

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.6636/Del/2015
(Assessment Year: 2011-12)

Rolls-Royce India Pvt. Ltd.,
2nd Floor, Birla Tower West,
25, Barakhamba Road,
New Delhi
PAN:AABCR5277Q
(Appellant)

Vs.

DCIT,
Circle-21(2),
New Delhi
(Respondent)

Assessee by :
Respondent by:
Date of Hearing
Date of pronouncement

Sh. Pradeep Dinodia, Adv
Sh. Manu Chaurasia, Sr. DR
16/02/2016
22/04/2016

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld. DRP-2, New Delhi for the Assessment Year 2011-12.
2. The assessee has raised the following grounds of appeal:-
 1. *That the Ld. TPO and consequently DRP/AO has erred in law and on facts in the circumstances of the case in confirming the addition on account of arms' length price under section 92CA(3) of the Income-tax Act amounting to Rs.3,64,82,532/- on wholly illegal, erroneous and untenable grounds.*
 2. *The order of assessment is bad in law.*
 3. *The learned AO's order based on the findings of the learned Transfer Pricing Officer and the directions of the learned Dispute Resolution Panel u/s.144C(5) of the Income-tax, is erroneous, untenable in law and on facts for the various reasons and not limited to the following: -*

- 3.1. The TPO as well as the DRP and consequently the AO have grossly erred in law and on facts and in the circumstances of the case in erroneously:
 - 3.1.1. Rejecting the scientifically run search process of the assessee without cogent reason.
 - 3.1.2. Rejecting the search process of the assessee was bad in law in view of the facts the final set of comparables of the Ld. TPO had 5 of the originally chosen comparables by the assessee.
 - 3.1.3. Carrying out a new search process based on erroneous filters
 - 3.1.4. Cherry Picking the comparables
- 3.2. The TPO as well as the DRP and consequently the AO have grossly erred in law and on facts and in the circumstances of the case for the choice of comparable companies by erroneously:
 - 3.2.1. Determining the ALP of the international transactions of the assessee related to project management services (PMS), marketing support services (MSS) and corporate services that are support services in nature by treating and comparing them to high-end technical services, which is not in line with Rule 10B(2)(b), such that it does not satisfy the Functions performed, Assets employed and Risk assumed (FAR) Tests.
 - 3.2.2. Ignoring the fact that the AE service segment of the assessee constitutes of more than 90% i.e. substantially and predominantly comprising of support services and therefore comparable companies which provided similar support services to the support service segment of the assessee should have been chosen, thus not satisfying the Functions Test.
 - 3.2.3. In not appreciating the fact that the new comparables chosen bear different risk in rendering technical services, while the assessee is non-risk bearing entity in its support services segment.
 - 3.2.4. In not appreciating that the differences on account of Assets Employed (Working Capital) in rendering services by HSCC (India) Ltd. and Ashok Leyland Project Services Limited materially affect the cost paid such that it does not fulfill the criteria laid down as per Rule 10B(3) of Income Tax Rules and should be rejected, such that reasonably accurate adjustment cannot be made to eliminate such differences.
 - 3.2.5. In not appreciating the Risks assumed by the assessee is NIL vis-a-vis the comparables which are high end service providers such that a Risk Adjustment should also be allowed to the assessee to fulfill the criteria laid down in Rule 10B(2)(b) of the IT Rules.
- 3.3. The TPO as well as the DRP and consequently the AO have erred in law and on facts and in the circumstances in determination of the PLI of the assessee and the comparable companies by:
 - 3.3.1. In treating the foreign exchange gain/loss as non-operating nature.

- 3.3.2. *In treating the provision of doubtful debts as non-operating nature*
- 3.3.3. *In treating the bad debts written off, bank and finance charges as non-operating nature*
4. *That the Ld. AO has erred on the facts of the assessee's case in not allowing the credit of prepaid taxes of Rs.7,83,747/- deposited on wrong PAN by genuine mistake and a TDS credit of Rs.70,321/- on account of computer mis-match.*
 5. *That the proposed addition of Rs.3,64,82,832/- is bad in the law and is prayed to be deleted.*
 6. *That the penalty proceedings initiated u/s Sec 271(l)(c) are on wholly illegal and untenable grounds since there was no concealment of any income nor submission of inaccurate particulars of income, nor any default according to law by the assessee.*
 7. *That the interest charged u/s Sec 234B and 234C of the Act is on wholly illegal and untenable grounds and is prayed not to be upheld."*
3. Brief facts of the case is that the assessee is a global company operating in the civil aerospace, defence, marine and energy markets with facilities in 14 countries. Its core gas turbine technology has created one of the broadest product ranges of aero engines in the world with 54,000 engines in service with 600 airlines, 4000 corporate and utility operators and more than 160 armed forces, powering both fixed wing and rotary aircraft. In addition more than 70 navies use Rolls-Royce propulsion. Rolls-Royce International Limited, UK (RRIL) is a private limited company registered in the United Kingdom. It is engaged in formation of policies and strategies for the development of business opportunities in specific countries and provides marketing, research and commercial information service to its associated enterprises. Rolls-Royce India Pvt. Ltd. A subsidiary of Rolls-Royce Overseas Holding Limited, operates in India primarily in the power generation and oil and gas markets, with a range of reciprocating engines covering gas engines, HFO engines and crude oil engines. In the oil and gas sector, Rolls-Royce engines

are used for running very large pumps to drive crude oil through pipelines running several hundred miles and also providing electrical power for such pumping stations. Similarly, for power generation, the engines are used to run generators catering for the captive power needs and process stream/ heat requirements of various industrial units. In additions to the above, RRIPL also undertakes servicing contracts wherein it purchases spare parts from Indian manufacturers and distributors, overseas Rolls-Royce entities and overseas third parties for subsequent sale. Further, it performs services such as repair and maintenance and other services including technical, project management and marketing support.

4. Assessee filed its return of income on 30.03.2013 (stated to be revised return) at a total income of Rs.382294149/-. According to the information filed assessee entered into following international transactions during the year:-

S. No.	Type of international transaction	Method Selected		Total value of transaction (Rs)
1.	Purchase of traded goods	TNMM	NPM	193890036
2.	Sale of traded goods			820463903
3.	Provision of technical, project management and market support services		NCP	56807674
4.	Repayment of loan	NA		17792500
5.	Interest on external commercial borrowing	CUP		175035
6.	Reimbursement of expenses	NA		282406098

5. For these international transactions assessee submitted requisite transfer pricing study report and report of auditors in form No.3CEB. For the benchmarking of support services assessee submitted that TNMM is a most appropriate method and selected

operating profit to total cost as PLI. The PLI of the company is @16.55% and PLI of the comparables selected by the assessee is determined at 13.71% and therefore it was submitted that the international transactions are at arm's length. For the TP Study Report assessee took multiple year data for this bench marking. Assessee selected 13 comparables for bench marking of its support services.

6. The case of the assessee was referred u/s 92CA(1) to Id. Transfer Pricing Officer for determination of arm's length of international transactions. Id. TPO on examination out of 13 comparables selected by the assessee rejected 8 comparables on various factors and updated search further selected and retained in final analysis total of 19 comparables whose average PLI is 27.46% and computed arm's length price of Rs.384455373/- against priced charged by the assessee of Rs.333193056/- and proposed an adjustment of Rs.51262317/-. Consequently draft assessment order dated 12.02.2015 was framed which was challenged before DRP by filing an objection on 09.04.2015. Id. DRP held that the service segment of the assessee includes mix of technical, project management and marketing support services. Therefore it cannot be said that all the services provided by the assessee are very high end services. On this observation it directed to include one comparable and further with respect to 8 comparables included by TPO it directed to exclude 3 comparables selected by TPO and retained 5 further comparables selected by TPO. It further directed to rectify arithmetic error in computing margins of 2 comparables i.e. Ashok Leyland and HSCC. In finality 17 comparables remained which has average PLI of 22.56% and the ALP was determined at 369675588/- of the international

transaction amounting to Rs.333193056/- resulting into adjustment of Rs.36482532/-. Against this assessee has preferred appeal before us raising in all 7 effective grounds of appeal as stated above.

7. Ground Nos.1,2,3,5 and 8 are submitted to be general in nature and same are dismissed.
8. The next ground of appeal is ground Nos. 3.1.1 to 3.1.4. These grounds are against the TP process conducted by the TPO and holding that support services activities in nature by treating them and comparing it with other high end service providers which do not satisfy FAR analysis with the assessee of comparability. Before us assessee submitted that this issue is covered in favour of the assessee in its own case for AY 2010-11 in ITA No.1310/Del/2015 wherein identically ground No.3.1 to 3.1.3 has been raised. Ld. AR submitted that in para No.31 of that decision the coordinate bench has held that for comparability analysis with the company comparable should be selected which are providing non risk bearing business support services. Therefore it was submitted that these grounds are covered in favour of the assessee.
9. Against this ld. DR referred to the order of coordinate bench wherein it is held that assessee is providing O&M services which are providing very highend services which constituted 10% of the average service segment. He also submitted that the ld. TPO at Page No.12 has dealt with this issue in para No.6 wherein it has been held that the assessee is engaged in providing market support services including identification of new business opportunity and prospective customers, planning and assistance in business strategy. Therefore ld. TPO has rightly stated that it

is not providing routine business services but rendering marketing support services.

10. We have carefully considered the rival contentions and we have noted that the assessee provides following services as per para no.4 of the TP Study Report submitted by the assessee. On perusal of the those services and risk assume which says that for this services the major risk assume by the assessee is service liability risk, market risk, foreign exchange risk and credit risk are assumed. The services performed are provision of technical services, project management services and market support services. The major contention of Id. TPO is that market support services is not routine services in the form of passive business support but rendering market support services. On perusal of the marketing services the assessee provide services such as maintenance of client relationship, identification of new clients, assistance in formulation of market and business strategy and coordination with respect to customer compliant services. On going through the order of TPO wherein a show cause notice dated 23.12.2014 we do not find in para no.4 a single word which shows that the assessee is asked to show cause at any point that assessee is not a low risk or non -risk bearing service provider. In para no.6 of the order of the TPO at page No.12 that various services provided by the assessee are not routine services but rendering market support services. This observation has not been substantiated by TPO how it changes the risk profile of the assessee which remains undisputed. Ld. DR also could not point out that what are the changes in the risk profile mentioned by the assessee and which has also been considered by coordinate bench comparable to this year. In view of this we respectfully

following the decision of the coordinate bench hold that assessee is low risk/ non risk bearing business support service provider.

11. The Ground No.3.2.1 to 3.2.3 which are also against the FAR analysis of the assessee. As we have already held following the decision of the coordinate bench that assessee is engaged in business support services which is low risk bearing or none risk bearing services and therefore we allow ground No.3.2.1 to 3.2.3 of the assessee respectfully following the decision of coordinate bench in AY 2010-11.
12. On the comparables this ground also says that only companies with similar profile should be selected and highly technical service provider should be excluded. Based on this the 17 comparables assessee has contested each of them as under:-

S. NO.	Company name	Business Profile	Reliance placed for rejection
1.	Apitco Ltd	Imparting consultancy in entirely different field and is not comparable to functions performed by the assessee (ITAT order PB pg. 254)	Covered by ITAT order for AY 2010-11 in assessee's own case
2.	Kitco Ltd	Functionally not comparable to the assessee because of nature of services rendered (ITAT order PB Pg.256)	Covered by ITAT order for AY 2010-11 in assessee's own case
3.	T C E Consulting Engineers Ltd.	Tata Consulting Engineers Limited (TCE) is an Indian engineering consulting firm. The company is a wholly owned subsidiary of Tata Sons Limited. The company provides engineering services and solutions for power, nuclear, infrastructure, industrial, mining and minerals, steels and metals, transportation, water, building, manufacturing, spatial planning, and the environment. Lately an advanced technology business unit has also been started. Hence highly technical. See profile on PB Pg.274-276)	M/s Verizon (India) Pvt. Ltd. Vs JCIT {ITA No: 4187/Del/2010}, "EIL, RITES, WAPCOS and TCE operate in engineering consultancy industry, the risks and returns vary significantly from those of the marketing support services company operating on a cost plus model." Covered by ratio of ITAT order for AY 2010-11.
4.	IBI Chematur (Engineering & Consultancy) Ltd.	IBI Chematur (Engineering & Consultancy) Ltd. is a joint venture company promoted in association with Chematur Engineering AB, Sweden to render engineering and consultancy	M/s Verizon (India) Pvt. Ltd. Vs JCIT [ITA No:4187/Del/2010], Engineeringconsultancy

		<p>services in field of Petrochemicals, Fine chemicals & Chemicals, Cosmetics, Pharmaceuticals, Industrial Explosives & Waste acid recovery. Hence highly technical. See profile on PB Pg.263-266.</p> <p>Also approved under the Software Technology Park scheme of the Govt as a 100% EOU.</p>	<p>activity, given the complexity of the function coupled with the technical expertise required in providing engineering consultancy, the same activity cannot be considered comparable to function of providing marketing support services due to functional differences, differences in industry and difference in market dynamics, Actis Advisers Pvt. Ltd. vs Addl. Commissioner of Income Tax [TS-181 -ITAT-2013-DEL-TP] Covered by ratio of ITAT order for AY 2010-11.</p>
5.	Mahindra Consulting Engineers Ltd.	<p>Mahindra Consulting has been focusing on engineering consulting services on the thrust areas of infrastructure. MACE of engaged in providing infrastructure engineering consulting services including basic/preliminary engineering, detailed engineering, project management services to various sectors. Hence highly technical. See profile on PB Pg. 271-273.</p>	<p>M/s Verizon (India) Pvt. Ltd. Vs JCIT [ITA No: 4187/Del/2010], Actis Advisers Pvt. Ltd. vs Addl. Commissioner of Income Tax [TS-181 -ITAT-2013 -DEL-TP] Covered by ratio of ITAT order for AY 2010-11.</p>
6.	Mitcon Consultants & Engg. Services Ltd.	<p>MITCON was formed as a technical consultancy organization in 1982 jointly by ICICI, IDBI, IFCI, SICOM, MIDC, MSS1DC and various banks.</p> <p>It is engaged in providing corporate solutions in power generation, energy efficiency, renewable energy, climate change and environmental management sectors. Over the years, it has diversified into providing services to banking, infrastructure and biotechnology sectors. It provide solutions to clients depending on their requirements inter alia including feasibility studies, detailed project reports, techno economic feasibility reports, financial syndication, lender's engineer services, Environment Impact Assessment (EIA), basic and detailed engineering. Hence highly technical. See profile on PB Pg. 277-278.</p>	<p>M/s Verizon (India) Pvt. Ltd. Vs JCIT [ITA No: 4187/Del/2010], Actis Advisers Pvt. Ltd. vs Addl. Commissioner of Income Tax [TS-181 -ITAT-2013-DEL-TP], Novartis Healthcare Pvt Ltd vs, Addl. CIT 2015-TII-161-ITAT-Mum-TP, IQOR India Services Pvt Ltd vs. ITO 2015-TH-164-ITAT-Del-TP</p> <p>Covered by ratio of ITAT order for AY 2010-11.</p>
7.	Info(India) edge Pvt.Ltd	<p>Info Edge (India) Limited (Info Edge) is India's premier on-line classifieds company in recruitment, matrimony, real estate, education and related</p>	<p>The company is an e-commerce/online classified advertisements internet company which provides information to customers</p>

		services.	about insurance policies, dining and eateries, HR recruitment etc. which is in strong contrast to the business profile of the assessee company which is providing basic co-ordination and support services to its AEs. Thus, not functionally comparable as per Rule 10B(2) and prayed to be rejected. 10B(2)
8.	MMTV Ltd.	MMTV is a Malayalam language news channel and has a presence in various media like print, radio, online and television.	Ld. TPO has rejected the assessee's comparable Entertainment Network (India) Ltd. for being operating a radio channel and thus being functionally different (PB Pg.110). On the same basis of functionally difference between rendering support services and running and operating an infotainment network channel, the comparable MMTV should also be rejected as functionally different as per Rule 10B(2).
9.	Ashok Leyland Project Services Ltd.	The company assists investment entities of the group in successfully identifying and implementing projects in India, provides specialized inputs to assist in the profitable and economic implementation of projects, provides negotiated equity on behalf of Hinduja Group as a commitment to the sustained result of its services etc. Hence highly technical. See profile on PBPg.283	Engaged in financial servicesector, Functionally different from the assessee as per Rule 10B(2)
10.	H S C C (India) Ltd.	HSCC India Ltd is a Government of India enterprise set up in 1983 with an authorised capital of Rs. 20 million, HSCC is one of the few organisation in South East Asia, rendering comprehensive range of professional consultancy services in health-care and other social sectors, in India and abroad The services of HSCC's being government of India enterprise, have been utilized by various organization, both in Public and Private Sectors, Central Government Department, State Governments as also international agencies like the World	The company is a Govt. of India Undertaking providing high quality professional services. Considering these facts, ITAT in case of Shell India Markets Pvt. Ltd [TS-430-ITAT-2014(MUM)-TP] held that the company was not functionally comparable and directed its exclusion. Reliance is also placed on ITAT rulings in Chemtex Global Engineers Pvt. Ltd. [TS-161-ITAT-2013(Mum)-TP] and Yum Restaurants (India) Pvt. Ltd [TS-I66-ITAT-

		Bank, WHO, among others for their projects in India and abroad. It undertakes various IT projects and Procurement projects as evident from the website of the company. Hence highly technical. See profile on PB Pg. 279-280	2014(DEL)-TP] in which it was held that engineering, consultancy, chemical testing services not comparable to assessed marketing support services. Covered by ratio of ITAT order for AY 2010-11.
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13. Against this all comparables ld. DR relied on the orders of ld. TPO as well as ld. DRP.
14. Before we proceed to examine the comparables several decisions of various tribunals have been cited by the rival parties regarding inclusion or exclusion of certain comparables submitting that these comparables should be excludible or includible at the first instances based on those decisions. We are of the view that each decision has rendered a particular comparable excludible or includible based on the facts of that case as well as the FAR of the assessee whose issues are decided. We are really aware about the precedent value of those decisions while deciding the comparables regarding its suitability. However we feel that the paramount importance shall be on Rule 10B (2) of the Income Tax Rules 1962 which is as under:-

“(2) For the purposes of sub-rule (1), the comparability of an international transaction ^{55c}[or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:—

- (a) the specific characteristics of the property transferred or services provided in either transaction;
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.”

Therefore it may so happen that a comparable company engaged in the similar business which is having the similar FAR may be generally included though same might have been held to be not includible by the courts in some other cases. Further the contractual terms as well as host of other factors stated in above sub rule may determine the comparability analysis. If the difference arising on comparability analysis does not affect the price or profitability of comparable or if so it can be reasonably adjusted same should be taken as good comparable for the Comparability analysis. Therefore it cannot be ever assumed that if a comparable is held to be excludible in one case, it shall always be excluded in the decisions to follow subsequently. Therefore while deciding the comparability the decisions cited definitely would be perused from this angle.

15. We have carefully considered the rival contentions. Comparable No.1 Apitco Ltd. and no 2. Kitco Ltd. are submitted to functionally not comparable and further it is submitted that they have been considered by the coordinate bench in the order of the assessee for A.Y. 2010-11 in assessee's own case as under:-

“36. The second comparable, inclusion of which is disputed by the assessee, is Apitco Ltd. In the synopsis filed by the assessee it is mentioned that the services provided include but not limited to the domains of project report preparation, techno economic studies, feasibility studies, micro enterprise development, skill development, project management consulting, industrial cluster development, environmental management consulting, energy management consulting, market & social research and asset reconstruction management services. This company was promoted jointly by All India Financial Institutions (IDBI, IFCI, ICICI), State Industry Development

Corporations (APIDC, APSFC) and commercial banks (Andhra Bank, Indian Bank, State Bank of India, Syndicate Bank),

37. From a bare perusal of the services rendered by Apitco Ltd. it is clear that it is imparting consultancy in entirely different field and is not comparable to the functions performed by different service segments of assessee. We, therefore, direct for exclusion of this comparable from the list of comparables.

KITCOLTD.

38. The functional profile of this company, as given in the synopsis filed by the assessee, is as under:

“1. KITCO, the first technical consultancy organization (TCO) in India, was established in 1972 by Industrial Development Bank of India, other national and state level financial institutions, Govt. of Kerala and 7 Public Sector Banks for rendering services to Entrepreneurs, Govt. Departmental PSUs, Local Bodies, etc. Presently, Small Industries Development Bank of India (SIDBI) is the prime shareholder with 49% shares of the company.

2. The aim of setting up of TCO, which had the blessing of Govt. of India and the Reserve Bank of India, was to provide professional technical consultancy assistance to banks by appraisal of projects for priority sector lending and to entrepreneurs in the 5MB Sector by way of preparation of Project Reports & Market Studies and conducting training programmes for entrepreneurship development. Subsequently similar TCOs were set up in almost all the states with one of the National Financial Institutions (IDBI, IFCI or ICICI) as the prime shareholder.

3. KITCO has successfully implemented projects like Cochin International Airport Ltd., Titanium Sponge Project, International Marina, Cochin Special Economic Zone, etc and presently implementing a multimodal Mobility Hub at Cochin, all of which are first of its kind in the country in their own respect. KITCO has successfully completed the Phase-1 of CIAL Golf Course & Country Club and Ghallah Wentworth Golf Course at Muscat, Sultanate of Oman, thereby establishing itself in an area, which was considered to be the forte of European Consultants. The prestigious overseas assignments KITCO so far has completed include the technical evaluation of electrical power distribution network at King Abdul Aziz International Airport, Jeddah.

4. All its clients are either central government, state government, PSU etc. Snapshot enclosed.

5. It is working in divisions like infrastructure, tourism, aviation, IT services, HRD, financial services etc. which are dissimilar to the functional profile of the assessee company. Snapshot enclosed.

39. From the above submissions it is evident that this comparable is not functionally comparable with the assessee because it is the nature of services rendered and not per se rendering of services is relevant in accepting or rejecting a company as comparable. Therefore, we direct exclusion of this comparable from the list of comparables.”

16. In view of above finding of coordinate bench for exclusion of Aptico and Kitco Ltd. holding that they are functionally different

and are not comparable with the assessee. Therefore respectfully following the decision of coordinate bench we direct to exclude both these comparables accordingly.

17. Regarding TCE Consulting Engineers Ltd. it is submitted that it is also engaged in providing highly technical services. The profile submitted by the assessee shows that it has successfully managed complex engineering projects across the infrastructure spectrum and also associated with prestigious urban infrastructure facilities such as Airports, Railway and Aerotropolis engineering consulting projects. Therefore it is apparent that this company is engaged in providing high end engineering consulting services which is not comparable with the functional analysis of the assessee. Therefore we direct to exclude this comparable.
18. Regarding IBI Chematur (Engineering & Consultancy) Ltd. it is contended that this company shows its project through R&D etc. and it is also 100% EOU and therefore it should be excluded. Before Id. TPO and DRP the assessee submitted that the assessee is a 100% EOU therefore it's pricing policy and profits are not comparable and therefore should be excluded. Before Id. DRP it also submitted that it has significant intangibles. We have carefully considered the rival contention with respect to this comparable based on the functional profile submitted before us at page no.263 to 266 it is apparent the profile pertains about IBI Group at page NO.263 and 264. At page no.263 the specialization of the company and its technologies offered to its respective clients are mentioned. At page 266 the list of clients of the comparables are mentioned. In view of this nothing has been produced before us to substantiate that this company is

functionally not comparable with the assessee. Further the reasons that assessee is a registered as 100% EOU cannot be the reason for exclusion of a comparable as a registration of comparable as 100% EOU only gives it benefit with respect to indirect and direct taxation and nothing else. It does not change the functional profile of the comparable. Further even if it has impacted the prices charged by the comparable same is required to be shown that what is its impact on the PLI of the comparable. Therefore merely on this ground this comparable cannot be rejected. Before Id. DRP assessee has submitted that it has significant intangibles however, no details demonstrating this fact has been produced before us and therefore we set aside this comparable to the file of Id. TPO for verification and adjudicating on this ground only.

19. The next comparable is Mahindra Consulting Engineers which is said to be highly technical. The functional profile is placed at page no.271, 272 of the Paper Book and objections before the Id. TPO at page 187 and 188 of the Paper Book. The TPO has selected this comparable stating that the company has single reportable segment as per page no.17 of the annual report i.e. consultancy business and therefore it is a good comparable. Id. DRP also accepted the inclusion of this company by Id. TPO. We have carefully perused page no.271 to 273 of the Paper Book. However on going through the same pages submitted before us it is mentioned that the above company is part of 'Mahindra Partners'. It does not show the functional profile of Mahindra Consulting Engineers i.e. comparable. However on page 272 it shows that this company is engaged in providing services and has proved its capability to execute innovative projects and two

penetrate into new areas of operation. It further submitted that it is engaged in providing infrastructure engineering and consulting services. Therefore it is apparent that it is functionally different. Therefore we direct comparable to be excluded in view of highly technical capabilities of executing infrastructure development projects.

20. The next comparable is Mitcon Consultants and Engineering Services. We do not find that this comparable is objected by the assessee either before Id. TPO or before Id. DRP. However it has been challenged before us now stating that this company is functionally not comparable. In view of this respectfully following the decision of honourable special bench in Deputy Commissioner of Income-tax V Quark Systems (P.) Ltd. 2010] 38 SOT 307 (CHD.) (SB) We remit this comparable back to the file of the Ld. TPO for exclusion or retention of this comparable as plea for its exclusion has been raised before us for the first time.
21. Regarding Infoedge India Pvt. Ltd we are of the view that this company has been included by the TPO holding that it is functionally comparable. Assessee contended before the Id. TPO as well as DRP that this company is functionally not comparable in view of it engaged in management of online portals and also has major sources of revenue as advertisement income. Both the lower authorities rejected the contention of the assessee. We have carefully considered the rival contentions. It is apparent that the comparable selected by TPO is engaged in online portal activities such as employment website, matrimonial website and its major revenue is advertisement and subscriptions. It has diversified services such as recruitment related, real estate related, matrimonial related services and owns significant

intangibles/websites such as naukri.com, 99 acre.com etc. Therefore this company is functionally different as it is providing an advertisement space as well as online portal based on subscription by the buyer and seller of the services compared to services provided by the assessee of marketing support services . In view of this we direct ld. TPO for exclusion of this comparable.

22. The next comparable is MMTV Ltd. Which is a Malayalam Language News Channel having presence in print media, radio and online television. Its main income is advertising income. Ld. TPO and DRP rejected the contention of the assessee. We have carefully considered the rival contentions and note that this company is engaged in running a news channel and also publish a daily magazine and main source of income of the comparable is advertising revenue. The functional profile of the assessee as well as the comparable are of diverse nature and therefore we direct for exclusion of this comparable.
23. The next comparable is Ashok Leyland Project Services Ltd. This company is included by TPO and before TPO assessee did not object regarding inclusion of the same. We have perused letter dated 19.01.2015 placed at page no.174 onwards where we do not find that assessee has raised any objection to the above company. Similarly on perusal of para no.7 of the order of the ld. DRP we also do not find that this comparable is objected to its inclusion. The only objection raised by the assessee was with respect to arithmetical error pointed out in computing margins of the comparable, which has been corrected by TPO after verification. Hence, In view of this respectfully following the decision of honourable special bench in Deputy Commissioner of

Income-tax V Quark Systems (P.) Ltd. 2010] 38 SOT 307 (CHD.) (SB) We remit this comparable back to the file of the Ld. TPO for exclusion or retention of this comparable as plea for its exclusion has been raised before us for the first time.

24. The next comparable is HSCC India Ltd. which has been included by ld. TPO based on page no.7 of the annual report of that company. However, on reading of the order of TPO we do not find any argument of the assessee regarding exclusion of this comparable. On reading of the order of the DRP also this comparable was not objected to its inclusion by TPO. Only objection was raised regarding correction of the margins and this grievance of the assessee is resolved by ld. DRP. In view of this respectfully following the decision of honourable special bench in Deputy Commissioner of Income-tax V Quark Systems (P.) Ltd. 2010] 38 SOT 307 (CHD.) (SB) We remit this comparable back to the file of the Ld. TPO for exclusion or retention of this comparable as plea for its exclusion has been raised before us for the first time.
25. Further, it is submitted by the assessee that risk adjustment made by the ld. TPO with respect to HSCC India Ltd. and Ashok Leyland Project Services Ltd. was without giving proper opportunity to the assessee. The ld. TPO in its final order has taken PLI of HSCC at 86.58% whereas in the show cause notice it was proposed at 21.04% and further in case of Ashok Leyland Project Services Ltd. also working capital adjustment made by TPO has not been confronted which is in the show cause notice was 24.70% whereas in the final order it is 33.47%. Therefore we direct ld. TPO to grant proper opportunity of hearing and

submission of its argument regarding adjustments made to the PLI of these comparables.

26. Regarding the risk adjustment assessee has raised a specific ground at ground no.3.2.5. assessee has contended that as it has been held by coordinate bench in AY 2010-11 in the case of the appellant that assessee is a risk free service providing entity and while the comparables proposed by TPO are providing high end technical services. This comparables assumes risk other than normal risk of business of providing marketing support services. In nutshell his argument was that in the selected and retained comparables the PLI should be adjusted according to the risk assumed by those comparables. Ld. DR relied on the orders of lower authorities and submitted that though risk adjustments should be made however, the information should be forthcoming from the assessee. We have carefully considered the rival contentions and fully agree with the contention of the ld. AR that an adjustment should be allowed to the assessee of the difference in the risk borne by the assessee as well as the comparables. Before us assessee has submitted a working which is based on market rate of return of 12.26% used by the TPO while granting working capital adjustment compared with 7.57% rate of return for Indian treasury bills. Based on this working assessee has computed the risk adjustment as under:-

Particulars	Percentage
Market Interest Rate (As per TPO Order PB Pg.286) (A)	12.26%
Risk Free interest (B)	7.57%
Risk Premium (OA-B)	4.69%
Proportion of Risk Premium Rate to Total Market Interest (D=C/A)	38.25%

Average PLI of Comparables (as per AO final order) (E) for market return (PB 224)	22.56%
Less: Adjustment of Risk Premium out of Market return (F=E*D) (22.56%*38.25%)	8.63%
Adjusted Risk free PLI of comparables (G=E-F)	13.93%
Tested Party PLI (para 1 5. 1 of TPO order)	10.24%

27. Without commenting on the correctness of the computation of adjustment requested by assessee we set aside this ground to the file of Id. TPO for fresh consideration in accordance with law after granting proper opportunity to the assessee for supporting its claim.
28. Thus we dispose of ground no. 3.2.1 to 3.2.5 accordingly with above directions.
29. Ground NO.3.3 of the appeal is against not including the forex gain or loss of the assessee as operating cost or operating income. Before us Id. DR contended that this issue is covered in favour of the assessee in view of decision of coordinate bench for AY 2010-11 in assessee's own case. Ld. DR relied on the orders of the lower authorities. Similarly regarding provision for doubtful debts which has been treated by Id. TPO and DRP as none operating cost it has been submitted that this issue is also covered in favour of the assessee by the above decision wherein it has been held that such provision be treated as part of operating expenditure. We have carefully considered the rival contentions and also perused the orders of the coordinate bench wherein in para 50 at page no.25 of that order it has been held that forex gain or loss shall be treated as operating income/ expenditure both in the case of tested party as well as comparables and the PLI should be determined accordingly. Regarding the treatment

for provision for doubtful debts in para 55 at page 27 of the order coordinate bench has held that this provision be treated as part of operating expenditure. In view of this finding of the coordinate bench for AY 2010-11 in assessee's own case we direct the ld. TPO to work out PLI of comparables and the assessee on the similar lines following that order. In the result ground No.3.3.1 and 3.3.2 is allowed accordingly.

30. Ground No.3.3.3 of the appeal is against treatment of interest and bank charges as non-operating expenses. We do not find any objection raised by the assessee against the show cause notice which is placed at page No.122 at para 13 on this issue either before ld. TPO or before ld. DRP. As this issue is raised before us for the first time we reject the same. Therefore ground no.3.3.3 of the appeal is dismissed.
31. Ground no.4 of the appeal of the assessee is against non-granting of credit for advance tax of Rs.783847/- and TDS of Rs.70321/-. Assessee has submitted that the amount of advance tax has not been given credit because of error in quoting PAN no of the assessee and whereas the short credit of TDS is on account of mis-match as per form No.26AS. these facts have also been drawn attention of Assessing Officer vide letter dated 11.03.2015 and 18.11.2015. ld. DR also fairly agreed that credit may be given after verification. In view this we direct the Assessing Officer to grant credit of advance tax as well as TDS to the assessee after obtaining proper undertaking. In the result the ground no.4 of the appeal is allowed with above direction.
32. Ground No.6 of the appeal is against initiation of penalty proceedings u/s 271(1)(c) of the Act and ground no.7 of the appeal is against charging of interest u/s 234B and 234C of the

Act. Ground no.6 of the appeal is premature and ground no.7 of the appeal is of consequential nature hence, both these grounds of appeal are dismissed.

33. In the result appeal of the assessee is partly allowed.

Order pronounced in the open court on 22/04/2016.

-Sd

(RAJPAL YADAV)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 22/04/2016
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi