

Resolution Panel - IV, New Delhi (‘the Ld DRP’) grossly erred in conforming the addition of Rs 40,34,383 proposed by the Ld Deputy Commissioner of Income Tax, Circle Gurgaon, New Delhi (‘the Ld AO’).

2. *The Ld DRP has erred, in facts and in law, in confirming that the Ld AO has discharged his statutory onus by establishing that the conditions specified in clause (a) to (d) of section 92C(3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price himself.*
3. *The Ld DRP/AO erred in facts and circumstances of the case in considering a company namely ICC International Agencies Limited which has earned super normal profits during the relevant assessment year, as comparable to the Appellant for benchmarking the impugned transaction pertaining to provision of services.*
4. *The Ld DRP/AO erred, on facts and in law, by not accepting the quantitative adjustments claimed by the Appellant in accordance with the transfer pricing provisions on account of significant differences in capacity utilization:*
 - 4.1 *The Appellant had claimed an adjustment for differences in capacity utilization vis-a-vis the comparable companies. The DRP/AO had also failed to appreciate and give due cognizance to factual data submitted on the number of years of operations of the comparable companies.*
 - 4.2 *The Appellant also respectfully submits that an adjustment due to differences between the actual capacity utilization vis-a-vis estimated capacity utilization should be provided as the Appellant was in its initial years of business operations.*
5. *The Ld DRP/AO erred in facts and circumstances of the case in rejecting certain comparable companies identified by the Appellant and considering functionally dissimilar companies as comparable to the Appellant for benchmarking the impugned transactions pertaining to provision of*

services.

6. *The Ld DRP/AO erred by using single year data as against the multiple year data used by the Appellant, to compute the arm's length price of the international transaction of the appellant using TNMM. The Ld DRP/AO has also erred in using data which was not available to the Appellant at the time of preparing transfer pricing documentation.*

7. *The Ld DRP/AO erred in ignoring the fact that the Appellant was in its nascent stage of business cycle experiencing high fixed cost of operations and therefore there was a valid case for adjusting the excess fixed costs incurred by comparing the capacity utilized by the Appellant in FY 2010-11 vis-a-vis the profitability before the start of operations with the actual profitability.*

8. *The Ld. AO has erred in facts and in law in initiating the penalty proceedings u/s. 271 (1) (c) of the Act against the appellant for concealing the particulars of income or furnishing inaccurate particulars of income.*

3. Vide application dated 12.11.2018 assessee prayed for admission of additional ground of appeal in terms of rule 11 of the ITAT Rules 1963. The additional ground so read as under :-

“5.1 That the DRP/ AO erred on facts and in law in computing incorrect operating margin of (i) ICC International Agencies Ltd. at 62.61% as against 40.20% and (ii) India Tourism Development Corporation Ltd. at (-) 5.86% as against (-) 17.21 % for the purpose of benchmarking the international transaction of provision of Market Support Services undertaken by the appellant.”

4. At the very outset the counsel for the assessee stated that the proposed additional ground relates to some calculation errors in the impugned comparables adopted by the AO. It is the say of the counsel that it requires no verification of new facts as all the financial datas are available on record and only some mathematical correction need to be made.

5. We have carefully perused the application raising additional ground. We find force in the contention of the Ld. Counsel for the assessee. While computing operating margin of the comparable companies, the AO has incorrectly calculated the operating margin which requires fresh determination of the operating margins hence, the additional ground is admitted.

6. Representatives of both the sides were heard at length. Case record carefully perused.

7. Appellant is engaged in the provision of market support services to its associated enterprises Hitachi High Technologies Corporation.

8. The appellant company has rendered sales and marketing support services/ sales development services to its AEs, for which it has been remunerated Rs.4,70,69,330/- during the year under consideration. These transactions have been aggregated for the purpose of benchmarking using TNMM method with OP/ OC as the profit level indicator. The assessee has selected 11

comparables and has taken weighted average of 3 years to justify the arm's length nature of the transaction.

9. During the course of the assessment proceedings the AO noticed that the assessee has selected the companies which are not comparable to the assessee company. The AO further noticed that the assessee has used multiple year data for benchmarking the transaction.

10. Accordingly, a show cause notice was issued to the assessee. The assessee was asked to explain why it has used multiple year data and not current year data alone i.e. F.Y.2010-11. The AO further proposed to exclude companies having substantial related parties transactions (more than 25%), to exclude companies having exceptional year of operation and to exclude companies with different functional profile.

11. Assessee filed a detailed reply justifying use of multiple data. The assessee further claimed that the comparables used by it are good comparables.

12. The objections of the assessee were dismissed by the AO who was of the firm belief that current year data alone should be taken into consideration for the purpose of benchmarking. After referring to OECD guidelines and various judicial decisions the AO finally concluded by taking the following companies in the final set of comparables :-

Name of the Company	OP/OC
E D C T L (India) Ltd.	1.73%
Cyber Media Research Limited (Formerly Known as IDC (India) Ltd.)	10.33%
ICC International Agencies Ltd (Segmental)	62.61%
In House Productions Ltd (Segmental)	-1.02%
	-5.86%
India Tourism Development Corporation Ltd (Segmental)	
Priya International Ltd (Segmental)	4.32%
Arithmetic Mean	12.02%

13. It can be seen from the above that margin of ICC International Agencies Limited (segmental) is taken at 62.61% and that of India Tourism Development Corporation Limited (Segmental) is taken at minus 5.86%.

14. Before us the counsel for the assessee pointed out that the correct margin of ICC International Agencies Limited comes to 40.20% and that of India Tourism Development Corporation Limited at minus 17.21% and furnished the margin computation.

15. Considering these facts we are of the considered view that the calculation made by the assessee needs verification by the AO. We accordingly restore the entire issue to the files of the AO. The assessee is directed to furnish the correct calculation of margins of ICC International and India Tourism and the AO is directed to examine the same and if satisfied decide the issue afresh after giving a reasonable opportunity of being to the assessee.

16. With the above directions, all the contested issues remain open and both the sides are at liberty to furnish new datas / comparables.

17. In the result, the appeal is treated as allowed for statistical purpose.

The order is pronounced in the open court on 10.10.2019.

**Sd/-
[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

**Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 10 October , 2019

Neha

Copy forwarded to:

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

Asst. Registrar
ITAT, New Delhi

Date of dictation	10.10.2019
Date on which the typed draft is placed before the dictating Member	10.10.2019
Date on which the typed draft is placed before the Other member	10.10.2019
Date on which the approved draft comes to the Sr.PS/PS	10.10.2019
Date on which the fair order is placed before the Dictating Member for Pronouncement	10.10.2019
Date on which the fair order comes back to the Sr. PS/ PS	10.10.2019
Date on which the final order is uploaded on the website of ITAT	10.10.2019
Date on which the file goes to the Bench Clerk	10.10.2019
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	