

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : FRIDAY I-2 : NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.897/Del/2015
Assessment Year: 2010-11

DCIT,
Circle-27(2),
New Delhi.

Vs Yum Restaurant India Pvt. Ltd.,
12th Floor, Tower-D,
Global Business Park,
M.G. Road,
Gurgaon.
PAN: AAACY1883E

ITA No.1993/Del/2015
Assessment Year: 2010-11

Yum Restaurant India Pvt. Ltd.,
12th Floor, Tower-D,
Global Business Park,
M.G. Road,
Gurgaon.
PAN: AAACY1883E

Vs DCIT,
Circle-27(2),
New Delhi.

(Appellant)

(Respondent)

Assessee by	:	Shri Ajit Korde, Advocate
Revenue by	:	Shri Rakesh Kumar, Sr. DR
Date of Hearing	:	28.11.2018
Date of Pronouncement	:	29.01.2019

ORDER

PER R.K. PANDA, AM:

These are cross appeals. The first one is filed by the Revenue and the second one is filed by the assessee and are directed against the order dated 28.11.2014 of the DRP-II, New Delhi, relating to assessment year 2010-11.

2. Facts of the case, in brief, are that the assessee is a company and is engaged in the business of developing and managing franchisees for restaurants and running own restaurants. There is no change in the nature of business from earlier years. It filed its return of income declaring loss of Rs.25,26,67,915/-. A reference u/s 92CA(1) of the IT Act was made by the Assessing Officer to the TPO for determination of the ALP of the international transactions undertaken by the assessee during the F.Y. 2009-10. The TPO, during the course of TP assessment proceedings observed that the assessee has entered into the following international transactions:-

Nature of International Transaction	Method Selected	Amount (in INR)
Providing services viz. Franchisee support services	TNMM	199,930,043
Payment of royalty for providing Systems, Trademarks and System property for franchisee	TNMM	122,017,071
Payment of royalty for providing Systems, Trademarks and System property for equity business	TNMM	26,275,533
Reimbursement of expenses to AEs	-	30,743,852
Reimbursement of expenses by AEs	-	15,695,884

3. From the various details furnished by the assessee, he observed that the assessee has returned a margin at 8.75% in respect of the international transaction related to providing franchisee support service. The updated margin of the comparables, on cost, using multiple year data is -4.05%. The assessee has used TNMM as the method and OP/TC is the PLI. In the international transaction related to payment of royalty for providing systems and system property for franchisee business, the margin of the assessee is 12.95%. The assessee has used the same set of comparables as used in the former transaction. The method remains TNMM but the PLI is OP/OR. The weighted

average margin of comparables is 6.06%. Based on this analysis, the assessee has concluded that its international transactions are at arm's length. The TPO, therefore, issued a show cause notice asking the assessee to justify the transfer pricing analysis. After considering the submissions made by the assessee, the TPO observed that the assessee has contributed to the brand building exercise of the AE for which it should have been reimbursed with a mark up. Since the sum of Rs.8,07,48,889/- has been placed at the disposal of the YRMPL, this is the amount that should have been reimbursed with a mark up. He observed that an amount of Rs.1,46,02,381/- is part of the cost base of the market support segment on which a mark up of 9.69% has been earned. According to him, the assessee should have been reimbursed the remaining amount of Rs.6,61,46,508/- with a mark up. This, according to the TPO would be a sum equal to the PLR of State Bank of India which would have been the standard return on this amount. Therefore, the TPO proposed an upward adjustment of Rs.7,44,14,821/- on account of reimbursement of marketing, advertisement and brand promotion. So far as the provision of marketing support services are concerned, he observed that the assessee has benchmarked the transactions related to provision of support services by taking 11 comparables as per page 16 of the TPO's order wherein average has been worked out at 7.32%. He rejected certain comparables selected by the assessee and added certain other comparables and selected the final list of comparables which are as under:-

S.No.	Company Name	OP/OC (%)	OP/Sales(%)
1.	Aptico Ltd.	40.09	28.62
2.	Cameo Corp. Serv.	8.26	5.90
3.	EDCIL	7.41	5.28
4.	Crystal Hues Limited	9.10	6.50
5	Cyber Media Research Ltd.	14.85	10.60
6	Global Procurement Consultants Ltd.	37.19	26.65
7	HCCA Business Services Pvt. Ltd.	20.05	14.31
8	Quadrant Communications Ltd.	13.11	10.08
9.	Quippo Valuers	25.49	20.31
10.	TSR Darashaw Ltd.	41.15	29.38
11	Karvy Data Mgmt. Services Ltd.	6.47	4.62
12	ICRA Management Consulting Services Ltd.	1.94	1.38
	Average	18.75	13.39

4. Since the assessee has declared 8.75% margin, the TPO, based on the average margin of 18.75% of the comparables, made an upward adjustment of Rs.1,83,76,224/- on account of provision of support services in area countries. Thus, the TPO proposed an upward adjustment of Rs.9,27,91,045/- u/s 92CA of the IT Act. The Assessing Officer, in the draft order, accordingly made upward adjustment of the above amount. The Assessing Officer also made certain other additions /disallowances such as royalty and TLA fees – Rs.13,80,89,085/-, disallowance of a portion of the administrative expenses – Rs.54,45,76,389/-, disallowance of depreciation- Rs.20,17,400/-, disallowance out of Research & Development expenses – Rs.56,55,254/-. He also treated the service income as ‘Income from other sources.’

5. The assessee approached the DRP who directed the Assessing Officer/TPO to delete the addition of Rs.1,83,76,224/- on account of provision of support service in area countries. However, they upheld the action of the TPO in confirming the transfer

pricing adjustment of Rs.7,44,14,821/- in relation to the advertisement, marketing and sales promotion expenses. They also upheld the various other additions made by the Assessing Officer in the corporate tax issues.

6. Aggrieved with such order of the DRP, the Revenue as well as the assessee are in appeal before the Tribunal by raising the following grounds:-

“ITA No.897/Del/2015 (Revenue’s appeal)

1. On the facts and in the circumstances of the case and in law, the DRP-II, erred in directing to reduce/delete the addition of Rs. 1,83,76,224/- on account of proposed addition of arm’s length price of the International transaction with its associated enterprises”.

2. “The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of appeal.”

ITA No.1993/Del/2015 (Assessee’s appeal)

A. Grounds relating to Transfer Pricing matter

General Grounds

1.1 On the facts and circumstances of the case and in law, the assessment order/directions passed by the Learned Assessing Office (‘Ld. AO’) / Transfer Pricing Officer (‘Ld.TPO’) / Dispute Resolution Panel (‘DRP’) are bad in law. Advertising, Marketing and sales promotion expenses in the “Equity segment”

1.2 On the facts and in the circumstances of the case and in law, the Hon’ble DRP erred in confirming transfer pricing adjustment amounting to 1NR 74,414,821 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as ‘the AMP expenses’) incurred by the appellant in the “equity” segment.

1.3. The Ld. TPO/Ld. AO/ Hon’ble DRP erred in facts and in law in treating advertising, marketing and promotional (“AMP”) expenditure as an international transaction under Section 92B of the Act, without appreciating the functional profile of the Appellant and the arrangement with its AE.

1.4. Without prejudice to any other contention, while making the AMP

adjustment the Ld. TPO/Ld. AO/Hon'ble DRP has erred in not appreciating the comparables provided by the Appellant to demonstrate that similarly characterized companies operating in the same industry incur the same level of AMP expenses.

1.5 That the Ld. AO/Hon'ble DRP erred on facts and in law in holding that Ld. TPO is correct in alleging that the appellant has adopted a colorable device to incur 'excessive' Advertisement, Marketing and Sales Promotion expenses through its subsidiary, which is both factually incorrect and irrelevant.

1.6 The Ld. TPO/Ld. AO/Hon'ble DRP has erred in determining arm's length price of the alleged AMP addition without use of any of the prescribed transfer pricing methods or use of any uncontrolled data.

1.7 Without prejudice to the contention that AMP expenses were incurred for the purpose of enhancing sales in India, the Ld. TPO/Ld. AO/Hon'ble DRP has made a gross error in considering rebates and discounts, sales promotion and selling expenditure as a part of AMP expenses.

1.8. The Ld. TPO/Ld. AO/Hon'ble DRP has erred by holding that a markup on the expenses incurred has to be earned by the Appellant in respect of the "alleged" AMP adjustment.

B. Grounds relating to Corporate Tax matter

Service income treated as 'income from other sources'

1. That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO has erred in characterizing the service income earned by the appellant amounting to Rs. 19,99,30,044 from M/s Yum! Asia Franchisee Pte Ltd., ("YAFL"), as "income from other sources" as against "business income".

1.1 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO has grossly erred in taking a divergent view from the Ld. TPO on the same sets of facts.

Disallowance of royalty expenditure

2. That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO has erred in disallowing the royalty expenditure paid by the appellant to YAFL to the tune of Rs. 13,80,89,085.

Hypothetical disallowance of administrative expenses

3. That on the facts and circumstances of the case and in law, the Hon'ble

DRP/Ld. AO has erred in making a hypothetical disallowance of the administrative expenses of Rs. 54,45,76,389 incurred by the appellant as being attributable to its subsidiary company, Yum! Restaurants Marketing Private Limited (“YRMPL”).

3.1 Without prejudice to the above, even assuming (without admitting) that the expenses pertained to that of YRMPL, the Hon’ble DRP/ Ld. AO had on the facts of the case and circumstances, erred in arbitrarily arriving at an allocation criteria of 50:50 ratio, for apportionment of the expenses.

3.2 Without prejudice to Ground No. 3 above, the Hon’ble DRP/ Ld. AO has erred in taking a contradictory view with regard to allowance of such administrative expenses as compared to the view taken by the Ld. TPO while carrying out segmental analysis.

Part disallowance of tax depreciation

4. That on the facts and circumstances of the case and in law, the Hon’ble DRP/Ld. AO has grossly erred in disallowing the income tax depreciation claim to the extent of Rs.20,17,400 made by the appellant under Section 32 of the Act.

4.1 That on the facts and circumstances of the case and in law, the Hon’ble DRP/Ld. AO has grossly erred in failing to appreciate that under the block of assets concept, actual physical possession of the fixed assets is not relevant for the claim of depreciation.

Disallowance of alleged excessive advertising, marketing and promotion (‘AMP’) contribution

5. That on the facts and circumstances of the case and in law, the Hon’ble DRP/Ld. AO has erred in making the protective addition of disallowing the contribution made by the appellant to YRMPL, to the tune of Rs. 2,99,27,892, for carrying out advertising, promotion and marketing (‘AMP’) activities contending the same to be excessive under Section 40A(2)(b) of the Act.

Disallowance of the research and development expenses

6. That on the facts and circumstances of the case and in law, the Ld. AO has erred in disallowing the research and development expenses amounting to Rs. 56,55,254 by holding them to be of capital nature.

6.1. Without prejudice to the above, even assuming (without admitting) that the said research and development expenses are of capital nature, the Ld. AO has erred in not allowing depreciation on the said expenditure.

The above grounds are independent and without prejudice to each other.

The Appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the ground mentioned herein above at or before the time of hearing.”

7. So far as appeal of the assessee is concerned, ground of appeal No.1.1 being general in nature is dismissed. The Id. counsel for the assessee submitted that the grounds relating to corporate tax matter in sub-clause B from ground of appeal No.1 to 6.1 become infructuous since all grounds of appeal have been allowed by the DRP. In absence of any objection from the side of the Id. DR, the grounds relating to corporate tax matter are dismissed as infructuous.

8. So far as ground relating to AMP issue is concerned, we have heard the rival arguments made by both the sides and perused the material available on record. We find identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. We find the Tribunal, after considering the rival arguments made by both the sides had restored the issue to the file of the Assessing Officer/TPO for fresh determination of the issue by observing as under:-

“6. We have heard the rival submissions and perused the relevant material on record. It is noticed that the Special Bench of the Tribunal in LG Electronics India Pvt. Ltd. Vs. ACIT 2013 152 TTJ (Del) (SB) 273, by majority decision, has inter alia held that incurring of AMP expenses towards promotion of brand, legally owned by the foreign AE, constitutes a `transaction'. The contention that no disallowance could be made out of AMP expenses by benchmarking them separately when the overall net profit rate declared by the assessee was higher than other comparable cases, also came to be specifically rejected by the special bench. Resultantly, the transfer pricing adjustment in relation to such AMP expenses was held to be sustainable in principle. In the eventual order, the Special Bench restored the matter to the file of the AO/TPO for fresh determination of Transfer Pricing adjustment for AMP expenses. In order to enable the determination of correct ALP of AMP expenses, the Tribunal has listed out 14 parameters in Para 17.4 of its order, which should be properly examined and given due weight by the AO/TPO before reaching the final conclusion about the warrant for a TP adjustment on this score. Coming back to

the facts of the instant case, it can be seen that the TPO did not have the benefit of the Special Bench order in the case of LG Electronics(supra) and the DRP failed to apply it correctly to the facts of the case, by making sweeping observations generally without considering the effect of relevant factors laid down by the special bench. In such circumstances, we are of the considered opinion that the ends of justice would meet adequately if the impugned order on this issue is set aside and the matter is restored to the file of the AO/TPO for a fresh determination of disallowance, if any, on account of Transfer pricing adjustment for AMP expenses in the light of the decision of the Special Bench in the case of L.G.Electronics (supra). We order accordingly. The question of disallowance u/s 40A(2) of the Act shall be decided by the AO after having found out the amount of TP adjustment on account of AMP expenses. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in this regard.”

9. Following the similar reasoning, the grounds relating to AMP issue is restored to the file of the Assessing Officer/TPO for adjudication of the issue afresh in the light of the direction of the Tribunal for the preceding assessment year 2009-10. The ground raised by the assessee is accordingly allowed for statistical purposes.

10. Now, coming to the appeal filed by the Revenue is concerned, the Revenue has basically challenged the order of the DRP in directing the Assessing Officer/TPO to delete the addition of Rs.1,83,76,224/- out of the ‘Provision of support services in area countries.’

11. After hearing both the sides, we find the assessee, in its TP study, has considered the following comparables with average of 7.32%, the details of which are as under:-

S.No.	Name of the Company Name	Weighted OP/OC (%) for three years
1.	Acess India Advisors Ltd.	34.77
2.	Asian Business Exhibition & Conference Ltd.	18.10
3.	EDCIL India Ltd.	4.37
4.	ICRA Management Consulting Services Ltd.	0.06

5	IDC India Ltd.	12.30
6	Inhouse Productions Ltd.	1.51
7	India Tourism Development Corporation Ltd.	5.31
8	Ma Foi Global Services	-0.54
9.	Ma Foi Management Consultants Ltd.	3.61
10.	Overseas Manpower Corpn. Ltd.	3.23
11	Times Innovative Ltd.	-2.21
	Average	7.32

12. The TPO, on the basis of the filters adopted by him made fresh search and finally selected the following 12 comparables wherein he rejected certain comparables and added few more comparables the details of which are as under:-

S.No.	Company Name	OP/OC (%)	OP/Sales(%)
1.	Aptico Ltd.	40.09	28.62
2.	Cameo Corp. Serv.	8.26	5.90
3.	EDCIL	7.41	5.28
4.	Crystal Hues Limited	9.10	6.50
5	Cyber Media Research Ltd.	14.85	10.60
6	Global Procurement Consultants Ltd.	37.19	26.65
7	HCCA Business Services Pvt. Ltd.	20.05	14.31
8	Quadrant Communications Ltd.	13.11	10.08
9.	Quippo Valuers	25.49	20.31
10.	TSR Darashaw Ltd.	41.15	29.38
11	Karvy Data Mgmt. Services Ltd.	6.47	4.62
12	ICRA Management Consulting Services Ltd.	1.94	1.38
	Average	18.75	13.39

13. The DRP, in the order upheld the action of the TPO in rejecting the Inhouse Productions Ltd., India Tourism Development Corporation Ltd. and Ma Foi Global Services Ltd. The DRP also upheld the action of the TPO in adding the new comparables. However, based on the argument of the assessee that there are certain computational error in the computation of the margins, the DRP held that if miscellaneous income and other income are not related to the operation, the same could not be taken for calculation of profit margin. In the same manner bad debts,

loans & advances written off should not be taken as non-operating in nature. Accordingly, they directed the TPO to recompute the margins based on the above observation and also directed him to allow working capital adjustment. However, they upheld the action of the Assessing Officer in excluding Forex items from calculating the operating profit. In the process, the adjustment of Rs.1,83,76,224/- was modified.

13.1 The Id. counsel for the assessee filed an application under Rule 27 of the ITAT Rules, requesting to include certain comparables which were rejected by the TPO and to exclude certain comparables which were added by the TPO.

A. Comparables to be included which were rejected by the TPO.

Sl. No.	Name of the company	Acceptance/Rejection reason	Judicial Precedents relied on
1.	InHouse Productions Limited	<p>The company is engaged in two main business segments namely 'Healthcare' and 'Media' Division.</p> <p>Under the Healthcare Division, the company provides access to information, relating to healthcare technology including management practices and knowledge databases.</p> <p>This is similar to the information/knowledge being provided by the assessee to its AEs on the market condition in India.</p> <p>Hence the same should be taken as an appropriate comparable.</p>	<ul style="list-style-type: none"> The said company was accepted by the TPO for the A.Y. 2009-10 on the same functional profile. Further, reliance can also be placed on the ITAT order for A.Y. 2006-07 in the assessee's own case. Other case Laws -Eli Lilly & Company (India) Private Limited vs. ACIT (ITA No.788/Del/2015).
2.	India Tourism Development Corporation Limited (ITDC)	<p>ITDC operates in various segments, of which the services provided in the ARMS division is similar to the services provided by the company.</p> <p>Hence the same should be taken as an appropriate comparable.</p>	<ul style="list-style-type: none"> The said company was accepted by the TPO for the A.Y. 2009-10 on the same functional profile. Further, reliance can also be placed on the ITAT order for

			<p>A.Y.2006-07 in the assessee's own case</p> <ul style="list-style-type: none"> • Other case laws -Eli Lilly & Co. (India) Pvt. Ltd. vs. ACIT (ita No.788/Del/2015).
3.	Ma Foi Global Services Limited ("Ma Foi")	<p>Ma Foi is engaged in providing executive search services to its clients. The company helps organizations to attract best talents to work for the company.</p> <p>The services provided by Ma Foi are similar to the ones provided by the assessee.</p> <p>Hence the same should be taken as an appropriate comparables.</p>	<ul style="list-style-type: none"> • Mckinsey Knowledge Centre India Private Limited vs. DCIT (ITA No.2195/Del/2011)
4.	Overseas Manpower Corporation Limited	<p>The assessee has taken the recruitment segment as the comparables segment, since the service under this segment is comparable to that of the assessee.</p>	<ul style="list-style-type: none"> • The said company was accepted by the TPO for the A.Y.2009-10 on the same functional profile.
5.	HT Music & Entertainment Company Limited	<p>The company is engaged in managing and organizing various events, shows, and derives revenue from such events. This support service is comparable to the assessee and hence has been considered as a comparable by the assessee.</p>	

B. Comparables to be excluded which were selected by the TPO.

Sl. No.	Name of the company	Acceptance/Rejection reason	Judicial Precedents relied on
1.	Apitco Limited	<p>Functionally dissimilar – engaged in technical and engineering services. It is even executing turnkey projects, which tantamount to construction in few projects.</p>	<ul style="list-style-type: none"> • H&M Hennes & Mauritz India Pvt. Ltd. vs. DCIT (IT (TP) No.282 & 490/Bang/2015) (A.Y. 2010-11) • Ciena India (P) Ltd. (ITA 2948 & 3324/Del/2013) • Adidas Technical Services P. Ltd. vs. DCIT [ITA

			<p>No.1233/Del/20150</p> <ul style="list-style-type: none"> Adidas Technical Services P. Ltd. vs. DCIT [ITA No.862/Del/2016]
2.	Global Procurement Consultants Limited.	Functionally dissimilar – engaged in specialized financial services related to procurement activities.	<ul style="list-style-type: none"> Marubeni-Itochu Steel India Pvt. Ltd. vs. DCIT (ITA No.1716/Del/2014) (A.Y. 2007-08) H&M Hennes & Mauritz India Pvt. Ltd. vs. DCIT (IT (TP) No.282 & 490/Bang/2015) (A.Y. 2010-11) Adidas Technical Services P. Ltd. vs. DCIT [ITA No.1233/Del/20150] Adidas Technical Services P. Ltd. vs. DCIT [ITA No.862/Del/2016]
3.	HCCA Business Services Private Limited	Functionally dissimilar – engaged in BPO services.	
4.	Quadrant Communications Limited	Functionally dissimilar – engaged in creative Services related to marketing	
5.	Quippo Valuers and Auctioneers Private Limited	<ul style="list-style-type: none"> It does not appear in the accept reject matrix of the assessee – Hence, basis of selection by the TPO is unclear. Functionally dissimilar – provides complex services of asset management. 	
6.	TSR Darshaw Ltd.	Functionally dissimilar – BPO services.	<ul style="list-style-type: none"> H&M Hennes & Mauritz India Pvt. Ltd. vs. DCIT (IT (TP) No.282 & 490/Bang/2015) (A.Y. 2010-11) Eli Lilly & Co. (India) Pvt. Ltd. vs. ACIT (ita No.788/Del/2015). Adidas Technical

			Services P. Ltd. vs. DCIT [ITA No.1233/Del/20150
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14. He also submitted that foreign exchange fluctuation gain/loss should be considered as operating item while computing the ALP of the international transaction.

15. We have considered the rival arguments made by both the sides and perused the material available on record. We find the Assessing Officer, on the basis of the report of the TPO, made an upward adjustment of Rs.1,83,76,224/- on account of provision of marketing support service segment. We find the DRP, while granting certain relief to the assessee, directed the Assessing Officer to rectify certain computational errors in case of certain comparables and they have also held that miscellaneous income and other income, if not related to the operation, cannot be taken for calculation of profit margin. They had also held that bad debts, loans and advances written off should not be taken as non-operating in nature. However, in the process, they upheld the action of the Assessing Officer in rejecting certain comparables taken by the assessee and upholding certain comparables added by the TPO/A.O. It is the submission of the Id. counsel for the assessee that certain companies which were included by the assessee should not have been rejected by the TPO/DRP since the Tribunal in assessee's own case in the preceding years has accepted those companies as comparables. Similarly, in the light of various other judicial precedents, the other comparable companies which were rejected by the TPO and certain companies which were added by the TPO are not as per law as they are functionally dissimilar. We find the order of the DRP is

not a speaking order especially when in assessee's own case, certain comparables were held to be accepted as comparables. Although the decision of the Tribunal was available for the assessment year 2006-07 and 2009-10 when the order of the DRP was passed, however, it appears that no cognizance has been taken by the DRP of the order of the Tribunal. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the ld. DRP to pass a speaking order relating to the various comparables which the assessee is challenging in its application under Rule 27 of the ITAT Rules and which have been reproduced in the preceding paragraphs. The DRP should also pass a speaking order on the issue relating to foreign exchange fluctuation/loss to be considered as operating item while computing the ALP of the international transaction. The ground raised by the Revenue is accordingly allowed for statistical purposes.

16. In the result, the appeal filed by the assessee as well as the Revenue are allowed for statistical purposes.

The decision was pronounced in the open court on 29.01.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 29th January, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi