| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |

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

SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
BEFORE SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

I.T.A. No. 5920/Mum/2024
Assessment Years: 2012-13

HERE Solutions India Private Limited 11 Floor B Wing Nesco IT park Tower 4 Western Express Highway Goregaon (East) Mumbai - 400063 **[PAN: AACCN7231R]**	Vs	**Deputy Commissioner of Income Tax, Circle - 10(1)(1), Mumbai**
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by	:	Shri Ketan Ved a/w Abdul Kadir Jawadwala, A/Rs
Revenue by	:	Shri Pravin Salunkhe, Sr. D/R

सुनवाई की तारीख/**Date of Hearing** : **01/01/2025**
घोषणा की तारीख /**Date of Pronouncement:** **03/01/2025**

आदेश/O R D E R

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the ld. CIT(A) - 56, Mumbai, dated 19/09/2024, pertaining to AY 2012-13.

2. The sum and substance of the grievance of the assessee relates to (i) Transfer Pricing (TP) adjustment of Rs.3,91,92,178/- in relation to the international transactions of receipt from production services ['ITeS services'] and (ii) TP adjustment of Rs. 1,99,51,451/- in relation to the international transactions of receipt from software development services ["IT Services"].

3. Representatives of both the sides were heard at length, case records carefully perused and the judicial decisions referred to during the course of the arguments duly considered.

4. Briefly stated the facts of the case are that the assessee electronically filed its return of income on 22/11/2012 declaring total income at Rs.7,96,47,469/-. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee.

5. The assessee company is engaged in providing digital mapping services, marketing support services and business support services to its associated enterprises (AEs) outside India. During the year under consideration, the assessee has entered into international transactions with its AEs which exceeded Rs.15,00,00,000/-. Therefore, the international transactions of the assessee have been referred to the TPO for determination of ALP.

6. The business profile of the assessee can be classified as under:-

*"**1.1. Overview of Production Services (Information Technology Enabled Services - 'ITES')***

1.1.1. HERE India receives request from NAVTEQ North America, LLC ('NTNA') for converting source data i.e. satellite images into electronic format of maps which is done by keying in the data collected into the database provided by NTINA. For the said purpose, the HERE India team co-ordinates with their field personnel for collection of further attributes required for the purposes of creating electronic format of maps.
1.1.2. The field department carries out the following activities:
• for the purpose of collecting point. of interests and traffic coding required for preparing meaningful maps, field team of HERE India obtains the required permissions from the local authorities
• Thereafter it sends the field staff to conduct a field survey of the respective location.
• The information collected / obtained by the field team is sent back to the production team.
1.1.3. The production team of HERE India verifies the data captured on the NTNA's database i.e. the information received from the field team is plotted on the database by using the supporting software's which are also provided by NTNA. This data is verified by the production team.
1.1.4. In simple language, production team only verifies the data collected by the field team and captured into the database provided by the NTNA which automatically converts it into the electronic format of maps. Hence it can be stated that the

Company is a low-risk captive service provider engaged in providing business process outsourcing services ('BPO') i.e. Information Technology Enabled Services ('ITES').

<u>1.2. Overview of Software Development Services (Information Technology Services - 'IT)</u>

1.2.1. The Software Development group ('Group') at Mumbai is a part of global team responsible for innovating. design, development and building the technology. The global group generates content (Maps, Traffic, Points of Interest and Dynamic Content) and connects people to content.
1.2.2. The group's goals are to build new Map and Content features, automate and scale data management, tools to improve data quality, and deliver data to customers quickly and frequently, and improve on-time software delivery and software quality.
• The group is engaged in the foundation to build navigable maps and associated content platforms;
• They modify and enhance NTNA's Map with new features defined by product / sales teams and technological innovations;
• They are engaged in automating and scaling the data collection, integration, management, validation and delivery of NTNA Maps and associated content products; and
• The group follows industry standards in design and development of software tools. The group also collaborates with other centers to build software platforms, tools and applications for building maps and content.
The software built is utilized by NTNA's Production and Field teams in creation, correction and building of data for maps. Using the software tools built by development teams, various data products are extracted for automative (in car navigation), internet platform (yahoo and bing maps) and (Garmin) development customers.
1.2.4. NTNA will have the following role and responsibilities:
• Developing, creating, maintaining and financing a worldwide digital geographic database, i.e.
NTNA database, which includes related location-based content to be used for various purposes like vehicle navigation, route guidance, fleet management and GIS related applications etc;
• NTNA is the economic owner of the NT database as well as the owner of intellectual property rights and copyrights of the same.
1.2.5. HERE India can be characterized as a limited risk service provider. It deals exclusively with its AE and is remunerated with a mark-up over its total costs regardless of the level of activity. Effectively HERE India earns an assured mark up over its total costs.
1.2.6. Accordingly, HERE India does not undertake any significant business risk. Specifically, HERE India does not undertake any market risk, price risk and credit risk. The only risk HERE India will bear is in relation to staff turnover and disruption of infrastructure.
1.2.7: On the other hand, AE of HERE India undertakes a significant amount of business risks."

7. We will first address to the grievance related to the TP adjustment in relation to the international transactions of receipt from production services.

8. The assessee selected the following comparables in its TP study report:-

Sr. No.	Name of Company	Single year Margin for FY 2011-12 (OP/OC)
1	Caliber Point Business Solutions Ltd.	12.48%
2	Cosmic Global Ltd.	40.73%
3	Datamatics Financial Services Limited	0.05%
4	e4e Healthcare Business Services Pvt. Ltd.	15.79%
5	ICRA Techno Analytics Limited	17.2%
6	Informed Technologies India Ltd.	8.26%
Arithmetic Mean		**15.75%**

8.1. The TPO adopted the following comparables:-

Sr. No.	Name of Company	NCP 2011-12
1	e4e Healthcare Business Services Pvt Ltd	19.85
2	Informed Technologies India Ltd.	6.08
3	Universal Print Systems Ltd	52.46
4	BNR Udyog Limited	41.58
5	Excel Infoways Ltd	29.79
6	Microgenetics Systems Limited	19.61
7	Accentia Technologies Limited	11.75
	Arithmetical mean	**25.87%**

8.2. As can be seen from the above, the arithmetical mean determined by the TPO was 25.87% against the arithmetical mean of the assessee determined at 15.85%. Accordingly, the TPO made the following upward adjustment:-

Particulars	Amount in Rs.
Operating Income	452,891,521
Operating Cost	390,945,976
ALP Operating Margin @ 25.87% (C = ALP% X B)	10,11,37,724
ALP Operating Income	49,20,83,699

105% of Transaction Value	475,536,097
95% of Transaction Value	371,398,678
Difference in transaction value	**3,91,92,178**

9. The assessee raised strong objections before the ld. CIT(A) but could not find any favour from the ld. First Appellate Authority.

10. Before us, the ld. Counsel for the assessee fairly stated that if, out of the seven comparables selected by the TPO, two comparables are excluded, the assessee would not have any objection in respect of the others. The two comparables which need to be excluded are, Universal Print Systems Ltd. with margin at 52.46% and BNR Udyog Limited with margin at 41.58%.

11. We have carefully perused the orders of the authorities below *vis-à-vis* the judicial decisions brought to our notices. We find that the Co-ordinate Bench in the case of *GTS e-services Private Ltd. vs. ITO Ward 15(1)(4) [ITA No. 1231/Mum/2017]*, had considered an identical business profile and held that Universal Print Systems Ltd., is not a good comparable. The relevant findings of the Co-ordinate Bench read as under:-

"(ii) Universal Print Solutions Ltd.

The Ld. AR disputed the inclusion of this entity on similar ground of functional dissimilarity by drawing our attention to the fact that this entity was an integrated print solution provider and operates in the segment of GTS e-Services Private Limited Assessment Year :2012-13 Repro, Label Printing, Offset Printing and Pre-Press BPO. The Ld. TPO picked up the pre-press BPO segment for the purpose of comparison. In this segment, the entity provides services in the nature of scanning, layouts, trapping, hand-outlined clipping path and image masking & magazine / catalogue publishing. Another point to which our attention is drawn is the fact that this entity has unallocated expenses of Rs.89.67 Lacs which would distort the segmental profits and therefore, the segmental results would not be reliable.

*Upon perusal, we find that Bangalore Tribunal in the case of **XLHealth Corporation India (P.) Ltd. vs. ACIT [2018 91 taxmann.com 310]** for very same AY 2012-13 directed for exclusion of this entity in case of assessee having similar functional profile on the ground that an entity which is engaged in the business of printing could be, by no structure of imagination, be considered as comparable entity. Secondly, as rightly pointed out by Ld. AR, the segmental results of the said entity would not be reliable in view of the fact that it has unallocated expenditure of Rs.89.67 Lacs which would surely distort the segmental results. Keeping in view the said factors, we direct for exclusion of this entity."*

12. As the business profile of the assessee is inline with that of *GTS e-services (supra)*, and finding that the Assessment Year is the same, therefore, respectfully following the decision of the Co-ordinate Bench *(supra)* we direct for the exclusion of this entity from the final set of comparables.

13. Similarly, the Co-ordinate Bench in the case of *Credit Pointe Services Pvt. Ltd. vs. DCIT Circle 1(1) [ITA No. 377/Pun/2017; AY 2012-13],* had the occasion to consider the comparability of Universal Print Systems Pvt. Ltd., and held as under:-

"8. We have perused the case records and heard the rival contentions and have given considerable thought on the records and relevant documents placed before us. From the facts on record and more specifically from the Transfer Pricing Index and report of the assessee, the details of functional structure is provided and after perusal of the orders of the TPO and the Ld. CIT(A), we find that there is no specific findings as to the analysis regarding the functioning of Universal Print Systems Ltd vis a vis the function of the assessee company before holding it to be a comparable company. In the decision of the Bangalore Tribunal in the case of M/s XL Health Corporation India Pvt. ltd. Vrs. ACIT 2018 (4) TMI 82, it was held as under :-

*"**C. Universal Print Systems Ltd.:-***

This company was selected by the TPO by obtaining information by exercising of the power vested with him under the provisions of section 133(6) of the IT Act. The TPO held that this company satisfies all the filters selected by him. However this company was objected by the assessee-company before the TPO on the grounds of functional differences as it is engaged in the business activities such as printing and allied activities, high profit making company and also fails the employee cost filter, the objections of the assessee-company were over ruled by the TPO by holding as under:

> *"Counter to the objection on Functional Comparability:*
> *The functions of the comparable are similar in the sense that the. Pre- Press BPO unit provides back office support services.*

Counter to the objection on High Margins:
Reliance is placed on the decisions of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors and the Delhi Tribunal in Nokia India Pvt Ltd (ITA No. 24210/2010).
Counter to the objection on Employee Cost Filter:
The company operates in four major segments viz., Repro, Label Printing, Offset Printing and Pre-press BPO and for our study, only the Pre-press BPO segment has been considered. Therefore, filters are to be applied only on the figures of this segment. The company was specifically asked to furnish the details of employee cost U/S 133(6) of the Act. Vide its' letter dated 18/12/2015, the company has furnished P&L a/c of Pre press BPO segment, from which it is seen that the 'employee cost relating to Pre-Press BPO segment is Rs. 268. 76(Lacs). The employee cost of Rs 268.76(Lacs) turnover of Rs 611.96 (Lakhs) works out to 44%. Therefore, this comparable clears the employee- cost filter.
The response received from the company u/s 133(6) of the Act has been attached with this order. (Annexure-G) The TPO has used only current data for the F.Y 2011-12. The corrected margin is 52.46%." The Hon'ble DRP also confirmed the findings of TPO.
ii) Being aggrieved, the assessee-company is before us. It is contended by the assessee that this company fail revenue filter more than 75% from ITES segment and also functionally not comparable with that of the assessee-company and also fails the filter of earnings from export against 75% of the total revenue and also fails the employee cost filter as employee cost is only 18.56% of the sales.
iii) We heard the rival submissions and perused the material on record. We have perused the Annual Report of this company placed at pages 352 to 463 of paper book. From the page no. 354 it is stated as under.
"In 2011-12, Your Company faced many challenges ranging from historically steep fuel price increases, non-availability of power throughout the year and high raw material costs.
The Labels and Offset divisions in particular were negatively impacted due to non-availability of power. Tamil Nadu on the whole, faced drastic power outages and restrictions, which were mainly directed at industries in order to keep the vote banks happy. The two divisions saw as much as 6 hours of power
cuts in a day in addition to two days of ''power holidays" in a week. Although this situation is expected to ease in the coming months, it has had an adverse impact on operations in 2011-12.
The periodic fuel price increases through our 2011-12 not just ensured high inflation cutting across every input element, but also adversely affected our cost of captive power generation which became the only source of power during certain periods in 2011-12. In addition, procurement cost of raw materials such
as paper, film and ink rose substantially along with, market expectation regarding price reduction of printed products."

From this it is very clear that this company is into the business of printers whereas the assessee-company is into the Business Process Outsourcing. Therefore by no structure of imagination these two companies can be considered to be functionally similar and therefore we direct the AO/TPO to exclude this company from the list of comparables.

9. Therefore respectfully following the decision of the coordinate Bench of Bangalore Tribunal in the aforesaid case, we direct the AO/TPO to exclude the Universal Print System Ltd from the list of comparables with regard to the assessee herein."

14. Finding parity of facts, we direct for the exclusion of Universal Print Systems Limited from the list of comparables.

15. Insofar as, the inclusion/exclusion of BNR Udyog Limited is concerned, the Hon'ble High Court of Delhi in the case of *Omniglobe Information Technologies (India) Pvt. Ltd. vs. Pr. Commissioner of Income Tax [ITA 741/2018]*, held as under:-

BNR Udyoq Ltd.

We find that this company is engaged in providing medical transcription services which cannot be compared with IT enabled services. The Hon'ble Tribunal in the case of appellant for the assessment year 2011-12 in ITA No. 103 excluded Accentia Technologies Limited from the final set of comparable companies inter alia on the basis that the company provided services in the healthcare division and also engaged in the business providing of KPO services. Similarly the Hon'ble Tribunal in the case of Avaya India (P) Ltd. vs. ACIT in ITA No. 5528/Del/2011 directed to exclude the company holding that a medical transcription service cannot be compared with IT enabled service provider. In ITA 23/PN/2014 and ITA 1897 again in the case of BNY Mellon International Operations (India) (P.) Ltd. vs. DCIT and Xchanging Technology Services India (P) Ltd. vs. DCIT the Hon'ble Tribunal has held that medical transcription services are functionally dissimilar to provision of BPO services. We further find that this comparable during the year under consideration had earned exceptionally higher operating margin at 40.62% which fact is apparent from the operating margin of the preceding and succeeding years wherein the average operating margin is 24.86%.The Hon'ble Tribunal in the case of Actis Advisors Pvt. Ltd. vs. DCIT in ITA No. 5277/Del/2011 has held that entities having high fluctuations in profit margins cannot be regarded as an appropriate comparable for the purpose of benchmarking analysis. In view of the above facts and circumstances we hold that BNR Udyog Ltd. is also not a suitable comparable and therefore we direct AO to exclude this comparable also for the purpose of benchmarking operating margin."

15.1. Which was subsequently followed by the Hon'ble High Court of Delhi in the case of *Evalueserve.com Pvt. Ltd. vs. Pr. Commissioner of Income Tax [ITA 127/2022]*, as under:-

> *"<u>BNR Udyog Ltd.</u>*
>
> *11. After considering the aforesaid submissions, we find that, first of all, on perusal of the annual report it is seen that apart from medical transcription activities, it is also into medical billing and coding services. The functional profile of the medical transcription segment is almost akin to functions of Accentia Technologies Ltd. and again for the various activities of medical transcription, medical billing and coding services there is no separate segment. In the case of Evalueserve SEZ, the Tribunal after detail analysis has excluded the said comparable. The finding of the Tribunal now stands confirmed by the Hon'ble Delhi High Court (supra). Accordingly, respectfully following the same, this comparable is also directed to be excluded."*

15.2. Respectfully following the decisions of the Hon'ble High Court *(supra)*, we direct for the exclusion of BNR Udyog Limited from the final set of comparable.

16. We will now address to the TP adjustment on account of receipt from software development services.

17. The assessee has adopted TNMM as the MAM with PLI being operating profit to operating cost treating the assessee as a tested party. As per the TP study report, the assessee has used the following comparables:-

[This space has been left blank intentionally. P.T.O.***]***

Sr.No	Name of the Company	NCP 2011-12 (%)
1	Akshay Software Technologies Ltd.	9.87
2	Evoke Technologies Pvt Ltd	11.61
3	E-Zest Solutions Ltd	18.79
4	Goldstone Technologies Ltd.	11.01
5	Mindtree Ltd.**	14.43
6	Persistent Systems Ltd.**	27.09
7	R S Software (India) Ltd.	15.28
8	R Systems International Ltd.*	2.60
9	Sasken Communication Technologies Ltd.**	17.00
10	Tata Elxsi Ltd.*	11.28
11	Thirdware Solutions Ltd	19.63
12	Vama Industries Ltd	31.07
	Arithmetic mean	**15.80**

17.1. However, the TPO adopted the following set of comparables for the determination of the ALP:-

Sr. No.	Name of company	PLI % (OP/OC)
1.	Spry Resources India Pvt. Ltd	22.37
2.	Vama Industries (software dev. Services - seg)	31.08
3.	Thirdware Solutions Ltd.	28.17
4.	Evoke Technologies Limited	22.37
	AVERAGE	**23.31**

17.2. And accordingly, worked out the TP adjustment as under:-

	Rs.
Operating revenue of the assessee [B]	27,61,03,112
Operating Cost (OC)	24,00,89,663
Arms Length Mean Margin (OP/OC) [D]	23.31
Arm's Length Price (ALP) of the international transaction [A] (ALP =OC*(1+D))	29,60,54,563
Adjustment over operating income [A-B] (Shortfall being adjustment u/s 92CA)	1,99,51,451

18. Before us, the ld. Counsel for the assessee had vehemently argued for the exclusion of two comparables, namely, Vama Industries with margin at 31.08 % and Spry Resources India Pvt. Ltd. with margin at 22.37%.

19. After giving a thoughtful consideration to the orders of the authorities below, we find that the Co-ordinate bench in the case of *Approva Systems Private Limited (now merged Infor (India) Private Limited) vs. DCIT Circle 1(1) [ITA No. 2444/Pun/2016],* had considered the inclusion/exclusion of Vama Industries on similar business profile and held as under:-

> *"3. We have heard both the sides and gone through the relevant material on record. The first issue taken up by the ld. AR is against the inclusion of Vama Industries Ltd. in the final set of comparables. In fact, the assessee chose this company as comparable. However, during the course of proceedings before the AO, it was contended that the same should be excluded. This contention did not find favour with the AO. The ld. CIT(A) upheld the inclusion of this company in the final set of comparables. The ld. AR submitted that this company should be excluded from the list of comparables on several reasons including different functional profile. The ld. DR raised a preliminary objection for non-exclusion of this company putting forth that it was a comparable chosen by the assessee itself and hence it cannot be allowed to resile from its own stand.*
>
> *4. We are disinclined to sustain the preliminary objection taken by the ld. DR that the assessee should be prohibited from taking a stand contrary to the one which was taken at the stage of the T.P. study or during the course of proceedings before the AO/TPO. It goes without saying that the object of assessment is to determine the income in respect of which the assessee is rightly chargeable to tax. As the income not originally offered for taxation, if otherwise chargeable, is required to be included in the total income, in the same breath, any income wrongly included in the total income, which is otherwise not chargeable, should be excluded. There can be no estoppel against the provisions of the Act. Extending this proposition further to the context of the transfer pricing, if an assessee fails to report an otherwise comparable case, then the TPO is obliged to include it in the list of comparables, and in the same manner, if the assessee wrongly reported an incomparable case as comparable in its TP documentation and then later on claims that it should be excluded, then, there should be nothing to forbid it from claiming so, provided the company so originally reported as comparable is, in fact, not comparable. Simply because a company was wrongly chosen by the assessee as comparable, cannot tie its hands in Approva Systems Private Limited contending before the Tribunal that such a company was*

wrongly chosen as comparable which, in fact, is not. There is no qualitative difference in a situation where the assessee claims that a wrong company inadvertently included for the purpose of comparison should be excluded and the situation in which the Revenue does not accept a particular company chosen by the assessee as comparable. The underlying object of the entire exercise is to determine the arm's length price of an international transaction. Simply because a company was wrongly considered by the assessee as comparable cannot act as a deterrent from challenging the fact that such a company is actually not comparable.

5. The Hon'ble Bombay High Court in several decisions including CIT Vs. Tata Power Solar Systems Ltd. (2017) 298 CTR 0197 (Bom) has held that a party is not barred in law from withdrawing from its list of comparables, a company included on account of mistake. Similar view has been taken by the Hon'ble Delhi High Court in Xchanging Technology Services India Pvt Ltd [TS-446-HC-2016(DEL)-TP] and the Hon'ble Punjab & Haryana High Court in CIT VS. Mercer Consulting (India) P. Ltd. (2017) 390 ITR 615 (P&H). In view of the foregoing discussion, Approva Systems Private Limited we do not find any substance in the preliminary objection taken by the ld. DR.

6. Now we turn to examine the actual comparability of Vama Industries Ltd. Before proceeding to analyze the comparability of this company, it would be befitting to consider the functional profile of the assessee. At the cost of repetition, it is noted that the assessee is engaged in providing software development services and quality assurance (testing) services and the later are also admittedly in the nature of software development services. The nature of services has not been disputed by the AO. We have gone through the Annual report of Vama Industries Ltd. for the year under consideration, a copy of which has been placed on record. Profit and loss account of this company has been set out at page 29 of the Annual report, which indicates revenue from operations at Rs.14.01 crore. Bifurcation of such revenues is available in Note no. 20 as Sale of products (Domestic - Rs.9,55,70,528/- & Export - Rs. Nil) at Rs.9,55,70,528/- and Other operating revenues (Domestic - Rs.1,17,40,234/- & Export - Rs.3,28,66,174/-) at Rs.4,46,06,408/-. Further bifurcation of `Other operating revenues' from export is given in Note No.33 which shows revenue from export of Engineering services at Rs.3.22 crore and revenues from software development services at Rs.6.02 lakh. The segmental information of this company has been given at page 50, which deciphers revenues from `Software development services' at Rs.3.28 crore, revenue from `Hardware sales and services' at Rs.10.21 crore and revenue from `Metals and minerals' at Rs.51.19 lakh leading to total consolidated revenue of Rs.14.01 crore. Thus, it is clear that the revenue from `Software development service' segment, which has been considered for the purposes of comparison with the assessee's only international transaction of rending software development services, stands at Rs.3.28 crore. On perusal of Note no.33 to the annual accounts of this company as referred to above containing break-up of revenue from `Software development services' segment, it emerges that revenue from software development services is only a sum of Rs.6.02 lakh and the entire remaining revenue of Rs.3.22 crore is from engineering services. There can be no dispute on the proposition that engineering services are quite distinct from software development *services in terms of skill, effort and expertise etc. An effective comparison of the assessee's lone software development services can be made only with a company which is also either rendering software development services alone or if it is doing some other activity also, then necessary information for computing operating profit rate from the software development services, can be separately identified. If a company is rendering software development services and also engineering services and further there is no information available from its Annual report to find out the operating profit from the software development services, then such a company cannot be considered as comparable with the assessee rendering only software development services.*

7. The Hon'ble Delhi High Court in CIT Vs. Verizon India Pvt. Ltd. (2014) 360 ITR 342 (Delhi) considered a case in which the assessee was engaged in providing marketing services. The AO selected certain companies as comparable which were rendering engineering services. The Tribunal's view in upholding the exclusion of such companies rendering engineering services was upheld by observing that the marketing services cannot be compared with engineering services. Similar ratio applies to the facts of the instant case as well. Whereas the assessee in question is engaged in rendering software development services, it cannot be compared with a company rendering software and technical services, more so, when the percentage of software development services is minuscule, at just 1.86%.

8. It is further pertinent to note that the Directors' report of this company contains `Segment-wise performance' at page 11, which states that : "As of March 31, 2012 our main reportable segments are Software Development & Services (IT & ITeS) and Product/Hardware Sales & Services". It is, thus overt that the "Software Development & Services" segment of Vama Industries Ltd., which has been considered as comparable not only includes revenues from Software development services but also from I.T. enabled services as well. It goes without saying that I.T. services and I.T. enabled services are as distinct in connotation and nature as north pole is from the south pole. Whereas IT services include software development services, IT enabled services means services rendered with the already developed software. As IT and ITeS services are not comparable, the assessee rendering only IT services cannot be compared with a company which renders both IT and ITeS. In view of the foregoing discussion, we are satisfied that Vama Industries Ltd. is not a functionally comparable company and the same should be excluded from the list of comparables."

20. Respectfully following the decision of the Co-ordinate Bench, we direct for the exclusion of this comparable from the final set of comparables.

21. The ld. A/R submitted that if Vama Industries is excluded, then its profit margin would fall within (+)/(-) 5% range and there would be

no need to examine other comparables challenged in the instant appeal. Considering this concession, we do not deem it appropriate to delve into other companies from the angle of comparability.

22. Insofar as, the inclusion of the Thirdware Solutions Ltd., is concerned, it has been argued that nowhere the TPO has explained how he has worked out the margin of this comparable at 28.17% when as per the assessee, the margin comes at 19.63%. We are left with no choice but to restore this issue to the file of the TPO. The TPO is directed to explain how he has computed the margin at 28.17% and re-determine the inclusion/exclusion of this comparable after affording a reasonable and adequate opportunity of being heard to the assessee.

23. In the result, appeal of the assessee is allowed as per above directions.

Order pronounced in the Court on 3rd January, 2025 at Mumbai.

Sd/-	***Sd/-***
(SANDEEP SINGH KARHAIL)	**(NARENDRA KUMAR BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated 03/01/2025
SC Sr.Ps

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि , **आयकर अपीलीय अधिकरण, मुंबई** /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ **BY ORDER,**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai