

IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No. 318/Bang/2016
Assessment Year :2011-12

M/s. Citrix Systems India Pvt. Ltd., Prestige Dynasty, Ground Floor, 33/2, Ulsoor Road, Bangalore – 560 042. <b>PAN: AAACP9889R</b>	vs.	The Deputy Commissioner of Income Tax, Central Circle – 2 (1) (1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Uma Shankar Gautam, Advocate
Respondent by	:	Shri C.H. Sundar Rao, CIT (DR-I)

Date of hearing	:	06.12.2018
Date of Pronouncement	:	31.12.2018

**ORDER**

*Per Shri A.K. Garodia, Accountant Member*

This appeal is filed by the assessee and the same is directed against the assessment order dated 31.12.2015 passed by the AO u/s. 143(3) r.w.s. 144C (1) of IT Act as per the directions of DRP for Assessment Year 2011-12.

2. The revised grounds raised by the assessee are as under.

*“The grounds mentioned herein by the Appellant are without prejudice to one another.*

*1. That the learned AO and the learned Panel erred in upholding the rejection of Transfer Pricing ('TP') documentation by the learned Deputy Commissioner of Income tax, Transfer Pricing- Range 1(1)(2) (learned TPO) and in upholding the adjustment to the transfer price of the Appellant in respect of marketing support services. [corresponding to ground no. 2]*

*2. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the rejection of comparability analysis of the Appellant in the TP and accepting the fresh comparability analysis performed by the learned TPO documentation of comparable companies viz. Asian Business Exhibition &Confrences*

*Ltd. [corresponding to ground no. 3(a)]*

*3. That on the facts and circumstances of the case, the learned AO/learned Panel erred in disregarding application of multiple year/prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2010-11) data for companies should be used for comparability. [corresponding to ground no. 3(b)]*

*4. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the learned TPO's approach of using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining the arm's length price. [corresponding to ground no. 3(c)]*

*5. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on excluding/not considering E D C I L (India) Ltd. (Segmental) that is otherwise functionally comparable to the Appellant. [corresponding to ground no. 3(d)]*

*6. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on excluding/not considering India Tourism Development Corporation Ltd (Segmental) that is otherwise functionally comparable to the Appellant. [corresponding to ground no. 3(d)]*

*7. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on excluding/not considering I C R A Management Consulting Services Ltd. that is otherwise functionally comparable to the Appellant. [corresponding to ground no. 3(d)]*

*8. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily-arriving at a set of companies as comparable for the services rendered by the Appellant, on excluding/not considering Indus Technical and Financial Consultant that is otherwise functionally comparable to the Appellant. [corresponding to ground no. 3(d)]*

*9. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on excluding/not considering Inhouse Productions Ltd (Segmental) that is otherwise functionally comparable to the Appellant. [corresponding to ground no. 3(d)]*

*10. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the TPO's approach of not providing Risk Adjustment and thus ignored the limited risk nature of the services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when full-fledged entrepreneurial companies are selected as comparables. [corresponding to ground no. 3(e)]*

*11. The learned AO)/ TPO/ learned Panel erred in law and on facts in considering ICC International Agencies Ltd (Segmental) as comparable company even though it does not pass the test of functional comparability vis-à-vis the functions performed by the Appellant. [corresponding to the additional grounds (ground no. 4)]”*

3. The assessee has also raised an additional ground which reads as under.

*“4. The learned Assessing Officer (AO)/ Transfer Pricing Officer (TPO)/ Dispute Resolution Panel (“DRP”) erred in law and on facts in considering ICC International Agencies Ltd (Segmental) as comparable company even though it does not pass the test of functional comparability vis-à-vis the functions performed by the Appellant.”*

4. Regarding the admission of additional ground, it has been submitted by assessee in paras 8 and 9 of the petition for admission of additional ground that this issue was not raised by assessee before the TPO or DRP because of inadvertent omission. As per para 10 of this petition, it is submitted that because of freshly available case laws, change of circumstance as well as law necessitating filing of additional ground, it should be admitted. He submitted that additional ground may be admitted and the matter may be restored back to the file of TPO for decision on this aspect. The Id. DR of revenue objected to the admission of additional ground. But we find that in para 4 of this petition, the assessee has pointed out various case laws for the same Assessment Year in which it was held by the Tribunal that a company with ‘Unallocable expenses’ and in the absence of availability of nature of expenses and proper allocation keys, it cannot be considered as a proper comparable and the Tribunal held in various cases that this company ICC International Agencies Ltd. is functionally dissimilar. Considering all these facts, we admit the additional ground raised by the assessee.
5. The Id. AR of assessee submitted a letter dated 28.08.2018 in which it is submitted that ground nos. 1 and 3 to 10 are not pressed and effectively the

Tribunal has to decide ground nos. 2 and 11 as appearing in revised grounds of appeal dated 24.08.2017 filed on 30.08.2017 and out of these two grounds, ground no. 11 is additional ground admitted by us and it is submitted by Id. AR of assessee that this issue has to be restored back to the file of TPO and we agree with this submission. Therefore, we have to decide only ground no. 2 of the assessee. Ground no. 2 is regarding assessee's request for exclusion of one comparable i.e. Asian Business Exhibition & Conferences Ltd. As per the chart submitted by the assessee, the assessee has placed reliance on Tribunal order rendered in the case of DCIT Vs. Electronic Imaging India Pvt. Ltd. in IT(TP)A No. 16/Bang/2016 dated 14.07.2017 copy submitted. It was also submitted that para 13 of this Tribunal order is relevant. The Id. DR of revenue supported the order of DRP.

6. We have considered the rival submissions. As per the Tribunal order in the case of DCIT Vs. Electronic Imaging India Pvt. Ltd. (supra), that company is engaged in two segments i.e. software development services and sales & marketing support services and this company is relevant in respect of sales & marketing support services segment. In the present case it is noted by the TPO in para 2.1 of its order that the present assessee is primarily engaged in providing marketing services to its AEs. Hence, it is seen that the profile of the present assessee and the Electronic Imaging India Pvt. Ltd. are similar if not identical and hence, this Tribunal order is relevant in the present case. We therefore reproduce para no. 13 from page no. 23 of this Tribunal order rendered in the case of DCIT Vs. Electronic Imaging India Pvt. Ltd. (supra) for the same Assessment Year i.e. Assessment Year 2011-12. This para reads as under.

*“13. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset we note that the functional comparability of Asian Business Exhibition & Conferences Limited has been examined by this Tribunal in assessee's own case for the Assessment Year 2010-11 vide order dt.24.2.2016 reported in 70 Taxman.com 299 in paras 53 & 54 as under :*

*" 53. We have considered the rival submissions and considered the relevant material on record. As it is clear that the assessee is providing sales and marketing services to its AE which includes identifying potential customers by conducting road shows,*

*presentation and the like, the working also includes educating potential users of the benefit and features of the AEs range of products. However, products for which the assessee is providing sales and marketing services is only software/information technology products. Therefore, Asian Business Exhibition & Conference Ltd. which is mainly engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses. The functions of this company are entirely different from the assessee who is providing sales and marketing support services to its AE for software/IT products. The Mumbai Bench of the Tribunal in the case of RGA Services India (P.) Ltd. (supra) while considering the functional comparability of this company has held at paras 11 and 12 as under:-*

*"11. We have considered the submission of the parties and perused the relevant material on record. On perusal of the order passed by the TPO it is noticed that the TPO while dealing with assessee's objection with regard to selection of Asian Business Exhibition and Conferences Limited as a comparable has admitted that the nature of function performed by this company is event management. It is further relevant to observe, on perusal of annual report of this company it is seen that as per directors report, the main operation is organizing exhibition and events. Further, schedule 12 of the profit and loss account as well as notes to the accounts reveals, revenue earned by the company is from sponsorship, delegates attending conferences, events and entry fees charged from visitors for visiting exhibition, sale of stall place etc.*

*12. Thus, on overall analysis of facts and materials placed on record it is very much clear that the business model of the assessee and Asian Business Exhibition and Conferences Limited are totally different. While assessee undoubtedly is providing support services to its overseas AE's, Asian Business Exhibition and Conferences Limited is primarily and fundamentally engaged in event management. Thus, under no circumstances it can be considered as a comparable to the assessee. Therefore, for the aforesaid reasons the DRP, in our view, was justified in excluding this company as a comparable. As far as the contention of learned DR that reasons on which this company was excluded equally applies to other comparables retained by the DRP, We may observe, such argument of learned DR is not at all relevant as the issue raised by the department in the present appeal is confined to exclusion of Asian Business Exhibition and Conferences Limited as a comparable. As far as objection of learned departmental representative that assessee itself has selected this company as a comparable, we may observe, that cannot be the sole criteria to reject assessee's objection with regard to selection of a comparable. At the time of preparing T.P. Study*

*report assessee had selected some comparables by considering multiple year data and information available at the relevant time. However, if subsequently on the basis of information available in public domain it is found on the basis of functionality or some other reason a company is not at all comparable, assessee cannot be precluded from objecting to selection of the company as a comparable. This legal proposition is fairly well settled by the decision in case of DC/T v. Quark Systems (P.) Ltd. (2010) 132 TTJ (Chd) (SB) 1 as well as decisions relied upon by the counsel for the assessee. In view of the aforesaid, we do not find any infirmity in the directions of DRP in excluding Asian Business Exhibition and Conferences Limited as a comparable. The ground raised is therefore dismissed."*

*54. In view of the above facts as well as decision of the Mumbai Bench of the Tribunal, this company cannot be considered as a good comparable with the assessee."*

*Thus when there is no change in the business activity of assessee for the year under consideration as well as in the functions of the said company then in view of the earlier order of this Tribunal in assessee's own case we hold that this company cannot be considered as a good comparable of the assessee and accordingly, the TPO/A.O. is directed to exclude the same from the set of comparables."*

7. We find that in that case, the Tribunal has followed an earlier Tribunal order in the case of same assessee for Assessment Year 2010-11 and decided the issue in favour of the assessee on this basis that there is no change in the business activity of the assessee for the year under consideration as well as function of the said company i.e. Asian Business Exhibition & Conferences Ltd. Respectfully following this Tribunal order, we hold that in the present case also, this company is not a good comparable i.e. Asian Business Exhibition & Conferences Ltd. We direct the AO/TPO to exclude this company from the final list of comparables. Ground no. 2 is allowed.
8. Regarding ground no. 11 i.e. regarding assessee's claim for exclusion of ICC International Agencies Ltd. (Segmental), we find that regarding exclusion of this company also i.e. ICC International Agencies Ltd. (Segmental) also, in the same case i.e. in the case of DCIT Vs. Electronic Imaging India Pvt. Ltd. (supra) in para no. 16 of this Tribunal order, it was held that this company is not a good comparable but still we feel it proper to restore this matter back to the file of TPO for fresh decision after examining the complete facts in this regard because this is a new ground raised before

us and this claim was never raised by assessee before TPO or DRP.  
Ground no. 11 is allowed for statistical purposes.

9. In the result, the appeal filed by the assessee is partly allowed in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-  
(LALIET KUMAR)  
Judicial Member

Sd/-  
(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 31<sup>st</sup> December, 2018.  
/MS/

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|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Bangalore.