

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

**BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**IT (TP)A NO. 3463/DEL/2013  
AY: 2005-06**

**Comverse Network Systems India Pvt. Ltd., vs  
DLF Infinity Tower-A, 2<sup>nd</sup> Floor,  
DLF Cyber City Phase-II,  
Gurgaon-122002  
(PAN: AABCC3225B)  
(Appellant)**

**ACIT,  
Gurgaon Circle,  
Gurgaon.**

**(Respondent)**

**Assessee by :** Shri G.C. Srivastava, Adv.  
Shri Parichay Solanki, Adv.

**Respondent by :** Ms Saweta Nakra, Sr. DR

**Date of hearing : 14.06.2019**

**Date of Pronouncement : 19.06.2019**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JM**

This appeal is preferred by the assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals), Rohtak {CIT (A)} vide order dated 28.03.2013 for assessment year 2005-06.

2.0 Brief facts of the case are that Comverse Technology Inc. which is the ultimate holding company of the group was incorporated in the year 1984 and is engaged in designing, developing, manufacturing, marketing and supporting

telecommunication systems and software for multimedia, communications and information processing applications. The holding company, through its various subsidiaries, primarily makes communication systems and software that telecom companies use to offer call answering, voice/fax mail, communications surveillance and recording etc. The assessee is a subsidiary of Comverse Technology Inc USA which holds 99.90% of the capital. The assessee was incorporated in the year 1999 to provide pre-sales support and post sales support services primarily to the customers of Comverse Network Systems Ltd.

2.1 The return of income for the captioned year was filed declaring an income of Rs. 90,00,050/-. Since the assessee's case was covered under the scrutiny category, as per the guidelines of the CBDT, scrutiny proceedings were initiated. Since the assessee had undertaken international transactions during the year, a reference was made to the Transfer Pricing Officer(TPO) u/s 92CA(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') in respect of the following international transactions:-

- i) Sales and post sales support - Rs. 100,213,264/-
- ii) Purchase of fixed assets - Rs. 1,021,316/-

- iii) Cost reimbursement recharges of  
Expenses paid - Rs. 2,68,177/-

2.2 The assessee had chosen Transactional Net Margin Method (TNMM) as the Most Appropriate Method with OP/TC as the Profit Level Indicator (PLI) and had arrived at a set of six comparables whose overall PLI was 1.75% whereas it had calculated its own PLI at 5.96%, thereby holding that the transactions relating to provision of sales and post sales support services were at Arm's Length Price (ALP). With respect to the purchase of fixed assets from Comverse Ltd., Israel, the assessee had used Comparable Uncontrolled Price (CUP) Method to justify the ALP and had contended that the same kind of fixed assets had been sold by the Associated Enterprise (AE) to the third party at the same price and hence the transaction was at arm's length. The assessee's comparables with respect to provisions of sales and post sales support services were as under:-

- i) CMC Limited
- ii) FL Smidth Limited
- iii) Hartron Communication
- iv) Himachal Futuristics Communication Limited

- v) Powerplant Performance Improvement Limited
- vi) TCE Consulting Engineers Limited

2.3 However, the TPO accepted some of the assessee's comparables and included some more comparables on his own. The final set of comparables, as determined by the TPO, was as under:-

- i) ICRA Limited
- ii) Tera Software
- iii) Toyo Engineering Limited
- iv) Grintex India Limited
- v) Vital Communications Limited
- vi) Otis Elevators Limited
- vii) TCE Consulting Engineers Limited

2.4 The TPO, thereafter, proceeded to compare the mean margin comparables at 21.63% and proposed a transfer pricing adjustment of Rs. 1,56,10,332/-. The assessment was completed at an income of Rs. 2,46,10,382/- after making a transfer pricing adjustment as proposed by the TPO.

2.5 Aggrieved, the assessee approached the Ld. First Appellate Authority and the Ld. Commissioner of Income Tax (Appeals) allowed partial relief to the assessee by directing

exclusion of ICRA Limited and Otis Elevators Limited. Still aggrieved, the assessee is now before this Tribunal (ITAT) and has raised the following grounds of appeal: -

*“On the facts and circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the assessment order passed under section 143(3) of the Income-tax Act, 1961 (‘the Act’) by the learned Assessing Officer (‘AO’) (after considering the adjustments proposed by the learned Transfer Pricing Officer (‘TPO’) in his order passed under section 92CA(3) of the Act) and in pursuance of the order passed by the Hon’ble Commissioner of Income-tax (Appeals) (‘CIT(A)’) under section 250(6) of the Act on the following grounds:*

*Each of the ground is referred to separately, which may kindly be considered independent of each other.*

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

- 1. The Hon’ble CIT(A) has erred in upholding the addition of INR 15,610,332 made by the learned AO / TPO to the total income of the Appellant by confirming the learned AO’s rejection of economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 (‘the Rules’), and modifying the same for the determination of the Arm’s Length Price (‘ALP’) of the Appellant’s international transaction to hold that the same is not at arm’s length.*
- 2. The Hon’ble CIT (A) has erred in upholding the learned AO’s action of not providing an opportunity to the Appellant of being heard before referring the transfer pricing issues to the learned TPO.*
- 3. The Hon’ble CIT (A) / AO has erred in:*

(a) *Using data for a single year instead of multiple year data; and*

(b) *Determining the arm's length margins / prices using data pertaining only to financial Year ("FY") 2004-05 which was not available to the Appellant at the time of complying with the Indian TP documentation requirements.*

*4. the Hon'ble CIT (A) / AO has erred, in wrongly rejecting certain companies selected by the Appellant and adding certain companies to the final set of comparables for the transaction pertaining to provision of sales and post sales support services on an ad- hoc basis, thereby resorting to cherry picking of comparable for benchmarking the said transaction.*

*5. The Hon'ble CIT (A) has erred in upholding the order of the learned AO / TPO in so far as rejection of Hartron Communication Limited is concerned without ascribing any reasons thereto, thereby passing a non speaking order and vitiating the principles of natural justice.*

*6. The Hon'ble CIT (A) has erred, in upholding the entire Adjustment made by the learned AO/ TPO, even after excluding two companies from the final set of comparable to benchmark the said transaction.*

*7. the Hon'ble CIT (A) has erred in including companies which were rejected on account of functional dissimilarity in immediately preceding assessment year for benchmarking the said transaction, thereby adopting an inconsistent approach and rendering the said analysis defective.*

*8. the Hon'ble CIT (A) / AO has erred, in assuming that the Appellant should have earned an operating margin of 21.63 percent (OP/OC) from uncontrolled transactions, thereby exceeding his jurisdiction and acting in contravention of law.*

9. *the Hon'ble CIT(A) / AO has erred in not making appropriate adjustments to account for differences in working capital employed by the Appellant vis-a-vis the comparables.*

10. *The Hon'ble CIT(A) / AO has erred in not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparables.*

11. *The Hon'ble CIT(A) / AO has erred in not providing the benefit of the arm's length range as provided under proviso to Section 92C of Act for purposes of computing the arm's length price under Section 92F of the Act.*

12. *The learned AO has erred in initiating penalty proceedings under section 271 (1 )(c) of Act in relation to transfer pricing adjustment.*

13. *The Hon'ble CIT(A) / AO has erred in levying interest under section 234B of the Act."*

3.0 The Ld. Authorised Representative (AR) submitted that the assessee wanted inclusion of five comparables viz.:-

- i) CMC Limited
- ii) FL Smidth Limited
- iii) Harton Communication Limited
- iv) Himachal Futuristics Communication Limited
- v) Powerplant Performance Improvement Limited

3.1 It was further submitted by the Ld. AR that the assessee was praying for exclusion of three comparables viz. TCE Consulting Engineers Limited, Tera Software Limited and Vital Communications Limited.

3.2 The arguments of the Ld. AR *vis-a-vis* the inclusion of the comparables were as under:-

i) CMC Limited

The Ld. AR submitted that the assessee had selected this comparable in the transfer pricing study but the same had been excluded by the TPO and the Ld. Commissioner of Income Tax (Appeals) had upheld the exclusion without giving any reasoning. He drew our attention to the impugned order and submitted that no finding had been given by the Ld. Commissioner of Income Tax (Appeals) in this regard.

ii) FL Smidth Limited

It was submitted by the Ld. AR that the assessee had taken this company also as a comparable but the same had been excluded by the TPO and the Ld. Commissioner of Income Tax (Appeals) had also upheld the findings of the TPO by holding that this company was a company related to cement industry. It was submitted that this exclusion was incorrect inasmuch as the assessee had only considered the service segment instead of the entire company at the entity level

and, therefore, the contention of the TPO that it was not a service company was incorrect.

iii) Hartron Communication Limited

It was submitted that this also was a comparable selected by the assessee but had been excluded by the TPO without assigning any specific reason for rejection. It was also submitted that the Ld. Commissioner of Income Tax (Appeals) had also excluded the company but had not given any specific finding while rejecting this comparable.

iv) Himachal Futuristics Communication Limited

It was submitted by the Ld. AR that this company was also selected by the assessee but had been excluded by the TPO and the findings of the TPO had been upheld by the Ld. Commissioner of Income Tax (Appeals) by holding that this company was engaged in the manufacturing of telecom equipment and hence not comparable. It was submitted by the Ld. AR that this company had been held to be a comparable in assessee's case by the Ld. Disputes Resolution Panel (DRP) in assessment year 2007-08.

v) Powerplant Performance Improvement Limited

It was submitted by the Ld. AR that this was also a comparable selected by the assessee but had been excluded by the TPO on the ground that the company was engaged in modernization of power plants. It was further submitted that the finding of the Ld. Commissioner of Income Tax (Appeals) in upholding the order of the TPO was given without any reasoning.

3.3 With respect to the comparables which the assessee wants to be excluded, the submissions of the ld. AR were as under:-

1) TCE Consulting Engineers Limited

The Ld. AR submitted that originally it was the assessee's own comparable and it had been accepted by the TPO also. However, now the assessee was praying for its exclusion because this company was functionally dissimilar as it was engaged in rendering engineering related services in various sectors including infrastructure, transportation, energy, processed steel and metal, mining and chemicals and engineering consultancy services which were dissimilar to

the services provided by the assessee company. It was also submitted that this company had been held to be functionally dissimilar by the ITAT in assessee's own case for assessment year 2010-11.

## 2) Tera Software Limited

The Ld. AR submitted that this comparable was included by the TPO on the ground that it was functionally similar to the assessee company but this company provided software solutions and services and was focussed on providing e-governance solutions and further this company was engaged in executing various computer literacy projects in schools for state governments. The company was also into trading of various kinds of computer items whereas the assessee was a pre and post sales service provider. It was submitted that this company should be excluded from the final set of comparables.

## 3. Vital Communications Limited

It was submitted that this company was included by the TPO on the ground that this was functionally similar to the assessee company whereas this company provided software

solutions and services and also provided e-commerce solutions and software development service which is functionally dissimilar to provision of sales and post sales services provided by the assessee.

4.0 In response, the Ld. Senior Departmental Representative (Sr. DR) submitted that it is not the case of the assessee that the TPO had rejected the search process carried out by the assessee and the TPO had only fine tuned the search process. It was also submitted that the assessee had not disputed the search criteria adopted by the department as was very much evident from the combined reading of the order of the TPO as well as the Assessing Officer. It was further submitted that the assessee had used multiple year data which was now not permissible as per the settled judicial precedent. The Ld. Sr. DR vehemently argued that the assessee should not be allowed to cherry pick the comparables which would suit its purpose to justify the assessee's stand that the transactions were at Arm's Length Price.

5.0 On a query from the Bench, both the parties fairly agreed that to give a fair chance to the assessee all the comparables could be restored to the file of the Ld. Commissioner

of Income Tax (Appeals) to re-consider the issues as the Ld. Commissioner of Income Tax (Appeals) had not considered the objections/submissions of the assessee on a number of comparables and had also passed a non-speaking order in respect of some of the comparables.

5.1 Both the parties also agreed that the issue of working capital adjustment as contested by the assessee in ground no. 9 and 10 should also be re-considered by the Ld. Commissioner of Income Tax (Appeals).

6.0 We have heard the rival submissions and have also perused the material on record. Before us, the assessee has prayed for exclusion of five comparables and inclusion of three comparables. A perusal of the impugned order shows that the Ld. CIT (A) has not properly considered the objections/submissions of the assessee on a number of comparables and has also passed a non-speaking order in respect of some of the comparables. The Ld. Sr. DR has been fair to accept that the issues need a re-examination by the Ld. First Appellate Authority. Therefore, in view of the facts, we deem it appropriate to restore the adjudication on the exclusion and inclusion of the above mentioned eight comparables to the file of the Ld. CIT (A). It is

restored accordingly with a direction to the Ld. CIT (A) to adjudicate the issue after providing reasonable opportunity to the assessee in this regard.

6.1 In view of the acceptance of both the parties before us, the issue of working capital adjustment and risk adjustment is also restored to the file of the Ld. CIT (A). It is restored accordingly with a direction to the Ld. CIT (A) to adjudicate the issues after providing reasonable opportunity to the assessee in this regard.

7.0 In the final result, the appeal of the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 19.06.2019.

**Sd/-**

**(N.S. SAINI)  
ACCOUNTANT MEMBER**

**Sd/-**

**(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER**

Dated: 19<sup>th</sup> JUNE, 2019  
'GS'

Copy forwarded to: -

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

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
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	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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	

