HC-KAR
CNR: KAHC010438032014

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF OCTOBER, 2026

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MRS. JUSTICE K.S. HEMALEKHA

INCOME TAX APPEAL NO.505 OF 2014

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX
CIRCLE-11(3),
RASHTROTHANA BHAVAN,
NRUPATHUNGA ROAD,
BANGALORE-560 001.

…APPELLANTS

Digitally signed by MAHALAKSHMI B M
Location: High Court of Karnataka

(BY SRI. E.I. SANMATHI, ADVOCATE A/W
MR. NIRMAL MATHEW, ADVOCATE)

AND:

DELL INTERNATIONAL SERVICES INDIA PRIVATE LIMITED
(SUCCESSOR IN INTEREST TO EMC SOFTWARE
AND SERVICES INDIA PRIVATE LIMITED
INTO WHICH EMC DATA STORAGE SYSTEMS (INDIA)
PRIVATE LIMITED STOOD AMALGAMATED)
HAVING ITS REGISTERED OFFICE AT
CRYSTAL DOWNS, OFF,
INTERMEDIATE RING RD.,
EMBASSY GOLF LINKS BUSINESS PARK,
DOMLUR, BENGALURU,
KARNATAKA - 560071.

(AMENDED AS PER COURT
ORDER DATED 29.10.2026)

…RESPONDENT

(BY SRI. T. SURYANARAYANA, SENIOR ADVOCATE A/W
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE; ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, BANGALORE IN ITA NO.1274/BANG/2010 DATED 18.07.2014 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE-11(3), BANGALORE AND ETC.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE
and
HON'BLE MRS. JUSTICE K.S. HEMALEKHA

ORAL JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE)

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 [**the Act**] impugning the order dated 18.07.2014 [**impugned order**] passed by the learned Income Tax Appellate Tribunal Bangalore Bench ‘B’, Bangalore [**Tribunal**], in IT (TP).A No.1274/Bang/2010 for the Assessment Year [**AY**] 2006-2007.

2. The respondent is the successor-in-interest of EMC Data Storage Systems (India) Private Limited [**Assessee**], which stood amalgamated with EMC Software and Services India Private Limited, which in turn amalgamated into the respondent.

3. The Assessee preferred an appeal before the Tribunal against the Assessment Order dated 17.09.2010, passed by the Assessing Officer [**AO**] under Section 143(3) read with Section 144C of the Act. The Assessee was, *inter alia,* aggrieved by the transfer pricing adjustments made pursuant to the directions issued by the Transfer Pricing Officer [**TPO**].

4. The Assessee is a subsidiary of EMC Corporation, a company incorporated in the United States of America. The Assessee's business is organised into the following three separate divisions:

i. Software Development Services [**SwD**];

ii. Information Technology enabled Services [**ITeS**]; and

iii. Marketing Support Services.

5. The Assessee provides software development and marketing services to its Associated Enterprises [**AEs**], namely, EMC (Benelux) BV/s.a.r.l.Netherlands and EMC Corporation, US. It also provides ITeS to EMC (Benelux) BV/s.a.r.l.Netherlands.

6. The Assessee had filed its return of income for the AY 2006-2007 on 24.10.2006, declaring its income at ₹4,66,18,718/-. The said return was initially processed under Section 143(1) of the Act on 01.10.2007. It was subsequently selected for scrutiny and the AO issued a notice under Section 143(2) of the Act on 22.10.2007.

7. Since the Assessee had entered into international transactions exceeding ₹15.00 crores, the AO made a reference to the TPO under Section 92CA of the Act for determination of the Arm's Length Price [**ALP**] of the said international transactions.

8. The learned TPO passed an order dated 26.10.2009 directing transfer pricing adjustments to the extent of ₹8,72,05,905/-.The said Adjustments comprise ₹8,41,17,749/- in respect of the SwD services and ₹30,88,156/- in respect of international transactions relating to the provision of ITeS.

9. The AO passed a draft assessment order, *inter alia,* incorporating the transfer pricing adjustments as directed by the learned TPO. The Assessee filed objections to the draft assessment order before the Dispute Resolution Panel, Bangalore [**DRP**], *inter alia*, objecting to the proposed transfer pricing adjustments. The DRP passed an order dated 27.08.2010 rejecting the Assessee's objections to the transfer pricing adjustments, except that it directed the AO to adopt a 51.73% margin for Megasoft Ltd. instead of 52.74%, and to recompute the Assessee's total income accordingly. Pursuant to these directions, the AO passed the assessment order, which the Assessee appealed before the learned Tribunal.

10. The Revenue has projected the following questions for consideration of this Court:

> "1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in directing the assessing officer to exclude the telecommunication expenses of Rs.1,89,67,308/- and insurance expenses of Rs.1,24,748 both from the export turnover as well as the total turnover without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover, as clause (iv) of the Explanation 2 to section 10A provides that such expenses are to be reduced only from the export turnover ?"

2. "Whether the Tribunal was justified, on the facts and in the circumstances of the case, in allowing relief to the assessee by relying on the decision of the High Court in the case of Tata Elxsi Ltd., 349 ITR 98 without appreciating that the decision of the High Court has not reached its finality and SLPs have been filed against such orders on this issue in a number of cases including the case of Tata Elxsi Ltd.,?"

3. "Whether, the Hon'ble Tribunal was correct in holding that the functions of the assessee is not comparable to the functions of KALS Information Systems Ltd., Accel Transmatics Limited and Lucid Software Ltd by relying on the decisions of the co-ordinate benches rendered in other cases and applying the decisions to the facts of the assessee without making a FAR analysis of the assessee and the companies which it directed to be omitted from the list of comparables?"

4. "Whether, the Hon'ble Tribunal was correct in holding that the functions of the assessee is not comparable to the functions of KALS Information Systems Ltd, Accel Transmatics Limited and Lucid Software Ltd without appreciating that the comparables satisfy all the qualitative and quantitative filters applied by the TPO?"

5. "Whether, on the facts and circumstances of the case, the Tribunal was correct in following the decisions of the other benches of the Tribunal while rejecting the comparables included by the TPO in the final list without appreciating that the selection of comparables in a case depends upon assessees specific FAR analysis?"

6. "Whether, on the facts and circumstances of the case the Tribunal was right in following the decision of the other benches of the Tribunal without appreciating the specific facts brought on record by the TPO?"

7. "Whether, on the facts and circumstances of the case, the Hon'ble Tribunal was justified in fixing the RPT filter at 15% of total revenue and deleting Megasoft Ltd., Aztec Software Ltd. and Geometric Software Ltd., from the list of comparables, by relying on the decisions of the Tribunal in other cases, including those of other benches of

Tribunal, without going into specific facts in the case of the taxpayer and without adducing the basis for arriving at the 15% cut off for RPT filter, in the case of the taxpayer ?"

8. "Whether, on the facts and in the circumstances of the case the Tribunal was correct in fixing a limit of 15% to the RPT filter without appreciating the fact that the assessing officer had fixed the RPT filter at 25% which is in line with the limits prescribed in section 92A(2) of the Act ?"

9. "Whether, on the facts and circumstances of the case, the Tribunal was correct in holding that M/s. Tata Elxsi Ltd., cannot be taken as comparable being functionally different without appreciating that it satisfied all the qualitative and quantitative filters applied by the TPO?"

10. "Whether, the Hon'ble Tribunal was correct in excluding Vishal Information Technologies Ltd., (VITL), Goldstone Infratech Ltd., Datamatic Financial Services Ltd., Maple e-Solutions Ltd., and Nucleus Netsoft & GIS (India) Ltd., as comparables, by relying on the decision of Tribunal in other cases, including those of other benches of Tribunal, without going into the specific facts in the case of the assessee?"

11. "Whether, the Hon'ble Tribunal is correct in deciding that advances received be included for the purpose of computing working capital adjustment without appreciating that the TPO had not included the same as the assessee had added fixed assets of Rs.54 Crores while showing Rs.5.44 Crores of advances received as still outstanding towards the AEs?"

12. "Whether, on the facts and circumstances of the case, the Tribunal was correct in not appreciating the fact that if any filter or criteria applied by the taxpayer for search of comparables is accepted or any filter or criteria applied by the TPO is relaxed, the entire accept / reject matrix changes resulting in a new comparable set including those companies which are not taken either by the assessee or by the TPO in its final comparable set and which may not be finding a place in the TP order under section 92CA?""

11. The Coordinate Bench of this Court had considered the aforesaid questions of law and dismissed the appeal by order dated 13.07.2018. While doing so, the Coordinate Bench, *inter alia,* referred to its earlier decision in **Principal Commissioner of Income Tax and Another Vs. M/s. Softbrands India Pvt. Ltd.**[1]

12. The Revenue preferred a Special Leave Petition before the Supreme Court against the order dated 13.07.2018. The said petition was tagged with a batch of matters including the appeal arising out of this Court's decision in **M/s. Softbrands India Pvt. Ltd**. (*supra*). The Supreme Court, *inter alia*, held that the question of whether the ALP had been determined by following the provisions of the Act and the Rules made thereunder may give rise to questions of law; therefore, all the appeals relating to transfer pricing adjustments could not be rejected on the ground that they did not entail any substantial question of law.

13. The Supreme Court disposed of the batch of matters by its decision in **SAP Labs India (P) Ltd. Vs. Income-tax Officer and other appeals**[2]**.** The present appeal was remanded to consider the

[1] ITA No.536/2015 c/w ITA No.537/2015 D.D. 25.06.2018
[2] 2023 INSC 394; [2023] 149 taxmann.com 327 (SC)

transfer pricing questions, bearing in mind the observations made by the Supreme Court in **SAP Labs India (P) Ltd.** (*supra*).

Re: Question Nos.1 and 2:

14. As rightly pointed out by the learned counsel for the parties, question Nos.1 and 2 do not arise for consideration by this Court. The learned counsel appearing for the Assessee also points out that question Nos.1 and 2 are covered by the decision of the Supreme Court in **Commissioner of Income-Tax, Central-III Vs. HCL Technologies Ltd.**[3]**.**

Re: Question Nos.3 and 4:

15. These questions relate to the Revenue's challenges to the decision of the learned Tribunal to exclude the following three companies as comparables for determining the ALP of the Assessee:

i. KALS Information Systems Limited;

ii. Accel Transmatics Limited; and

iii. Lucid Software Limited

[3](2018) 404 ITR 719 (SC)

16. The question of whether the said companies are comparable to a company with a functional profile similar to the Assessee on FAR[4] analysis is squarely covered by this Court's decision in **The Commissioner of Income-Tax and Another Vs M/S. Logica Private Ltd.[5].**

Re: Question Nos.5, 6 and 12:

17. Question Nos.5 and 6 relate to the Tribunal's reliance on other precedents. The said questions are also covered by the decision of the Co-Ordinate Bench of this Court in **SAP Labs India Private Limited Vs. The Income Tax Officer[6].** In the said decision, the Court observed as under:

> "19.1 The said contention cannot be accepted. Once the Tribunal, in the case of any taxpayer, records findings regarding the functions performed, assets employed, or risks assumed and, on that basis, finds justification to include or exclude a comparable, there can be no prohibition in following such decision where it relates to the same assessment year or to the preceding years, as permissible under Rule 10B, provided the relevant facts and circumstances remain identical. If the functional analysis and other relevant factors continue to be the same, and the issue has already been adjudicated by the Tribunal, no fault can be found with the Tribunal following its earlier decision instead of undertaking a repetitive exercise. Merely because

[4] Function, asset and risk
[5] ITA No.338/2013 D.D. 28.10.2026
[6] ITA No.10/2011 D.D. 28.08.2026

> the Tribunal has relied upon its earlier decision, it cannot be said that its findings are not in conformity with Section 92C of the Act and Rule 10B of the Rules.
> 19.2 However, it is always open to the Revenue or the assessee to demonstrate that the inclusion or exclusion of a particular comparable in the earlier decision was incorrect or that the facts of the present case are distinguishable so as to warrant a different conclusion."

18. In the recent decision in **M/s. Logica Private Ltd** (*supra*), this Court had observed as under:

> "60. The question whether the learned ITAT could rely on an order passed in case of another assessee must be answered in the affirmative, provided that the learned ITAT concludes that the material facts of the case relied upon are similar to the facts relating to the Assessee. In the context of transfer pricing adjustments, if the learned ITAT comes to the conclusion that the business activities carried on by the Assessee in another case are similar to the business activities carried on by the Assessee, it would be appropriate for the learned ITAT to take a similar view unless it finds other reasons to distinguish the case from the earlier precedent."

19. In view of the above, the questions of law framed in this regard cannot be construed as substantial questions of law arising for consideration in the present appeal.

Re: Question Nos.7 and 8

20. The present questions relate to the use of the Related Party Transaction [**RPT**] filter at 15%. Concededly, the said question stands covered in favour of the Assessee by the decision of this

Court in **SAP Labs India Private Limited Vs. The Income Tax Officer** (*supra*) as well as in **M/s. Logica Private Ltd.** (*supra*).

Re: Question No.9:

21. This question relates to the exclusion of Tata Elxsi Limited as a comparable. The learned Tribunal excluded the said company by following the decision of a Coordinate Bench of the Tribunal in **M/S. Logica Private Ltd.** (order dated 28.02.2013 passed in ITA No.1129/Bang/2011).

22. This question is also squarely covered by the decision of this Court in **The Commissioner of Income-Tax and Another Vs. M/s. Logica Private Ltd.** (*supra*).

Re: Question No.10:

23. The Revenue seeks to challenge the exclusion of the following five companies as comparables:

i. Vishal Information Technologies Ltd., (VITL);

ii. Goldstone Infratech Ltd.;

iii. Datamatic Financial Services Ltd.;

iv. Maple e-Solutions Ltd.; and

v. Nucleus Netsoft and GIS (India) Ltd.

24. The learned Tribunal excluded the said companies by referring to the decision in **HSBC Electronic Data Processing India Limited Vs. ACIT**[7].

25. It is the Revenue's case that the learned Tribunal could not have excluded those companies merely by relying on the earlier decision and was required to examine the facts in the given case.

26. A plain reading of the order passed by the learned Tribunal indicates that the Tribunal had considered the facts relating to the comparable companies, which had a bearing on the profile of the five companies, as noted by the Tribunal in the earlier decision. The learned Tribunal had set out, in extenso, the observations made in the said earlier decision[8]. We consider it apposite to reproduce the same.

> "24. We have considered the rival submissions. As far as comparable companies chosen by the TPO at S.No.7, 8, 5, 1 and 3 in the list of comparable companies given at para-20 of this order, we find that the Hyderbad Bench of the

[7] ITA No.1624/Hyd/2010 D.D. 28.06.2013
[8] HSBC Electronic Data Processing India Limited Vs. ACIT

ITAT in the case of HSBC Electronic Data Processing India Ltd. Vs. ACIT, ITA No.1624/Hyd/2010 by order dated 28.6.2013 considered comparability of these companies in the case of a company engaged in rendering IT enabled services to its AE similar to that of the Assessee in the present case. The tribunal held that the aforesaid companies are not comparable. The following were the relevant observations of the Tribunal.

> "8. The first objection is with reference to selection of comparable data by the TPO with reference to the following five companies-
>
> (a) Vishal Information Technologies Ltd.
> (b) Goldstone Infratech Ltd.
> (c) Datamatic Financial Services Ltd.(seg)
> (d) Maple e-Solutions Ltd.
> (e) Nucleus Netsoft & GIS(India) Ltd. (now known as (Asit C.Mehta Financial Services Ltd.)
>
> Vishal Information Technologies Ltd.
>
> 9. The assessee's objection with reference to inclusion of this comparable is on the reason that the company is functionally different, also does not satisfy the filters such as employee cost and on-site revenue filter. It was submitted that employee cost forms a major portion of the total cost of BPO services and in the assessee's case employee cost is 62% of the total cost, whereas in the selected company the employee cost is less than 2%, which indicates that most of the work was outsourced and the out-sourcing cost was at 88.64% of the operating cost. It was further submitted that the ITAT Bangalore in the case of First Advantage Off-shore Services (ITA No.1252/Bang/2010) has directed to use employee turnover filter in a consistent manner for selection of comparables and in the case of Maersk Global Services Centre (India) Pvt. Ltd. (14 ITR(Trib) 541) the Mumbai Bench of the Tribunal has analysed and rejected this company as comparable for the reason that it has outsourced a considerable portion of it's business and is

functionally different. Moreover, it was also submitted that the DRP in the later year of 2008-09 vide its order dated 3.8.2012 has rejected this company as a comparable (name changed to Coral Hub Ltd.), vide para 18 of the order, wherein ultimately, it was decided that there is major difference in functionality and the business model and the DRP Bench was of the view that Coral Hub (formerly known as Vishal Information Technology Ltd.) was not a suitable comparable and needs to be dropped from the final set of comparables. Based on the above submissions, it was submitted that this company cannot be used as a comparable and has to be excluded.

9.1. The learned Departmental Representative, however relied on the orders of the TPO.

9.2. After considering the rival contentions, we find considerable force in the contentions advanced by the learned counsel. There is no dispute with reference to the fact that most of the cost incurred by the company taken as comparable is outsourcing cost, as can be seen from the Annual report placed in the paper-book and ITAT, Mumbai in the case of Maersk Global Service Centre (supra) has analysed and rejected this company as comparable, due to the reason that it has outsourced a considerable portion of its business and it is functionally different. This factor was also approved by the DRP in assessee's own case in the later year, as can be seen from the copy of the order placed on record, for assessment year 2008-09. In view of this, we direct the Assessing Officer to exclude this company from the list of comparables.

Goldstone Infratech Ltd

10. The assessee's objection for inclusion of this comparable is on the basis of the filter on foreign exchange earnings, diminishing revenue filter and functionality, being run on lease basis. It was submitted that this company was rejected in the

case of Stream International Services Pvt. Ltd. V/s. ADIT(International Taxation) by the Mumbai Bench of the Tribunal, vide its order dated 11.1.2013 in ITA No.8997/Mum/2010 for assessment year 2006- 07.

10.1. After considering the rival contentions, we are of the opinion that the business model of the above company is different from that of the assessee. In this case, the foreign exchange revenue is less than 1% of the total turnover. Therefore, it fails the filter provided by the Assessing Officer, on the basis of the foreign exchange earnings. Further, the Revenue from BPO is failing over a period of three years. This issue was considered by the coordinate Bench (Mumbai Bench) of the Tribunal in the case of Stream International Services Ltd.(supra) wherein it was considered as under-

"14. The inclusion of second case objected to by the ld. AR is that of Goldstone Infratech Limited (Seg) (earlier known as Goldstone Teleservices Limited). Here it is relevant to note that the TPO, inter alia, applied filter of 'Companies with export revenues more than 25% of the revenues'. Annual accounts of Goldstone Teleservices Limited indicate total revenue of the company at Rs.30.89 crore from three segments, viz., Telecommunication at Rs.13.63 crore, BPO at Rs.5.02 crore and Insulator at Rs.12.23 crore. The break up of such revenue of Goldstone Teleservices Limited has been provided at page 236 of the paper book. Schedule forming part of the annual accounts of Goldstone Teleservices Limited divulges earnings in foreign currency at Rs.4.24 lakh. Such detail is available at page 239 of the paper book. When we compare earning in foreign currency at Rs.4.24 lakh with the earnings of BPO at Rs.5.02 crore or for that purpose of the entity as a whole at Rs.30.89 crore, it becomes manifest that this case does not pass through the filter adopted by the TPO, being, the 'companies whose export revenues are more than 25% of the revenues'.

Therefore, we are of the opinion, that this company cannot be considered as a comparable for the purpose of determining the ALP in this case. We direct the same to be excluded.

Datamatic Financial Services Ltd.

11. The assessee's objection to inclusion of this comparable is on the basis of Related Party Transactions filter. It was submitted that RPT exceeds 25% of the sales and therefore, to be excluded. The assessee relied on the decision of the coordinate Bench of the Tribunal (Mumbai Bench) in the case of Stream International Services (supra), wherein, wherein with reference to this comparable company, it was held as under :

> "11. The first is M/s. Datamatics Financial Services Limited. It can be observed that the TPO applied filter of "Companies with less than 25% related party transactions". The learned Counsel for the assessee took us through the Annual accounts of Datamatics Financial Services Limited, and submitted that the gross income of this company for the year ending on 31.03.2006 was at Rs.2.31 crore as against total expenses of Rs.1.84 crore. Referring to pages 319 and 320 of the paper book, our attention was drawn towards Annexure-2 to demonstrate that the "Transactions with the Associated Parties within the meaning of section 92A and 92B of the Income-tax Act, 1961" showed one major transaction with Datamatics Limited towards Reimbursement of expenses' at Rs.99.14 lakh. The learned AR contended that the transactions of Datamatics Financial Services Limited with other AEs amounted to Rs.14.31 lakh making total of transactions with the AEs at Rs.1.13 crore. It was submitted that the percentage of transaction with related parties is much more than 25%, being, the filter adopted by the TPO himself and hence the same should be excluded.

12. In the opposition, the learned Departmental Representative contended that the major transaction of

Rs.99.14 lakh of Datamatics Financial Services Limited with Datamatics Limited was towards 'Reimbursement of expenses'. Since the reimbursement of expenses does not include any profit element, the Id. DR urged that the same be excluded. He stated that once this transaction is excluded, the other transaction of Rs.14.31 lakh are less than 25% of the total transaction with related parties.

13. We do not find any force in the contention advanced by the learned Departmental Representative for the exclusion of transactions with Datamatics Limited towards 'Reimbursement of expenses' from the overall transactions entered into by Datamatics Financial Services Ltd. with its AEs. Section 92F(v) defines 'transaction' in the context of transfer pricing provisions to include an arrangement, understanding or action in concert whether or not it is formal or in writing or whether or not it is intended to be enforceable by legal proceeding. There is no reference to any transaction having necessarily including profit element or mark-up so as to fall within the definition of 'transaction' under Chapter X of the Income-tax Act. Since the TPO applied filter of having companies with less than 25% related party transactions, it is not open to argue that the transactions of reimbursement of expenses duly reported by Datamatics Financial Services Limited as an 'international transaction' within the meaning of section 92B should be ignored simply because they represent reimbursement of expenses. If the contention of the Id. DR that the reimbursement of expenses not involving profit element should not be construed as a transaction, is taken to a logical conclusion, it would mean that all such dealings will cease to be transactions for the purposes of Chapter-X of the Act. Once these dealings are not considered as 'transactions', these will also cease to be international transactions, going out of the purview of section 92 itself. Obviously, such a view point is contrary to the clear intention and the language of the relevant provisions. A pure reimbursement of expenses by one AE to another AE is very much a 'transaction' as per section 92F(v) and consequently is equally an international transaction as per section 92B requiring consideration as per section 92 of the Act. Be that as it may, the learned Departmental Representative could not demonstrate the fact that such

reimbursement of expenses was without any markup. As the so called comparable case of Datamatics Financial Services Limited was included by the TPO in the final list of comparables, in our considered opinion, the same is liable to be excluded as it involves related party transactions at much higher level, as against the filter adopted by the TPO himself, being companies with less than 25% related party transactions. We order accordingly."

In view of the above, since this company fails in this filter adopted by the TPO, we direct the TPO to exclude this company from the list of comparables adopted.

Maple e-Solutions Ltd.

12. The objection of the assessee with reference to this company is with regard to the financials of the company, on the ground of unreliability of data. It was submitted that selection of this company was rejected in the case of CRM Services India Pvt. Ltd. in ITA No.468/Del/2009 and also in the case of Stream International Services (supra). Further, the assessee also relied on the DRP order in assessment year 2007-08, with reference to the above company.

12.1. We have considered the rival sub missions. We agree with the objections of the assessee. In the case of Stream International Services P. Ltd. (supra), it is held with reference to this company as under:

"18. We are unable to uphold the contention raised by the learned Departmental Representative. It is apparent from two orders passed - one by the Delhi Bench and the other by the Hyderabad Bench of the Tribunal - that the case of Maple e-Solutions Limited has been directed to be excluded from the list of comparables. As the assessment year under consideration is 2006-2007 and the Delhi Bench of the Tribunal has also considered the same assessment year while directing the exclusion of the case of Maple e-Solutions Limited from the list of comparables, we are unable to accept the contention of the ld. DR in this regard. It is more so because no contrary view has been brought by the Ld. DR to our notice.

Respectfully following the precedents, we direct the exclusion of this case from the final list of comparables."

Since the DRP in assessee's own case for assessment year 2007-08 also considered and excluded this company, we uphold the assessee's objection in this regard and direct the Assessing Officer to exclude this company from the comparables adopted.

Nucleus Netsoft & GIS(India) Ltd.

13. The last objection was with reference to the above company, which is on similar facts as that of Vishal Information Technologies, discussed above. It was submitted that this company is functionally different and fails under the employee cost filter. It was further submitted that there is a scheme of amalgamation of earlier company by the orders of the Hon'ble High Court of Judicature of Bombay, on 22.2.2006 and in view of amalgamation, the financials have changed and the business model also changed. Referring to the annual report placed on record, it was submitted that as against Rs.24.02 lakhs of employee costs for the year ending 31st March, 2005, the employee cost has increased to Rs.132.59 lakhs. Further, the data processing charges is also to the extent of Rs.1.04 crores, which indicates that the assessee is outsourcing the work. Accordingly, it cannot be selected as a comparable. Due to amalgamation during the year, the assessee's business model has changed and because of employee cost filter also, this comparable has to be excluded.

13.1 After considering the rival submissions, we are of the opinion that this company cannot be selected as comparable not only on the reason of failing employee cost filter, but also due to amalgamation during the year, which has changed the business model of the company.

14. In view of the foregoing discussion, we agree with the assessee's objection that the above five comparables should be excluded.

> 25. The facts and circumstances and the Assessment year for which the aforesaid companies were not considered as comparable are identical to the case decided by the Hyderbad Bench of ITAT and that of the case of the Assessee. Respectfully following the decision of the Hyderbad Bench of ITAT, we direct the TPO to exclude the aforesaid companies from the list of comparable while arriving at the arithmetic mean of comparable. The relevant grounds of appeal of the Assessee are allowed."

27. As is apparent from the above, the learned Tribunal had referred to the specific facts relating to the companies that were excluded and had accepted the findings recorded by the Tribunal in its earlier decision. We note that the Revenue has not produced any materials to controvert the facts that were relied upon by the Tribunal in **HSBC Electronic Data Processing India Limited** (*supra*), which were expressly accepted by the Tribunal. The Revenue has merely framed a general question on the assumption that the learned Tribunal did not examine the facts in the present case. However, we note that the Tribunal noted the functional profile of the Assessee and, in that context, found that the aforesaid companies, selected as comparables, ought to be excluded on the basis of a FAR analysis.

28. We asked the learned counsel for the Revenue whether there was any specific fact as noted by the learned Tribunal, which

was *ex-facie* erroneous on the material placed on the record. However, the learned counsel is unable to point out any material that would controvert the facts recorded by the Tribunal. Importantly, no question of law has been framed challenging any finding of fact as perverse.

29. Further, learned counsel submits that the TPO gave reasons for including the aforesaid companies. The Tribunal's finding that the selected comparables ought to be excluded must be tested against the reasons set out by the learned Tribunal. Since we find no material to controvert the said findings recorded by the Tribunal relating to the FAR analysis, we cannot accept that any substantial question of law arises for consideration in this Court.

Re: Question No.11:

30. This question relates to the working capital adjustment. The Assessee had challenged the working capital adjustment made by the TPO on the ground that adjustment did not take into account the advances received by the Assessee from its AE. The TPO had excluded the same on the ground that the advances had been utilized for acquiring fixed assets. However, the Assessee has

pointed out that the advances were received to render contractual services in the future. Thus, the learned Tribunal examined the said contention and found merit in the Assessee's contention. Paragraph No.26 of the impugned order is set out below:

> "26. After excluding the aforesaid 5 companies from the list of comparable, the arithmetic mean of the OP/TC margin of the remaining companies before working capital adjustment comes to 17.85% and after working capital adjustment allowed by the TPO comes to 16.74%. The Assessees OP/TC margin is however at 8.00%. The Assessee has in its grounds of appeal challenged the manner in which working capital adjustment had been allowed by the TPO. In this regard the Assessee has pointed out that while working out the adjustment to be made to the profit margins on account of working capital adjustment, the TPO did not take into account the advance received by EMC India (Assessee) from its Associated Enterprise on the ground that these advances were utilized for acquiring fixed assets. The Assessee pointed out before DRP that the advances received by the Assessee from its AE were monies paid in advance by the AE for contractual services to be rendered by the Assessee to them in future. It was pointed out that out of the total advances received from AE of Rs.56,13,36,329 a sum of Rs.49,24,92,142 pertains to advance for future services. Similar advances as on March, 31st 2005 was Rs.43,31,75,394 out of which Rs.38,73,53,427 pertains to advances for future services. The Assessee also pointed out that the above factum of advances having been received for rendering future services were also pointed out in Schedule 9 to the Notes on Accounts to the Audited financials of the Assessee for the year ending 31st March, 2006. It was also pointed out that the Foreign Inward Remittance Certificate (FIRC) authenticated by Citibank under which the Assessee received payments also clearly reveal the fact that the monies received were advance for services to be rendered. Thus it was argued that the advances received were for

> rendering services and should be considered in computation of working capital adjustment. The Assessee also pointed out that the cash profits for the year ending 31st March, 2006 of the Assessee was Rs.29,80,73,006/- which was much higher than the investment in fixed assets made by the Assessee during the previous year. This according to the Assessee was sufficient to demonstrate that the assessee did not utilize the advances received for purchase of fixed assets."

31. The learned counsel for the Revenue submits that the question as to whether the advances were for working capital or capital is not supported by any factual finding. However, we find that the said contention is *ex facie* erroneous. The learned Tribunal had noted that Schedule 9 to the Notes on Accounts to the Audited Financial Statements of the Assessee for the year ending 31.03.2006 reflected the receipt of the advance. The Tribunal also noted that the Foreign Inward Remittance Certificate (FIRC) authenticated by Citibank also reflected that the advances had been received towards services to be rendered in the future.

32. Thus, the finding of the learned Tribunal that the amounts were received as working capital is based on material on record. The Revenue has not contested either the final accounts or the FIRCs, which evidence the receipt of the payments.

33. The question whether the advances have been received as working capital or otherwise is essentially a question of fact. Since the Tribunal's decision is based on reliable material, no question of law arises for consideration.

34. In view of the above, no substantial question of law arises for consideration before this Court in this appeal. The appeal is accordingly dismissed.

Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE

Sd/-
(K.S. HEMALEKHA)
JUDGE

MBM
List No.: 2 Sl No.: 10