

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: '1-2' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 252/DEL/2013 ( A.Y 2008-09)**

Beam Global Spirits & Wine (India) Pvt. Ltd. 12 <sup>th</sup> Floor, Building No.10, Tower-C, DLF Cyber City, Phase-II Gurgaon AAACA1614R <b>(APPELLANT)</b>	Vs	DCIT Circle-2(1) New Delhi  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. Ravi Sharma, Adv, Ms. Shruti Khimta, Adv</b>
<b>Respondent by</b>	<b>Sh. Rakesh Kumar, Addl. CIT</b>

<b>Date of Hearing</b>	<b>27.11.2018</b>
<b>Date of Pronouncement</b>	<b>11.12.2018</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the assessee against the Assessment Order dated 17/11/2011 passed u/s 143(3)/144C/92CA (4) of the Income Tax Act, for Assessment Year 2008-09.

2. The grounds of appeal are as under:-

“1. The Learned Dispute Resolution Panel (“Ld. DRP”) and the Learned Deputy Commissioner of Income-tax (“Ld. AO”) (following the directions of the Ld. DRP), erred on facts and in law, in enhancing the income of the appellant by Rs. 0.64 crores<sup>1</sup>, on account of the Transfer Pricing (“TP”) adjustment u/s 92CA(3) of the Income-tax Act, 1961 (“Act”) made by the Learned Assistant Director of Income-tax, Transfer Pricing Officer - 1(4) (“Ld. TPO”), by holding that the international transactions with associated enterprises (“AEs”) does

*not satisfy the arm's length principle ("ALP") envisaged under the Act and in doing so have grossly erred in:*

*1.1 disregarding the fact that the spends to third party vendors are pass through in nature and are recovered fully from the AEs on whose behalf such payments are made and therefore the appellant does not assume any risk of non-payment by the customer/AEs.*

*1.2 disregarding the fact that these payments made to third party vendors do not represent any 'value adding' activity undertaken by the appellant and therefore should not be considered for the purpose of determining the appellant's operating profitability;*

*1.3 Total Adjustment Amount = INR 6,369,110 = 6,046,056 (recomputed TP adjustment) + 323,054 (adjustment already made by the appellant) disregarding the ALP as determined in the TP documentation maintained by the appellant in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');*

*1.4 using current year data for comparable companies, i.e., data for financial year 2007-08, despite the fact that the same was not available with the appellant at the time of preparing its TP documentation report, and the appellant used multiple year data for the analysis;*

*1.5 rejecting without reason, the quantitative and qualitative screens/filters applied and set of comparables arrived at by the appellant following a detailed and robust search methodology carried out in the TP documentation report, and proceeding to earn<sup>7</sup> out fresh search by erroneously selecting comparables which are functionally dissimilar to the appellant's functional profile;*

*1.6 disregarding judicial pronouncements in India in undertaking the TP adjustment; and*

*2. That the Ld. AO failed to take cognizance of a voluntary' adjustment of Rs.*

*0.03 crores made by the appellant towards the arm's length price although the subject upward adjustment was taken into consideration by the Ld. TPO.*

**Corporate Tax disallowance**

*3. That the Ld. AO and Ld. DRP grossly erred on facts and in law in making a disallowance of Rs. 0.21 crores being 3% of "Customer Pull and Support Expenses" on adhoc basis."*

*The appellant prays that the above grounds of appeal are without prejudice to each other."*

3. Beam India is a wholly owned subsidiary of Beam Global Spirits & Wine, Inc.('Beam USA') and is engaged in the production and sale of alcoholic beverages in India. During the relevant Financial Year, the assessee company undertook the following international transactions with its AEs which were duly reported in the Accountant's Report (Form No. 3CEB), filed along with the assessee company's return of income:

<b>International Transaction</b>	<b>Amount in INR</b>	<b>Outcome of TP Order</b>
Purchase of compound Alcoholic Preparation	14,35,47,473	Accepted
Provision of Marketing support services ('MSS')	1,28,11,244	ADJUSTMENT
Reimbursement of expenses	17,69,26,002	Accepted

Under the MSS segment, the assessee company was engaged in providing marketing support services to JBB U.S to promote the duty-free sales of international brands of liquor products of JBB U.S. The assessee company's benchmarking approach is summarized below:

<b>Particulars</b>	<b>Marketing</b>	<b>Support</b>	<b>Page</b>	<b>Reference</b>	<b>in</b>
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	<b>Services</b>	<b>Paper Book 2</b>
No. of comparables	5	877
Comparables' Mean OP/TC margin	12.60%	877
Appellant's OP/TC margin	6.971%	884

The assessee company incurred certain advertising and brand promotion expenses while rendering marketing support services to JBB U.S. These expenses were reimbursed by JBB, U.S to the assessee company on cost-to-cost basis without any mark-up. Such expenses were in the nature of pass-through expenses as the assessee company submitted that it is just acting as a conduit between the associated enterprise and the third party vendors. There is no cogent nexus with its market support services activity. The Transfer Pricing Officer ('TPO') rejected the economic analysis submitted by the assessee company and undertook a fresh search using arbitrary quantitative and qualitative filters and arrived at an NCP of 21.76%. The TPO further observed that the reimbursed AMP expenses have been incurred while rendering marketing support service and, therefore, would fall within the scope expenditure for services. Accordingly, these expenses were considered while determining the operating profits of the assessee company. The TPO proposed an adjustment of Rs.60,77,920/- to the income of the assessee company.

4. The Dispute Resolution Panel (DRP) directed the exclusion of Vapi Waste Management and Effluent Management Co & Rites Ltd. from the comparables selected by the TPO. The final comparable set after the order of the DRP is as follows:

<b>S. No.</b>	<b>Name of the company</b>	OP/TC
1	Apitco Ltd.	49.35%

2	Best Mulyankan Consultants Ltd.	12.85%
3	Choksi Laboratories Ltd.	29.20%
4	ICRA Managemtn Consulting Ltd.	4.18%
5	Technicom-Chemie (India) Ltd.	7.32%
6	I D C (India) Ltd.	15.48%
7	Indus Technical & Financial Consultants Ltd.	14.56%
8	Wapcos Ltd. (Seg) (Segment)	40.37%
9	Indiacom Ltd.	49.35%
	<b>MEAN</b>	<b>21.66%</b>

The Assessment Order was passed on 22.10.2012 by assessing the income of the assessee at Rs. 21,44,07,570/-.

4. Being aggrieved by the Assessment Order/TPO, the assessee has filed present appeal before us.

5. The Ld. AR submitted that Ground No. 3 i.e. corporate tax disallowance is not pressed by the assessee. Therefore, Ground No. 3 is dismissed.

6. The Ld. AR submitted that the assessee company is challenging certain comparables before us as regards exclusion and inclusion of comparables. The exclusion of comparables are as follows:

- (i) Apitco Limited
- (ii) Choksi Laboratories Ltd.
- (iii) WAPCOS Ltd. (Segment)
- (iv) IDC India Limited

The Ld. AR also submitted for inclusion of one comparable i.e. Rediff.com

6.1 **Apitco Limited:-** The Ld. AR submitted that this comparable company is

functionally dissimilar as it is engaged in highly technical services which includes Asset Reconstruction and Management Services, Projects Related services, Micro Enterprise Development, Infrastructure, Planning and Development, research studies & Tourism, Skill Development, Environment Management, Entrepreneurship Development & Training, Cluster Development, Energy Related Services, Emerging areas etc. The Ld. AR submitted that the Marketing Support Agreement clearly sets out the scope of services rendered by the assessee company. The services are restricted to provision of marketing support to assist in the Duty Free Sales division of the assessee company. The Ld. AR submitted that it has been held in a plethora of case of various Tribunals that the instant comparable is engaged in rendering high end technical consultancies and therefore not comparable to companies engaged in the rendering mere support services. The Ld. AR relied upon the following decisions:

- a) Avaya India P. Ltd. Vs. DCIT (ITA No. 146/Del/2013)
- b) Ciena India P. Ltd. Vs. DCIT (ITA No. 3324/Del/2013)

6.2 The Ld. DR relied upon the order of the TPO and the directions of the DRP.

6.3 We have heard both the parties and perused all the relevant material available on record. From the Annual Reports it can be seen that this comparable company is functionally dissimilar. This comparable company is engaged in highly technical services which includes Asset Reconstruction and Management Services, Projects Related services, Micro Enterprise Development, Infrastructure, Planning and Development, research studies & Tourism, Skill Development, Environment Management, Entrepreneurship Development & Training, Cluster Development, Energy Related Services, Emerging areas etc. Whereas under the MSS segment, the assessee company is engaged in providing marketing support services to JBB U.S to promote the

duty-free sales of international brands of liquor products of JBB U.S. Thus, this company is functionally different from the assessee company. Therefore, we direct the TPO to exclude this comparable.

**6.4 Chokso Laboratories Ltd.:-** The Ld. AR submitted that this comparable company is functionally dissimilar as the company is a Commercial Testing House engaged in testing of various products including chemicals. It also offers consultancy services in the field of pollution control as an allied activity. The Assessee company, on the contrary is engaged in providing mere support services to its AE. The two companies are thus in completely different domains and accordingly, not functionally comparable. During the relevant year, Choksi incurred significant expenditure on purchase of inventory, such as glassware and chemicals used for testing purposes. 55% of the asset base are instruments that are used for chemical testing purposes. However, in the case of the assessee the assets are of routine nature namely computer and office equipment etc. The Ld. AR relied upon the following decisions:

- a) Avaya India P. Ltd. Vs. DCIT (ITA No. 146/Del/2013)
- b) Ciena India P. Ltd. Vs. DCIT (ITA No. 3324/Del/2013)

**6.5** The Ld. DR relied upon the order of the TPO and the directions of the DRP.

**6.6** We have heard both the parties and perused all the relevant material available on record. From the Annual Reports it can be seen that this comparable company is functionally dissimilar. This comparable company is a Commercial Testing House engaged in testing of various products including chemicals and also offers consultancy services in the field of pollution control as an allied activity. On the contrary, the assessee company, under the MSS segment, is engaged in providing marketing support services to JBB U.S to

promote the duty-free sales of international brands of liquor products of JBB U.S. Thus, this company is functionally different from the assessee company. Therefore, we direct the TPO to exclude this comparable.

**6.7 WAPCOS Ltd. (Segment) :-** The Ld. AR submitted that this comparable company is functionally dissimilar as the company is engaged in high-end consultancy and works on engineering projects. Accordingly, the segment of the company is functionally not comparable as it undertakes high-end technical consultancy services, as against the routine support services undertaken by the assessee company. The Company is a Government of India Undertaking. It has the support and backing of the government which makes it incomparable to the Assessee company as the functions profiles of the entities is completely different. The business profile of government owned undertakings is dissimilar to that of the entities operating in free market/uncontrolled environment. Therefore, such undertakings cannot be selected as comparables for determining arm's length price of the marketing support services rendered by the Assessee company who is a captive service provider to its AEs. Similar principles were laid down by the Hon'ble Bombay High Court in the case of Thyssen Krupp Industries India (P.) Ltd. [ITA No. 2218 of 2013]. In this case, the assessee company assessee was engaged in the business of providing turnkey services for design, manufacture, supply, erection and commissioning of sugar plants, cement plants, bulk material handling etc,. The Hon'ble High court excluded government companies as comparables citing the reason that wherein it was held that the contracts between public sector undertakings are driven by social obligations rather than profit motive. The Ld. AR relied upon the following decisions:

- a) Avaya India P. Ltd. Vs. DCIT (ITA No. 146/Del/2013)
- b) Ciena India P. Ltd. Vs. DCIT (ITA No. 3324/Del/2013)

**6.8** The Ld. DR relied upon the order of the TPO and the directions of the

DRP.

6.9 We have heard both the parties and perused all the relevant material available on record. From the Annual Reports it can be seen that this comparable company is functionally dissimilar. This comparable company is engaged in high-end consultancy and works on engineering projects and also a government company. The assessee company, under the MSS segment, is engaged in providing marketing support services to JBB U.S to promote the duty-free sales of international brands of liquor products of JBB U.S. Thus, this company is functionally different from the assessee company. Therefore, we direct the TPO to exclude this comparable.

6.10 **IDC India Limited.**:- The Ld. AR submitted that this comparable company is functionally dissimilar as the instant comparable is engaged in the business of rendering market research and management consulting services in the field of IT, telecommunications and consumer technology. The Ld. AR relied upon the decision in case of Microsoft Corporation India [2015] 63 taxmann.com 178 (Delhi - Trib.) wherein the Tribunal analyzed the functional profile of IDC India vis-a-vis the marketing support segment of Microsoft and held that IDC is a research and advisory firm which is no match for a marketing support service provider such as the assessee company.

6.11 The Ld. DR relied upon the order of the TPO and the directions of the DRP.

6.12 We have heard both the parties and perused all the relevant material available on record. From the Annual Reports it can be seen that this comparable company is functionally dissimilar. This comparable company is engaged in the business of rendering market research and management consulting services in the field of IT, telecommunications and consumer technology. Whereas under the MSS segment, the assessee company is

engaged in providing marketing support services to JBB U.S to promote the duty-free sales of international brands of liquor products of JBB U.S. Thus, this company is functionally different from the assessee company. Therefore, we direct the TPO to exclude this comparable.

6.13 **Rediff.com** :- The Ld. AR submitted that this comparable company is functionally comparable as the Company is an internet destinations focusing on India and the global Indian community. Its websites consist of interest specific channels relevant to Indian interests such as cricket, astrology, movies, content on various matters like news and finance, search facilities, e-commerce, broadband wireless content etc. It is engaged in the business of online advertising and fee based services. The services rendered by Rediff.com are thus broadly similar to the services of sales promotion through marketing support rendered by the assessee company. The Ld. AR relied upon the decision in case of Microsoft Corporation India (2015) 63 taxmann.com 178 (Delhi-Trib.)

6.14 The Ld. DR relied upon the order of the TPO and the directions of the DRP.

6.15 We have heard both the parties and perused all the relevant material available on record. The contentions of the Ld. AR that this comparable company is a good comparable as it is engaged in the business of online advertising and fee based services which are broadly similar to the services of sales promotion through marketing support rendered by the assessee company. But the same appears not to be similar as the Annual Report describes that revenues comprise of revenues from online advertising and fee based services which is not at par with the marketing support services to JBB U.S to promote the duty-free sales of international brands of liquor products of JBB U.S. Besides that there is no segmental bifurcation available in the

financials of Rediff.com. Thus, we are rejecting the contention of the Ld. AR to include this comparable.

7. In result, the appeal of the assessee is partly allowed for statistical purpose.

**Order pronounced in the Open Court on 11th December, 2018.**

**Sd/-  
(R. K. PANDA)  
ACCOUNTANT MEMBER**

**Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 11/12/2018  
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	27.11.2018
Date on which the typed draft is placed before the dictating Member	28.11.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	11.12.2018
Date on which the final order is uploaded on the website of ITAT	11.12.2018
Date on which the file goes to the Bench Clerk	11.12.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	