

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

**BEFORE SHRI B.P.JAIN, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 6407/Del /2012
Asstt. Year: 2008-09**

Toluna India Pvt. Ltd., (Formerly known as Greenfield Online Pvt. Ltd.), First Floor, Unitech Trade Centre, Sushant Lok, Phase-I, Gurgaon. (PAN:AACCG0003G)	vs	DCIT, Circle-12(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Anubhav Rastogi, Adv.
Respondent by : Shri Sanjay Kuamr Yadav, Sr. DR

**Date of Hearing : 22.09.2017
Date of Pronouncement: 22.09.2017**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal of the assessee was initially disposed of by this Tribunal vide order dated 2.6.2015 in ITA No. 6407/Del/12. However, subsequent to the order of the ITAT, the assessee filed an M.A. before the Tribunal submitting that the ITAT had not disposed of the contentions of the assessee on the issue of

Transfer Pricing adjustment relating to international transaction of provision of Marketing Support Services. The Miscellaneous Application of the assessee was allowed and the order of the Tribunal dated 2.6.15 was recalled only for the limited purpose of adjudication on the issue of international transaction of provision of Marketing Support Services vide order dated 19.1.2017 in M.A. No. 342/Del/15. Accordingly, we proceed to hear both the parties on the issue relating to international transaction of provision of Marketing Support Services.

2. The facts of the case are that the assessee is a wholly owned subsidiary of Toluna US (formerly known as Greenfield US) which is the ultimate parent entity of the Toluna Group (formerly known as Greenfield Group). The assessee is primarily engaged in providing contract IT and related services to its parent Company. Further, during AY 2008-09, the assessee also provided routine Marketing Support Services to its Parent Company. During the relevant Assessment Year, the assessee undertook international transactions with its Associated Enterprises ('AEs'), which were duly reported in the Accountant's Report (Form No. 3CEB), filed along with the Assessee's return of income.

2.1 For benchmarking its international transactions of 'Provision of Contract IT Services' and 'Provision of Marketing Support Services', the Assessee in its TP Documentation, selected TNMM as the Most Appropriate Method applying Operating Profit / Total Cost ('OP/TC') as the Profit Level Indicator ('PLI'). The following table summarises the results of the comparable search and the economic analysis undertaken by the Assessee for benchmarking the said international transactions:

Particulars	Provision of Contract IT Services	Provision of Marketing Support Services
No. of comparables	20	5
Average OP/TC of comparables (using multiple year data)	13-32%	11.06%
OP/TC (using current year data)	15.06%	8.00%
Conclusion	At arm's length in accordance with the Indian Transfer Pricing ('TP') Regulations.	

2.2 During the course of the transfer pricing assessment proceedings, the TPO directed the Assessee to submit updated current year i.e. Financial Year ('FY') 2007-08 data for the comparable companies considered in its TP Documentation. Thereafter, the TPO made an adjustment to the Assessee's

international transactions of 'Provision of Contract IT services' and 'Provision of Marketing Support Services' vide order dated October 25, 2011. The TPO, however, accepted the arm's length nature of the other international transaction entered into by the Assessee with its AEs.

2.3 The final set of comparable companies identified by the TPO in his order to benchmark the Assessee's international transactions of provision of Marketing Support Services are as follows:

Provision of Marketing Support Services

S. No.	Comparable	OP/TC margin (using current year data)	Working Capital adjusted OP/TC margin
1	Apitco Limited	49-35%	47.30%
2	Best Mulyankan Consultants Limited	12.85%	3-34%
3	Choksi Laboratories Limited	29.20%	28.90%
4	ICRA Management Consulting Services Limited	4.18%	2.60%
5	IDC (India) Limited	15.48%	16.67%
6	Indus Technical & Financial Consultants Limited	14.56%	18.37%
7	Rites Limited	25.77%	37.18%
8	Technicom-Chemie (India) Limited	7.32%	13-57%
9	Vapi waste & Effluent Mgmt. Co. Limited	18.53%	10.00%
10	WAPCOS Limited (Seg.)	40.37%	61.14%

2.4 Based on the above approach, the TPO, thereafter, proceeded to pass an order under section 92CA(3) of the Act dated October 25, 2011 proposing an adjustment of INR 28,290,817/- to the income from provision of Contract IT Services and INR 234,191/- to the income from provision of Marketing Support Services by holding that the said two international transactions did not meet the arm's length standard as laid down under the Indian TP Regulations. However, the TPO accepted the arm's length nature of all the other international transactions entered into by the Assessee with its AEs during AY 2008-09.

2.5 Aggrieved by the TPO's approach in determining the Arm's Length Price ('ALP') in reference to the international transactions of provision of Contract IT Service and Marketing Support Services in his TP order, the assessee approached the Hon'ble DRP.

2.6 The Hon'ble DRP issued the following directions to the TPO in reference to the Assessee's international transaction of marketing support services:

- To exclude M/s Apitco Limited, M/s Rites Limited and M/s

Vapi Waste & Effluent Mgmt. Co. Limited in the final comparable set for determining the revised ALP for the Assessee's international transaction in the nature of provision of Marketing Support Services.

2.7 Accordingly, after incorporating the above changes in accordance with the directions issued by the Hon'ble DRP, the final comparable set is as follows:

Sr. No.	Name of the Company	Revised Comparables Set - As per directions of the Hon. DRP
1	Best Mulyankan Consultants Limited	3-34%
2	Choksi Laboratories Limited	28.90%
3	ICRA Management Consulting Services Limited	2.60%
4	IDC (India) Limited	16.67%
5	Indus Technical & Financial Consultants Limited	18.37%
6	Technicom-Chemie (India) Limited	13-57%
7	WAPCOS Limited (Seg.)	61.14%
	Count	7
	Average OP/TC	20.66%
	Appellant's OP/TC	8.00%

2.8 Now the assessee has approached the ITAT and seeks exclusion of three more comparables.

3. The Ld. AR submitted that the assessee prays for exclusion of three more comparables viz. Choksi Laboratories Ltd., Indus Technical & Financial Consultants Limited and WAPCOS Limited

(Seg.). The Ld. AR drew our attention to the annual report of Choksi Laboratories Ltd. and submitted that this company was not a comparable as it was functionally dissimilar to the assessee company as it provided analysis, calibration, pollution control services to a broad spectrum of industries. Ld. AR placed reliance on the order of the ITAT Delhi Bench in the case of Nortel Networks India Private limited vs ACIT in ITA No. 4765/Del/2011 and 427/Del/2013 wherein vide order dated 25.2.2014, Choksi was excluded from the final list of comparables on the ground that Choksi provided end to end solutions and hence could not be compared with assessee who provided marketing support services to the parent company.

3.1 It was further submitted that Indus Technical & Financial Consultants Limited was a company engaged in provision of technical consultancy. It was submitted that its website showed that this company was involved in environment and pollution control, technology management, financial services, administrative and legal services, project selection and project implementation services, energy and power services and therefore, this company was not a company which could be compared to the assessee company. Reliance was placed on the

order of the ITAT Delhi Bench in the case of Intrepid Travels Pvt. Ltd. vs ADIT in ITA No. 5582/Del/2012 wherein vide order dated 27.2.2015 this company was excluded on the ground that this company was engaged in manufacturing activity and therefore had completely different FAR from the tested party.

3.2 Regarding WAPCOS Limited (segmental) it was submitted that this company was into high end consultancy and was, therefore, functionally different from the assessee company. Our attention was drawn to the Director's report as well as the annual accounts to buttress the argument that this company was providing infrastructure facilities relating to environment, rural and urban development, water resources, personnel development, industrial relations etc. and was not providing marketing support services and hence the same needed to be excluded.

4. The Ld. Departmental Representative, in response, submitted that even the comparables accepted by the assessee were not strictly providing Marketing Support Services and that these comparables were excluded looking into the main function of the assessee which was of providing IT enabled services. Ld. DR placed reliance on the findings of the TPO as well as of the

Hon'ble DRP and submitted that in absence of proper comparables, a broader view has to be taken. It was submitted that these three comparables should not directed to be excluded.

5. We have heard the rival submissions and perused the material available on record. We take up the comparables disputed by the assessee one by one.

i) Choksi Laboratories Limited :

It is the assessee's contention that this company was functionally dissimilar to the assessee company as this company provided end to end solutions whereas the assessee company only provided marketing support services along with IT enabled services. We find that Choksi has been excluded from the finals set of comparables in the case of Nortel Networks India Private limited vs ACIT reported in 164 TTJ 21 (Del) on the ground that companies providing end to end solutions could not be compared with assessee providing Marketing Support Services to the parent company and hence they were held to be functionally not comparable. ITAT Bangalore Bench has also taken a similar view. We find that Choksi Lab Ltd. is a commercial testing and analysis laboratory engaged in analysing food and agricultural

products, cement and building material, chemicals, drugs and paints. The said services rendered by the company are calibration services, pollution control, research and consultancy services. Therefore, this company cannot be said to be functionally dissimilar to the assessee company and we accordingly direct the TPO/Assessing Officer to exclude this company from the final set of comparables.

ii) Indus Technical and Financial Consultants Limited:

We find that this company, as per the website details, is a renowned manufacturer of TMT bars having diverse exposure in many fields. Thus, this company is a manufacturing company and cannot be said to be a comparable to the assessee company. This company was also excluded on the ground of being engaged in manufacturing activity and having a completely different FAR vide order of ITAT Delhi in Intrepid Travels Pvt. Ltd. Vs ADIT in ITA No. 5582/Del/2012. Accordingly, we direct the Assessing Officer/TPO to exclude this company from the final list of comparables.

iii) WAPCOS Limited (Segmental) :

It is seen that this company provides consultancy services relating to water, power and infrastructure sector. The

services offered include market intelligence studies, planning/project formulation and geotechnical investigation, engineering, quality assurance and management and human resource development. This company also executes turn key projects on a regular basis. This company was excluded as a comparable by ITAT Delhi Bench in Nortel Networks India Ltd. vs ADIT (supra) on the ground of being functionally dissimilar. Marketing support services cannot be compared with turnkey, engineering services and therefore, this company cannot be held to be functionally comparable to the assessee company. Accordingly, we direct the Assessing Officer/TPO to exclude this company also from the final list of comparables.

6. In the result, the appeal of the assessee stands allowed in terms of our above observations.

The order is pronounced in the open court on 22nd September, 2017.

Sd/-

**(B.P. JAIN)
ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: SEPTEMBER, 2017
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

ASSISTANT REGISTRAR