

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 862/Del/2016
AY: 2011-12**

Adidas Technical Services P.Ltd. vs. Dy.CIT, Circle 1(2)
2nd Floor, Unitech Commercial Tower II New Delhi
Sector 45, Block B, Greenwood City
Gurgaon 122 001

PAN: AAACR 0240 C
(Appellant)

(Respondent)

Appellant by : Sh.Deepak Chopra, Adv.
And Sh.Harpreet Singh, Adv.

Respondent by : None. (Application Rejected)

ORDER

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

This is an appeal filed by the Assessee directed against the order passed u/s 143(3) r.w.s.144C(v) of the Income Tax Act, 1961 (the Act) pertaining to the A.Y. 2011-12 on the following grounds.

“On the facts and circumstances of the case and in law, the learned Deputy Commissioner of Income-tax, Circle-1 (2), New Delhi (“AO”) has erred in passing the assessment order under Section 143(3) of the Income-tax Act, 1961 (“the Act”) after considering the adjustments proposed by the Assistant Commissioner of Income-tax, Transfer Pricing Officer - 1(1)(1), New Delhi (“TPO”) in his order passed under Section 92CA(3) of the Act and subsequently partially confirmed by the Hon’ble Dispute Resolution Panel (“DRP”).

Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.

That on the facts and circumstances of the case and in law,

1. *The learned AO / TPO / DRP have erred in making an addition of INR 2,11,15,791/- to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the international transactions related to business support services entered into by the Appellant with its associated enterprises ("AEs").*
2. *The learned AO / TPO / DRP have erred in classifying the functions of the assessee as providing high value services and accordingly selecting comparables in same genre.*
3. *The learned AO / TPO / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("the Rules").*
4. *The learned AO / TPO / DRP have erred in making an adjustment under Section 92CA(3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section (3) of Section 92C of the Act.*
5. *The learned AO / TPO/ DRP have erred in rejecting the comparable company, Ma Foi Global Services identified by the appellant for having different accounting year (i.e. having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months).*
6. *The learned AO / TPO / DRP have erred in :*
 - a. *Using single year data instead of multiple year data*
 - b. *Determining the arm's length margins / prices using data pertaining only to FY 2010-11 which was not available to the Appellant at the time of complying with the Transfer Pricing ("TP") documentation requirements;*
7. *The learned AO / TPO / DRP have erred in rejecting Ma Foi Global Services on the basis of erroneous application of negative net worth filter.*
8. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using "Turnover less than INR 1 Crores" as a comparability criterion.*
9. *The learned AO / TPO / DRP have erred in rejecting certain companies which are comparable to the Appellant and adding following functionally dissimilar companies to the final set of comparable companies:*

- *Apitco Ltd.*
- *Chemical Metallurgical Design Company Ltd.*
- *Global Procurement Consultants Ltd.*
- *Cameo Corporate Services Limited*
- *TSR Darashaw Ltd*

10. *The learned AO / TPO / DRP have erred by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.*

11. *The learned AO / TPO / DRP have erred in not applying the proviso to Section 920(2) of the Act correctly and has failed to allow the benefit of downward variation of 5 percent in the determining arm's length price so computed.*

12. *The learned AO erred in holding that the appellant has furnished inaccurate particulars of income in respect of each item of disallowance/ additions and in initiating penalty proceedings under section 274 read with section 271 of the Act.*

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case. For adidas Technical Services Pvt. Ltd."

2. None appeared on behalf of the Revenue. No person is present in the Court on behalf of Revenue. This case is a stay granted matter. It has come up for hearing yesterday i.e. 21.6.2016. The Ld.Sr.D.R. Shri Gansar Dudeja submitted that, he was asked by the Income Tax Department to represent the cases of I-2 Bench, New Delhi today at 06.00 in the morning, and that he was not prepared. It was also submitted that the Ld.Sr. D.R. was unwell and hence could not represent the Revenue. On a query from the Bench, he submitted that this case may be posted for today i.e. 22.6.2016 and that he had already read and prepared the matter but as the

paper book was not with him, he seeks a short adjournment of one day. Accordingly the case was posted for hearing today.

3. Today an adjournment application has been moved by the Ld.Sr.D.R. Ms. Anima Barnwal which reads as follows: “the concerned Sr.D.R. has to take care of some urgent official work as directed by his CIT.” After considering this application for adjournment, we come to a conclusion that it is not a fit reason to get an adjournment. Hence we reject the same. On 20th June, 2016 and 21st June, 2016 all the appeals on the board had to be adjourned as the Revenue has been seeking adjournments on the ground of non availability of Sr.DRs and also on the ground that the Ld.Sr. D.R. is unwell. With some difficulty we could hear one small matter on Monday i.e. in ITA 2555/Del/16, as this was a simple case of setting aside.

3. The Bench has crashed yesterday i.e. on 21.6.2016. We have been making repeated requests to the Revenue to make some arrangement by posting adequate D.Rs to represent the case of Revenue. No action has been taken till date by the Department. Not a soul is present in the Court on behalf of the Revenue. Under these circumstances, as we are unable to allow crashing of the Bench every day, we reject the Application of the Ld.Sr.D.R. and proceed to hear these cases ex parte qua the Revenue on merits. It would not be out of place to mention that we have granted adjournments in cases which are posted today, where the ground of adjournment was that the Ld.Sr.D.R. was unwell. In our view, the adjournment application filed by the Ld.Sr. D.R. in the case on hand is contemptuous.

4. We have heard the Id.Counsel for the assessee Mr.Deepak Chopra. The sum and substance of the submissions are that, though a number of grounds have been raised, the assessee would be contesting the inclusion of the following +five comparables for the purpose of determination of the Arm's Length Price (ALP).

- a) Apitco Ltd.
- b) Global Procurement Consultants Ltd.
- c) Chemical Metallurgical Design Co.Ltd.
- d) TSR Darashaw Ltd.
- e) Cameo Corporate Services Ltd.

4.1. He submits that, without prejudice to the claim of the assessee in other years, he would not be arguing for the inclusion of three comparables sought by the assessee, i.e. IDC (India) Ltd., Info Edge (India) Ltd. and ICRA Management Consulting Services Ltd., and submitted that the same shall not be treated as a precedent.

5. No other issue is argued or pressed before us. On careful consideration of these submissions we find that Apitco Ltd., Global Procurement Consultants Ltd. and TSR Drawshaw Ltd. have to be necessarily excluded from the list of comparables approved by the Dispute Resolution Panel (DRP) for the purpose of computation of ALP, for the reason that the Tribunal in the assessee's own case in ITA 1233/Del/2015 for the A.Y. 2010-11 as directed the exclusion of these three comparables on various grounds including, difference in functional profile of the companies. There is no change in the facts and circumstances of the case of the assessee in this year, when compared with the facts and circumstances of its case for the A.Y. 2010-11. Hence consistent with the view therein, we direct the A.O. to exclude these three companies from the list of comparables approved by the D.R.P.

6. In the case of Cameo Corporate Services Ltd. the DRP is of the view that, the functions are comparable with that of TSR Drawshaw Ltd. As the Tribunal in its order for the A.Y. 2010-11 has directed exclusion of TSR Drawshaw Ltd. from the list of comparables, for the same reasons, we direct the A.O./T.P.O. to exclude Cameo Corporate Services Ltd. from the list of comparables in this year.

7. We now take up the issue as to whether the company Chemical Metallurgical Design Co.Ltd. has been rightly taken as a comparable company by the D.R.P. The T.P.O. in his order, notes that this company has three segments i.e. (a) business centre operations; (b) F&B services, (c) Others. He held that the business Centre operations can be taken as a comparable (see page 46 and 47 of the order of the TPO).

8. Before us the Ld.Counsel for the assessee filed the profile of Chemical & Metallurgical Design Co. Ltd. with respect to business centre operations. This read as follows.

“Paharpur Buisness Centre (PBC) is rated as one of the healthiest office buildings in Delhi by Central Pollution Control Board, Ministry of Environment and Forest, Government of India and Chittaranjan National Cancer Institute, Kolkata.

Located in the IT hub of South Delhi – Nehru Place Greens, New Delhi, PBC offers different sizes of elegantly designed spaces for large or small offices, Conferences, Training, Interviews, Seminars, Product Launch, Cocktail Parties, Hi-Tea, Corporate Lunches and Dinners. It is the best choice for arbitration, meditation proceedings, virtual offices, night BPO and hot-desking in a private and secured environment. It also has an in-house multi-cuisine restaurant. It offers a complete range of services office solutions and support services designed to fit the needs of the clients.

PBC, a division of M/s Chemical & Metallurgical Design Co.Ltd. a Public Ltd. Company, is a medium enterprise in the mSME category, began its operations in 1990 with an equity capital of less than US \$ 15,000. We currently have a net worth of US \$ 16.19 m.”

At page 25 the nature of services are given as follows.

“Apart from providing services and furnished offices on a ‘plug and play’ basis, the services provided are office services, Communications, Food and Beverages, Tours and Travel, Building Utilities, House Keeping and Maintenance, Security and Florist Services. Office Facilities comprises fully furnished offices, serviced and maintained by the Business Centre.”

8.1. This Bench of the ITAT in the assessee’s own case has noted that the functional profile of the assessee is to provide specified procurement services to its foreign company Adidas Consultants Ltd. The nature of services have been brought out at para 8.1 and 8.2 of that order. A perusal of these demonstration that the functional profile of M/s Chemical & Metallurgical Design Co.Ltd. are totally different from the functional profile of the assessee company. Thus this company should be excluded as a comparable company for determining the ALP. The TPO/AO is directed accordingly.

8.2. As already stated the Ld.A.R. has not pressed all other grounds for the reasons already stated. Hence we do not adjudicate the same.

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

Order pronounced in the Open Court on 29th June, 2016.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 29th June, 2016

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Copy of the Order forwarded to:

1. Assessee;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar