

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

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA.No-1422/Del/2017
Assessment Year: 2011-12**

**Trip Advisor Travel India Pvt. Ltd.,
E-20, First & Second Floor,
Hauz Khas, New Delhi-110016.
PAN-AACCT9945Q**

(Appellant)

Appellant by: Sh. Vishal kalra, Adv., Ms. Surabhi Suri, Adv. &
Ms. SumishaMurgai, CA

Respondent by: Sh. H.K.Choudhary, CIT DR

vs

**DCIT,
Circle-25(2),
New Delhi.**

(Respondent)

Date of hearing: 29/07/2019

Date of order : 01/08/2019

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 22.04.2015 for the Assessment Year 2011-12 passed by the Assessing Officer, New Delhi, assessee preferred this appeal.

2. Brief facts of the case are that M/s. Trip AdvisorTravel India Pvt.Ltd. ("the assessee") is a subsidiary of Trip Advisor APAC Holding Corporation, and was incorporated on 30.07.2008 under the provision of Companies Act, 1956. The parent company operates user generated travel information website under several brands including trip advisor, independent and traveller, smart traveller, Virtual tourist, holiday Watchdog, travel pod, seat

guru, booking Budy and airfair Watchdog. The assessee performs the marketing support services and generally the activities to promote and market trip advisors India website, trip advisor.in under the direction and management of trip UK.

3. For the assessment year 2011-12, they have filed their return of income for 29.11.2011 declaring income of Rs.62,04,883/-.

4. During the Financial year 2010-11, the assessee had undertaken two international transactions with its AEs, namely, Provision of Marketing Support Services by Trip India to Trip UK and reimbursement of expenses. The determination of arm's length price of the international transaction was referred to the Ld.TPO u/s 92CA of the Act and by order dated 21.01.2015, Ld.TPO recommended an adjustment of Rs.26,10,163/- u/s 92CA (3) of the Act. Besides that while making certain disallowances, Ld.AO by order dated 22.04.2015 assessed the income of the assessee at Rs.91,02,630/-. Assessee challenged the said order before the CIT(A) and by way of impugned order, Ld.CIT(A) directed the Ld.AO to consider the compensation for marketing expenses as classified in the financial accounts of the assessee as part of the total cost for calculating the profit level indicator ("PLI"). Ld.CIT(A) also brushed aside the contentions of the assessee to include Goldmine Advertising Ltd. and to exclude Media Research User Counsel ("MRUC"). Further, risk adjustment was denied to the assessee. Hence, the assessee filed this appeal on as many as 11 grounds.

5. Ground Nos. 1 to 3 are general in nature and Ground No.11 is consequential. Ld.AR not pressed Ground Nos. 9 & 10. Therefore, what effectively remains for adjudication are Ground No.4 in respect of the inclusion of reimbursement of third-party marketing expenses paid by the

assessee on behalf of the AE for calculating the margin, Ground Nos.5 & 6 challenging the exclusion of Goldmine Advertising Ltd., Ground No.7 challenging the inclusion of MRUC and Ground No.8challenging the denial of risk adjustment. It is submitted by the Ld. AR that in case of inclusion of Goldmine Advertising Ltd and exclusion of MRUC, the margins of assessee will be within the permissible limit of plus or minus 5% and therefore any discussion on ground No. 8 will be purely economical and the assessee will not be pressing for it.

6. In so far as the grievance of the assessee is the Ld.CIT(A) including the alleged reimbursement of third party marketing expenses paid by the assessee, it could be seen from the record that on a perusal of the accounts of the assessee, Ld.CIT(A) found that the total operating profit disclosed was Rs.37,37,140/- on a total income of Rs.6,13,26,700/-, revealing a margin around 6%, although the assessee had claimed it to be at 10% in their transfer pricing study. Ld.CIT(A) further found that the assessee had not considered the market expenses in their total cost by saying it to be a pass-through cost by relying on clause (iv) of the Marketing Services Agreement whereunder the AE had agreed to reimburse the assessee only 100% of the assessee's third party cost.

7. Ld.CIT(A) observed that apart from not considering its own marketing cost while claiming the allowance for working capital, the assessee claimed the creditors in respect of those advertisement expenses as its own creditors, thereby claim a higher allowance for working capital. Ld.CIT(A) therefore, directed the Ld.AO to consider the compensation for marketing expenses as classified in its financial accounts as a part of the total cost, for the purpose of calculating of PLI of the assessee.

8. It is argued by the Ld.AR that the assessee provide marketing support services to its AEs and as per the service agreement with AEs, the AE remunerates the assessee at mark-up of 10% in respect of the direct and indirect cost incurred by the assessee; whereas in respect of the third party marketing cost borne by the assessee on half of the AEs on cost to cost basis without any mark-up being charged. In respect of the observations of the Ld.CIT(A), it is submitted that the agreement defines the direct cost on which the mark-up can be charged as cost incurred by the assessee that are attributable on the employees directly engaged in performing the duties of the assessee under the agreement; whereas the cost incurred by the assessee for securing the services performed by third parties, it was defined as third party cost. It is further submitted that all the relevant bills and invoices were submitted before the TPO, the TPO verified and accepted the same and therefore, the interference by the Ld.CIT(A) is unwarranted.

9. Ld.AR further submitted that the assessee is only a conduit between the AEs and third parties or performance of the marketing services, but routed the third parties marketing expenses through P&L A/c on actual cost and reimbursement of such cost by the AEs on cost to cost basis was also added to the service income for the purpose of disclosure in the P&L A/c.

10. Ld.DR argued the matter is in consonance with the observations of the Ld.CIT(A) and submitted that it is the responsibility of the assessee under clause 3.1 of the Marketing Agreement to provide such marketing services to Trip Advisory, UK and therefore, assessee is not a conduit but service provider to Trip Advisory, UK by availing the services of third parties, and, therefore, the payments made to third parties become the cost of the assessee.

11. We have gone through the record. Under clause 3.1 of the Marketing Services Agreement, during the term, the assessee shall provide such marketing services to TA-UK as agreed by the parties from time to time and the assessee retains the right to perform itself, or retain third parties to perform, any of the marketing services. It clearly shows that performance of the marketing services is the responsibility of the assessee and whether the assessee does it on their own or through some third parties is not the concern of the TA-UK and it is the convenience of the assessee. This clause makes it amply clear that TA-UK does deal with the third parties through the assessee but the assessee as per their needs and performance of the contractual obligations under the agreement may retain the third parties to perform such functions.

12. As rightly observed by the Ld.CIT(A) inasmuch as the assessee has only eight employees at their disposal, discharge of this obligation to perform the marketing services, the assessee has to engage the third parties, not on behalf of the AE but as their own agents to fulfill their own obligations. We, therefore, are of the considered opinion that the assessee is working as an independent marketing agency and the payments made to the third parties for discharging the obligations of the assessee as envisaged in, are the cost of the assessee alone. We reject the contention of the assessee that the assessee is only a conduit and deal with the third parties agencies on behalf of the AE. With this view of this matter, we uphold the findings of the Ld.CIT(A) and dismiss Ground No.4.

13. Now, coming to the question of inclusion or exclusion of Goldmine Advertising Ltd. and MRUC, firstly, we deem it necessary to note the functions of the assessee as captured by the authorizes below and there is

no dispute on the nature of the functions performed by the assessee. Functions performed by the assessee include the activities to promote and market TripAdvisor group's Indian website, tripadvisor.in under the direction and management of Trip-UK, identifying new Indian advertisers for the group websites, maintaining relationships with existing advertisers, and marketing and promoting the TripAdvisor websites in India, and are determining the market conditions in India and informing Trip-UK of the local terms and pricing levels.

14. Now coming to the comparability of Goldmine Advertising Ltd., the annual report and the website information clearly show that this company is engaged in the provision of digital advertising and marketing services which are in the nature of marketing support services. Further, Ld.TPO in his order by Paragraph No.12.2 does not dispute the nature of functions performed by this entity and the only reason for rejection of this entity is that they failed the service income filtered of 75%.

15. Ld.CIT(A) on consideration of the notes of accounts of this company for the FY ending with 31.03.2012 noticed that this company is also an advertising agency, carries out advertisements on first hand basis but the assessee only liaise with advertising agency with clients and handle public relation matters. Ld.CIT(A) does not advert to the service income filter.

16. On a careful consideration of the functions performed by the assessee and also Goldmine Advertising Ltd, we are of the considered opinion that the lowest common factor of functions of these two entities is market support service, and in that perspective there is functional similarity between these two entities and the rejection of this comparable is not tenable. We, therefore, direct the inclusion of this company in the list of

comparables for benchmarking the international transactions of provision of marketingsupport services.

17. Next comparable that arises for our consideration is Media Research Users Council (MRUC), the inclusion of which the assessee is resisting. Contention of the assessee was that MRUC is a registered not-for-profit body of members representing advertisers, advertising agencies, publishers, and broadcast/other media with the objectives to ensure the periodic research made available to its constituents, for measuring effectiveness of media for advertising, research relevant to meet the industry's increasing need for reliable and accurate information on all media, and timely and economic research for its users.

18. Ld. TPO rejected the same on the ground that the services rendered by MRUC are in the nature of business/marketing services and support services, and since the services being provided by the company or in the nature of business/marketing services, it is a good comparable and in any case these services are much less diverse and the less high-end than services provided by the companies taken as comparables by the assessee.

19. Ld. CIT(A) also opined that MRUC is completely involved in conducting surveys and in respect of requirement of its members, carries out a media research to understand the choice, test and preferences of people and these activities are actually identical to the activity being conducted by the assessee. On this premise, Ld. CIT(A) reached a conclusion that this company is very much comparable on its FAR analysis with the assessee.

20. With reference to the annual report of this company, Ld. AR demonstrates that MRUC is registered as not-for-profit body of members

representing advertisers, advertising agencies, publishers and broadcast/other media totally 249 in number; that it is engaged in undertaking surveys, research into readership, viewership, listenership of various media for advertising; that MRUC works for the benefit of its exclusive members only without any objective of profit and making; that the major sources of income earned by the MRUC was in the form of membership and subscription fees for Indian readership survey and Indian outdoor survey reports; and that this company was outsourcing most of its activities to third-party research agencies.

21. We have referred to the page No. 462 to find out that the source of income of this entity is membership subscription, income from subscription for IRS/Ay Wireless reports etc and it constitutes more than Rs.2 crores out of the Rs. 2.64 crores of its income. Page numbers 449 and 452 of the paper book show the activities of this entity which include undertaking surveys, research into the readership, viewership and listenership of various media for advertising. Page No. 454 shows the target clientele of this entity. Undoubtedly MRUC is a not for profit body. On a careful consideration of the functions performed and other attendant factors, we are of the considered opinion that a company registered as a not-for-profit body, lacking profit motive is not a comparable to the assessee and even the area of operation of MRUC is different from the assessee. We, therefore, find this MRUC not a comparable and have to be excluded. We, therefore, direct the Assessing Officer to exclude this company from the list of comparables to benchmark the international transaction.

22. In view of the submission of the Ld. AR that discussion on ground No. 8 will be academic in case of inclusion of Goldmine Advertising Ltd and

exclusion of MRUC, we do not propose to delve deeper into the discussion of this ground.

23. In the result, appeal of the assessee is allowed in part.

Pronounced in open court on 1st August, 2019.

Sd/-

(PRAMOD KUMAR)
VICE PRESIDENT

sd/-

(K. NARSIMHA CHARY)
JUDICIAL MEMBER

Dated: 01 /08/2019

Amit

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Draft dictated	30.7.2019
Draft placed before author	31.7.2019
Approved Draft comes to the Sr.PS/PS	
Order signed and pronounced on	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	
Date of uploading on the website	