76	3.26	13.50	24.15	19.45
4.	Maruti Insurance Agency Logistics Ltd.	25.01	10.31	14.70	70.14	41.22
5.	Goldyne Peoplepower Ltd.	5.41	1.38	4.03	34.24	25.51
			Average		30.42	21.45

The TPO computed the ALP of this segment as under :-

Operating Cost	Rs.1,39,18,740
Arm's Length Mean Margin	39.42 %
Arm's Length Price (130.42% of Operating Cost)	Rs.1,81,52,821
Price Received	Rs.1,26,96,558
Shortfall being adjustment u/s.92CA	Rs.54.56,263

The Assessing Officer then completed the draft assessment order under Section 143(3) rws 144C(13) of the Act dt.28.2.2014 wherein the assessee's income was determined at Rs.3,03,75,718; which included the T.P. Adjustment of Rs.1,89,05,122 proposed by the TPO.

4.5 Aggrieved by the draft order of assessment for A.Y. 2010-11 dt.28.2.2014, the assessee filed its objections thereto before the DRP. The DRP issued its directions under Section 144C(5) of the Act vide order dt.28.11.2014 allowing the assessee partial relief by excluding the following companies selected by the TPO.

4.5.1 In the Market Support Services Segment, the DRP directed the exclusion of the following companies :-

- (i) Asian Business Exhibition & Conference Ltd. ('Asia Ltd.')
- (ii) HCCA Business Services Pvt. Ltd. ('HCCA Ltd.')
- (iii) Hindustan Housing Company Ltd. ('Hindustan Housing')
- (iv) ICC International Agencies Ltd. ('ICC Ltd.')
- (v) Killick Agencies & Marketing Ltd. ('Killick Ltd.')

4.5.2 In the Global Support Services Segment, the DRP had directed the exclusion of the following companies :-

(i) Best Mulyankan Consultants Ltd. ('BMCL')

(ii) HDO Technologies Ltd. ('HDO Ltd.')

(iii) Goldyne Peoplepower Ltd. ('Goldyne Ltd.')

4.6 The Assessing Officer then passed the final order of assessment for Assessment Year 2010-11 under Section 143(3) rws 144C of the Act vide order dt.30.12.2014, in pursuance of the directions of the DRP issued under Section 144C(5) of the Act dt.28.11.2014.

5. Aggrieved by the final order of assessment for Assessment Year 2010-11 dt.30.12.2014, both the assessee and Revenue have preferred appeals before the Tribunal. We now proceed to examine the grounds of appeal raised by both parties.

**Revenue's appeal in IT(TP)A No.145/Bang/2015**

6.1 Ground No.1 of Revenue's appeal is regarding the exclusion of comparables by the DRP from the set of comparables companies chosen by the TPO. It is the contention of revenue that these companies qualify all the qualitative and quantitative filters applied by the TPO and therefore the DRP was wrong in directing the exclusion of these companies.

6.2 We have considered the matter carefully. Revenue has raised a general ground without specifying or bringing on record material to establish why it considers the decision of the DRP to be erroneous. We find that the DRP has given elaborate reasons for directing the exclusion of each of the companies. In the absence of any material

evidence to controvert the findings of the DRP, the contentions of Revenue in this ground remain unsubstantiated and therefore we are unable to concur with the same. In this view of the matter, we dismiss Ground No.1.

7. **Ground No.2 : Risk Adjustment.**

7.1 In this Ground, Revenue contends that risk adjustment is not required in this case as the assessee face risks like political risk, foreign exchange risk and also market risks. It was also contended that the DRP was wrong in directing that risk adjustment may be granted @ 1% without indicating the method by which the same is to be computed. The learned Departmental Representative submitted that this claim for risk adjustment cannot be allowed since no such claim was made in the assessee's T.P. Study or before the TPO nor was any quantification of the claim made before any authority for examination which ought to have been done.

7.2 Per contra, the learned Authorised Representative for the assessee supported the decision of the DRP. It was submitted that a co-ordinate bench of this Tribunal in the case of Intellinet Technologies India (P) Ltd. V ITO in ITA No.1237/Bang/2010 in principle held that risk adjustment ought to be given to the net margin of the companies for bringing them on par with the assessee. It was also submitted that this decision has been followed in several subsequent decisions of this Tribunal. It is submitted that the quantification of risk adjustment has been furnished by the assessee at pages 451 to 453 of the paper book along with the submissions thereto from pages 227 to 450 for examination and allowance thereof.

7.3.1 We have heard the rival contentions and carefully perused and considered the material on record. We find that the DRP has directed that risk adjustment may be granted to the assessee by placing reliance, inter alia, on the decisions of the co-ordinate bench in the following cases wherein it was held in principle, that risk adjustment was to be allowed to the assessee, if after examination it is found that the facts of the case being audited warrants such an adjustment.

(i) Bearing Point Business Consulting Pvt. Ltd. in ITA No.1124/Bang/2011 and

(ii) Intellinet Technologies India Pvt. Ltd. in ITA No.1237/Bang/2007.

We also find that the DRP has directed the TPO to examine the assessee's claim and decide the percentage of risk adjustment to be allowed to the assessee in the case on hand. While the DRP did mention that 1% risk adjustment was allowed in the case of Helio Soft Pvt. Ltd. (2013) 32 Taxman.Com 101 (ITAT, Hyd.), it is not correct to infer that the DRP has allowed the assessee risk adjustment at 1%.

7.3.2 While it is true that the DRP in its order has observed that the assessee has neither made a claim for risk adjustment in its own T.P.Study or before the TPO in audit proceedings, it is observed that this claim was put forth before the DRP, though bereft of any detailed quantification of the adjustment claimed on account of risk differential. However, before us, as submitted by the learned Authorised Representative of the assessee; it has submitted its documentation in respect of risk adjustment at pages 227 to 450 of the Paper Book and quantification of its claim at pages 451 to 453 thereof. Since these details and quantification of the assessee's claim for risk adjustment has

only been placed before us and was not before the authorities below, we deem it appropriate to remand this issue back to the file of the TPO with a direction that the TPO examine the assessee's claim for risk adjustment and allow the same if the facts of the case on hand so warrant such adjustment. Needless to add, the assessee shall be afforded sufficient opportunity of being heard and to make its submissions in this regard which shall be considered by the TPO before he takes a decision in the matter. It is ordered accordingly. Consequently, Ground No.2 raised by Revenue is dismissed.

8. Ground No.3 is general in nature and therefore no adjudication is called for thereon.

9. In the result, Revenue's appeal for Assessment Year 2010-11 is dismissed.

**Assessee's appeal in IT(TP)A No.26/Bang/2015.**

10. The Grounds at S.Nos.1 & 2 are general in nature and not being urged before us are rendered infructuous and accordingly dismissed.

11. **Grounds 3 to 5**

11.1 Ground No.3 is related to the rejection of the T.P. Study conducted by the assessee.

Ground No.4 is in respect of the application of multiple year data and

Ground No.5 is in respect of the use of contemporaneous data.

11.2 During the course of hearing, the learned Authorised Representative for the assessee did not press or urge these grounds before us and therefore they are rendered infructuous and are accordingly dismissed.

12. Ground No.6 (6.1 to 6.3) : Marketing and Support Services Agreement.

12.1 The assessee has raised 3 sub-grounds in Ground No.6. Ground No.6.1 is general in nature and therefore no adjudication is called for thereon.

13.0 Ground No.6.2 is on inclusion of comparables sought by the assessee.

13.1 IDL (India) Ltd.

13.1.1 It was submitted that this company was selected as a comparable company by the assessee in its T.P. Study. It was pointed out that in the T.P. order, while analyzing the comparability of the five comparables chosen by the assessee, the TPO has recorded this company is functionally comparable to the assessee and acceptable but, however, in the final set of comparables selected by the TPO, this company was not included and no reason has been given by the TPO for its exclusion in the final set of comparables.

13.1.2 We have heard both the learned Authorised Representative for the assessee and the learned Departmental Representative for Revenue in the matter and have perused the relevant records. It is seen that the facts submitted by the assessee in this regard emerge from the records. This company was included in the list of comparables chosen by the assessee in its T.P. Study. We find that the TPO has indeed mentioned in the T.P. order that this company is 'functionally comparable and acceptable'. That being so, it is not clear as to why this company was not selected and included in the final set of comparables and why this company did not figure in the search process conducted by the TPO. In this view of the matter, we consider it appropriate to remand this issue to the TPO for consideration with a direction that the TPO may consider the submissions made

by the assessee for inclusion of this company in its list of comparables. Needless to add, the assessee shall be afforded adequate opportunity of being heard and to make submissions/file details in this regard which shall be considered by the TPO before deciding the issue.

13.2 **Kores (India) Ltd.**

13.2.1 The learned Authorised Representative for the assessee submitted that the assessee had proposed this company as an additional comparable during proceedings before the TPO, but the TPO had disregarded the same. It is submitted that the assessee's submissions in this regard were considered by the DRP but not found to be acceptable. It was further submitted that while reviewing the search process conducted by the TPO, the assessee identified this company as a comparable, as it passes all the filters adopted by the assessee in the T.P. Study and also the filters adopted by the TPO and as such should be included as a comparable company.

13.2.2 We have heard both the learned Authorised Representative for the assessee and the learned Departmental Representative for Revenue and perused and carefully considered the material on record. We find that this company was not a comparable selected by the assessee in its T.P. Study, but has been suggested as a comparable by the assessee during T.P. proceedings before the TPO. Evidently, this company has not been selected out of a search process and as such could be a case of 'cherry picking'. It is also seen that the assessee, in its letter dt.24.1.2014, addressed to the TPO, had not made any submissions regarding inclusion of this company as an additional comparable as claimed

by the learned Authorised Representative and therefore it appears that the TPO had no occasion to consider this company as a comparable.

13.2.3 The DRP, however, has considered the submissions for the inclusion of this company in the set of comparables and found them to be not acceptable. It was found that the Business and Computer Systems Division is involved in a variety of operations like marketing of equipment relating to banking, postal offices, etc and after sales services including software support. The after sales services referred to in this division is an insignificant component of the revenue of the company and therefore it is not appropriate to compare the division of this company with the Market Support Services performed by the assessee. We find that the DRP has given detailed reasoning for rejection of this company as a comparable company to the assessee in the case on hand. Before us, the assessee had failed to adduce any material evidence to controvert the findings of the DRP. In this factual matrix, we find no infirmity, in the order of the DRP that would require our interference and therefore uphold its decision to exclude this company from the set of comparables to the assessee.

13.2.4 This Ground No.6.2, is consequently partly allowed for statistical purposes.

13.3 **Ground No.6.3 : Computation of Margin.**

13.3.1 It was submitted by the assessee that the assessee has computed the margin of Cyber Media Research Ltd./IDC (India) Ltd. wrongly. It was submitted that the TPO has computed the OP/Cost at 19.52% (Page 9 of TPO's order) whereas it is actually 13.68% as per the show cause notice issued by the TPO (page 6 of TPO's order). We have perused

the relevant portions of the TPO's order and find that the OP/Cost is given by the TPO at 13.68% (Page 6 of TPO's order) and later computed at 19.52% (Page 9 of TPO's order). In these circumstances, the TPO is directed to verify the above contention of the assessee and adopt the correct margin of IDC (India) Ltd. / Cyber Media Research Ltd. after affording the assessee adequate opportunity to be heard and make submissions in the matter, which shall be considered by the TPO before coming to a finding in the matter. It is ordered accordingly. Consequently, Ground No.6.3 is allowed for statistical purposes.

**Ground No.7 (7.1 to 7.3) : Global Support Services.**

14.1 The assessee has raised 3 sub-grounds :

Ground No. 7.1 - regarding the T.P. Study conducted by the TPO.

Ground No.7.2 - regarding the comparables selected by the TPO and

Ground No.7.3 - regarding the comparability analysis conducted by the assessee.

14.2 In respect of the Grounds at S.No. 7.1 and 7.3, it is seen from the records before us, that the TPO rejected the documentation prepared by the assessee for the reasons mentioned in the TP order under Section 92CA of the Act. The assessee in its TP Study had worked out matters at the entry level, including the Global Support Services Segment also under the distribution segment. The TPO in his order has recorded detailed reasons for considering the Global Support Services as a separate segment. Further, for the subsequent years, admittedly, the assessee itself has classified Global Support Services as a separate segment. In support of Market Support Services also, the assessee had analysed the transactions by selecting companies engaged in trading activities and for this

reason also the TPO had rejected the assessee's TP Study. Further, another reason for the TPO to reject the assessee's TP Study was the fact that the assessee adopted multiple year data. The use of current year's data is mandated by the relevant I.T. Rules, 1962 and by not adhering to this, the assessee's TP Study was rendered unreliable. Before us the assessee reiterated the submissions made earlier and has not adduced any material evidence to controvert the findings of the TPO and the detailed reasoning of the DRP while rejecting the assessee's contentions. There are a catena of judicial pronouncements supporting the use of current year's data alone for the purpose of comparability. In this view of the matter, as discussed above, we hold that the TPO was correct in rejecting the assessee's TP Study / documentation in the facts and circumstances of the case and conducting her own search process for selection of comparables.

**Assessee's contentions for Exclusion of Comparables from TPO's list of comparables.**

(Global Support Services Segment)

15. The TPO has selected a set of 5 companies as comparable to the assessee in the Global Support Services Segment (supra), out of which the DRP has excluded three of them, leaving the following two companies in the list of comparables :-

(i) G.K. Consultants Ltd.

(ii) Maruti Insurance Agency Logistics Ltd.

Before us, the assessee seeks exclusion of both the remaining companies as comparables.

16. **G.K.Consultants Ltd.**

16.1 The TPO has selected this company as a comparable to the assessee. As per the TPO, this company operates as a Non-Banking Finance Company ('NBFC') and is involved in financing, share trading, etc. and also provides information technology marketing and professional services. The TPO was of the view that this company provides services in the nature of comprehensive consultancy services. The assessee filed objections before the DRP for exclusion of this company from the list of comparables on the ground that this company is functionally different and not comparable to the assessee. The DRP, however, was of the view that the assessee's objection is not tenable and upheld the inclusion of this company, observing that the Annual Report of this company clearly mentions that it is involved in the provision of professional services.

16.2 Before us, the assessee reiterated its contention that this company is engaged in various operational activities and that it is, therefore, not correct to classify the operations of this company as professional services.

16.3.1 We have heard the rival contentions and examined the issue and the material brought on record; including the Annual Report of the company. We find that from mentions in the Annual Report that this company carried on its business activities in the area of financing, share trading, professional services, textile trading, information technology and investments. It is also seen that the volume of revenue from share trading is substantial when compared to its other activities, including professional services. It is

also seen that the company operates in several segments and segmental details have been furnished in the Annual Report.

16.3.2 From the TPO's order, it is not clear as to whether the TPO has examined this aspect of the company operating in several segments out of which professional services is only a small portion. It is also not clear as to whether the TPO has adopted the segmental details or the entity level details. In fact, the DRP has directed that it is to be ascertained whether segmental margins were adopted or entity level margins. In this factual matrix as discussed above, we are of the view that it would be appropriate to remand the issue back to the file of the Assessing Officer / TPO to examine the comparability of this company with the assessee, in the light of our observations above and if this company is found comparable, to adopt the margins as per the segmental details. It is ordered accordingly.

17. **Maruti Insurance Agency Logistics Ltd.**

17.1 The TPO selected this company as a comparable to the assessee as she was of the view that this company operates as an insurance agent and is seen to be providing various consultancy services despite the objections of the assessee. The assessee filed its objections to the inclusion of this company as a comparable before the DRP on the grounds that this company is not functionally comparable. The DRP, however, held that the objections of the assessee as not tenable since the insurance agency services, at the heart of its operations, involve consultancy and upheld the decision of the TPO in including this company as comparable to the assessee.

17.2 Before us, the assessee reiterated the contentions that this company is not functionally comparable. It was submitted by the learned Authorised Representative that this company has been barred by IRDA from carrying out the operations and therefore the results of the company are not reliable for comparability analysis. The assessee contends that on this ground itself this company needs to be excluded from the set of comparables to the assessee.

17.3 We have heard the rival contentions and perused and carefully considered the material on record. It is seen from the orders of the Insurance Regulatory & Development Authority ('IRDA') that this company is a group entity belonging to the Maruti Suzuki Ltd. group and is acting as its corporate agent. In that order of the IRDA, it has been held that no insurer is supposed to be granted license to act as corporate agent on the basis of reputation and strength of the applicant firm and a finding has been rendered that the corporate agent; namely this company has violated the statutory provisions. We find that the documents filed before us were evidently not placed before the TPO and DRP and therefore this aspect has not been examined by the authorities below. In this view of the matter, we deem it appropriate to remand the issue back to the file of the Assessing Officer / TPO to examine the comparability of this company with the assessee, in the light of our observations (supra). Needless to add that the assessee shall be afforded adequate opportunity of being heard and to file details / submissions in this regard which shall be considered by the TPO before deciding the issue of comparability of this company to the assessee it is ordered accordingly.

**Inclusion of comparables sought for by the assessee.**

18.1 Before us, it was submitted that the following two companies may also be considered for inclusion in the list of comparables to the assessee :-

(i) ICRA Management Consulting Services Ltd. ('ICRA')

(ii) Pagaria Energy Ltd.

It was submitted that the assessee has proposed these two companies for being considered as comparables before the DRP and that the DRP had not specifically adjudicated on these two comparables. It was the contention of the assessee that ICRA was involved in the business of software consultancy services and is functionally similar to the assessee. It was also contended that Pagaria Energy Ltd. is also involved in the provision of software and consultancy services.

18.2 We have heard both parties and perused and carefully considered the material on record. Evidently these two companies have not been selected as part of or as a result of any search process and therefore could be a case of "cherry picking" by the assessee. However, it is also a fact on record that the assessee had included the Global Support Services Segment in the Distribution Segment and therefore had not conducted an independent bench marking for this segment. Therefore, if the Global Support Services Segment is considered as a separate segment, as has been done by the TPO, the assessee should have the right to conduct its search process and select its set of comparables; which of course will be subjected to the examination and scrutiny of the TPO. In this view of the matter, we deem it appropriate to remand the issue back to the file of the

Assessing Officer / TPO to examine the comparability of these two companies with the assessee, in the light of our observations (supra). The assessee shall also be afforded adequate opportunity of being heard and to file details and submissions in this regard, which shall be considered by the TPO, before deciding the issue of comparability of these companies to the assessee. It is ordered accordingly.

19. **Ground No.8 - Working Capital Adjustment**

19.1 In this Ground, the assessee contends that the TPO and DRP did not grant working capital adjustment to the assessee vis-à-vis the comparable companies for the purposes of determination of the ALP of international transactions. On perusal of the orders of the authorities below, we find that the DRP has granted the assessee working capital adjustment, subject to the upper limit of average cost of capital of the comparables. The Assessing Officer / TPO is directed to examine the assessee's claim for and allow working capital adjustment vis-à-vis the comparable companies, in accordance with law, if so warranted.

20. **Ground No.9 - Risk Adjustment**

20.1 In this Ground, the assessee has raised objections that the risk adjustment has not been provided based on the actual differences in the risk profile between the assessee and the comparable companies and that the DRP was wrong in limiting the risk adjustment to 1%. It was submitted that the quantification of its claim of risk adjustment and accompanying details have been filed at pages 227 to 453 of Paper Book.

20.2 Revenue, in its appeal had also contended (supra) that risk adjustment is not required in this case as the assessee face risks like political risk, foreign exchange risk and also market risks. It was also contended that the DRP was wrong in directing that risk adjustment may be granted @ 1% without indicating the method by which the same is to be computed. The learned Departmental Representative submitted that this claim for risk adjustment cannot be allowed since no such claim was made in the assessee's T.P. Study or before the TPO nor was only quantification of the claim made before any authority for examination which ought to have been done.

20.3.1 We have heard the rival contentions in the matter and perused and carefully considered the material on record; including the judicial pronouncements referred to by the DRP. We find that the DRP has directed that risk adjustment may be granted to the assessee by placing reliance, inter alia, on the decisions of the co-ordinate bench in the following cases wherein it was held in principle, that risk adjustment was to be allowed to the assessee, if after examination it is found that the facts of the case being audited warrants such an adjustment.

(i) Bearing Point Business Consulting Pvt. Ltd. in ITA No.1124/Bang/2011 and

(ii) Intellinet Technologies India Pvt. Ltd. in ITA No.1237/Bang/2007.

We also find that the DRP has directed the TPO to examine the assessee's claim and decide the percentage of risk adjustment to be allowed to the assessee in the case on hand. While the DRP did mention that 1% risk adjustment was allowed in the case of Helio

Soft Pvt. Ltd. (2013) 32 Taxman.Com 101 (ITAT, Hyd.), it is not correct to infer that the DRP has allowed the assessee risk adjustment at 1%.

20.3.2 While it is true that the DRP in its order has observed that the assessee has neither made a claim for risk adjustment in its own T.P.Study or before the TPO in audit proceedings, it is observed that this claim was put forth before the DRP, though bereft of any detailed quantification of the adjustment claimed on account of risk differential. However, before us, as submitted by the learned Authorised Representative of the assessee has submitted its documentation in respect of risk adjustment at pages 227 to 450 of the Paper Book and quantification of its claim at pages 451 to 453 thereof. Since these details and quantification of the assessee's claim for risk adjustment has only been placed before us and was not before the authorities below, we deem it appropriate to remand this issue back to the file of the TPO with a direction that the TPO to examine the assessee's claim for risk adjustment and allow the same if the facts of the case on hand so warrant such adjustment. Needless to add, the assessee shall be afforded sufficient opportunity of being heard and to make its submissions in this regard which shall be considered by the TPO before he takes a decision in the matter. It is ordered accordingly.

Consequently, Ground No.9 of the assessee's appeal is treated as allowed for statistical purposes.

21.1 In Ground No.10 - the assessee has sought the benefit of + / - 5% as set out under the proviso to Section 92C(2) of the Act. ; Prior to the amendment made by Finance (No.2)

Act, 2009 and Finance Act, 2012, the proviso to Section 92C(2) of the Act provided that the ALP would be taken to be the arithmetical mean (AM) or at the option of the assessee, a price which may vary from the AM by an amount not exceeding 5% of such AM. Thus, the ALP was + / - 5% of such AM. This issue is now more of an academic nature, since the Act has been amended w.r.e.f. 1.4.2002 by introduction of a clarificatory amendment in which Section 92C(2A) of the Act was inserted, which as per the Finance Act, 2012 reads as under :-

*“ Section 92C (2A) : Where the first proviso to sub-section (2) as it stood before its amendment by the Finance (No. 2) Act, 2009 (33 of 2009), is applicable in respect of an international transaction for an assessment year and the variation between the arithmetical mean referred to in the said proviso and the price at which such transaction has actually been undertaken exceeds five per cent of the arithmetical mean, then, the assessee shall not be entitled to exercise the option as referred to in the said proviso.*

21.2 The new section 92C(2A), mandates that if the AM price falls beyond + / - 5% from the price charged in international transactions, then the assessee does not have any option referred to in Section 92C(2) of the Act. Thus, as per the above amendment, it is clear that the + / - 5% variation is allowed to justify the price charged in the international transactions and not for adjustment purposes. The aforesaid amendment has settled the issue and accordingly, the 5% benefit is not allowable in the assessee's case. In view of the retrospective amendment by way of insertion of Section 92C(2A) w.r.e.f. 1.4.2012 brought about therein by Finance Act, 2012, this Ground No.9 of the assessee's appeal is not maintainable and is accordingly dismissed.

22. In the result, the assessee's appeal for Assessment Year 2010-11 is partly allowed for statistical purposes.

23. To sum up, Revenue's appeal for Assessment Year 2010-11 is dismissed and assessee's cross appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 28<sup>th</sup> October, 2015.

Sd/-  
**(VIJAYPAL RAO)**  
Judicial Member

Sd/-  
**(JASON P BOAZ)**  
Accountant Member

\*Reddy gp

Copy to:

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore