

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-1 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.6410/Del/2016
Assessment Years: 2006-07

Copal Research India Pvt. Ltd.,
Plot No.267, Phase-II,
Udyog Vihar,
Gurgaon.

Vs DCIT,
Circle-6(2),
New Delhi.

PAN: AACCC1159R

(Appellant)

(Respondent)

Assessee by	:	Shri K.M. Gupta, Advocate, Ms Shruti Khimta, AR& Mr. Neeraj Sharma, AR
Revenue by	:	Shri Subha Kant Sahu, Sr. DR
Date of Hearing	:	07.10.2019
Date of Pronouncement	:	15.10.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 31st August, 2016 passed u/s 254/143(3) read with section 144C of the IT Act, 1961 for the assessment year 2006-07.

2. This is the second round of litigation before the Tribunal. Earlier, the Tribunal, vide ITA No.3955/Del/2010, order dated 8th May, 2015, had restored the issue back to the file of the DRP on the ground that the assessee has raised a

number of contentions before the DRP and none of these contentions were considered by the DRP and they have not passed a speaking order in this case. Subsequently, the DRP, vide order dated 28th June, 2016, passed the order. The Assessing Officer, vide order dated 31st August, 2016, revised the TP adjustment to Rs.1,28,30,310/- as against the original adjustment of Rs.1,77,38,869/-.

3. Aggrieved with such order of the DRP/Assessing Officer/TPO, the assessee is in appeal before the Tribunal by raising the following grounds:-

“That on the facts and circumstances of the case, and in law:-

1. The Ld. AO following the directions of the Ld. TPO/ Hon’ble DRP erred on facts and in law in making an upward adjustment to the income of the appellant by INR 1,28,30,310 holding that the international transactions of the appellant pertaining to provision of Information Technology Enabled Services (‘ITeS’) does not satisfy the arm’s length principle envisaged under the Act and in doing so, have grossly erred in:

- 1.1. not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;
- 1.2. ignoring the functions, risks and asset profile of the appellant provided in the Transfer Pricing (‘TP’) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (‘the Rules’);
- 1.3. disregarding the Arm’s Length Price (‘ALP’) as determined by the appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Rules and modifying/ rejecting the filters applied by the appellant;

2. The Ld. AO following the directions of the Ld. TPO/ Hon’ble DRP erred on facts and in law in including Vishal Information Technologies Ltd. as a comparable in the final set of comparables which has been held to be not comparable to the appellant in its own case for AY 2009-10 by the Hon’ble Income-tax Appellate Tribunal;

3. The Ld. AO following the directions of the Ld. TPO/ Hon’ble DRP erred on facts and in law in including certain other companies as comparables

without appreciating that they are not comparable to the appellant keeping in view their functional, asset and risk profile;

4. The Ld. AO following the directions of the Ld. TPO/ Hon'ble DRP erred on facts and in law in ignoring the claim for working capital adjustment to the operating profit margins of the companies selected as comparable to the appellant;

5. The Ld. TPO erred on facts and in law by considering incorrect operating margin of Asit C. Mehta Financial Services Ltd.

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

That the Appellant prays that it kindly may be allowed to add, amend, alter and delete the above grounds of appeal before or during the course of hearing.”

4. Facts of the case, in brief, are that the assessee is a company engaged in the business of providing financial services. It filed its return of income on 30.11.2006 declaring total income of Rs.2,83,768/-. Since the assessee had entered into international transaction for an aggregate value of Rs.12,02,77,639/-, the Assessing Officer referred the matter to the TPO for determination of the arm's length price of the international transaction entered into by the assessee. The TPO, during the course of TP assessment proceedings observed that the assessee has undertaken the following international transaction:-

S.No.	Description of transaction	Method	Value (in Rs.)
1.	IT enabled back office services	TNMM	120,277,639

5. The assessee selected the PLI based on the operating cost for determining the arm's length result. The PLI used is the net operating profit based on cost which is the ratio of net operating profit to total expenses. The assessee selected

14 comparables and the mean margin of the comparables was 11.72%. Since the margin of the assessee was 12.20%, it was explained that the transaction of the assessee with its AE is at arm's length from the perspective of the Indian transfer pricing regulations.

6. However, the TPO rejected the economic analysis submitted by the assessee and undertook a fresh search and proposed a TP adjustment of Rs.1,74,55,101/- on account of the provision of ITES. The assessee approached the DRP. The DRP directed the correction of margins of certain comparables, however, no relief was granted on the exclusion/inclusion of the comparables. When the assessee filed an appeal before the Tribunal, the Tribunal, vide ITA No.3955/Del/2010, order dated 8th May, 2015, restored the issue to the file of DRP for passing a speaking order and to deal with all the objections raised before it by the assessee. The DRP, in the set aside proceedings, directed the corrections of margin for certain comparables, but, did not accept the contention of the assessee in respect of inclusion/exclusion of comparables. The final set of comparable companies post DRP directions are as under:-

S.No.	Name of the company	OP/TC
1.	Allsec Technologies Limited	28.84%
2.	City Online Services Limited	0.1%
3.	Spanco Telesystems and Solutions Limited (BPO segment)	20.80%
4.	Maple eSolutions Limited	31.46%
5.	Triton Corp Limited	16.98%
6.	Vishal Information Technologies Limited	48.03%
7.	Wisec Global Limited	(11.45)%
8.	Aditya Birla Minacs Worldwide Ltd. (Transworks Information Services Limited)	19.56%

9.	Asit C Mehta Financial Services Ltd. (segmental) (Nucleus Netsoft and GIS India Ltd.)	60%
Mean		23.76%

7. The Assessing Officer accordingly passed the final assessment order making an upward adjustment of Rs.1,28,30,310/-. Aggrieved with such order of the A.O./TPO/DRP the assessee is in appeal before the Tribunal.

8. The Id. counsel, referring to the final set of comparable companies selected by the DRP, submitted that he is challenging the inclusion of only the following comparables:-

S.No.	Name of the company	OP/TC
1.	Vishal Information Technologies Limited	48.03%
2.	Maple eSolutions Limited	31.46%
3.	Triton Corp Limited	16.98%
4.	Asit C Mehta Financial Services Ltd. (segmental) (Nucleus Netsoft and GIS India Ltd.)	60%

9. So far as the inclusion of Vishal Information Technologies Limited is concerned, the Id. counsel for the assessee submitted that Vishal Information Technologies Limited is functionally dissimilar since it provides agency services by way of outsourcing services to third party vendors and acting as an intermediary between the final customer and the vendor. It has a distinct business model which is completely different from that of the assessee. Vishal Information Technologies Limited outsources a substantial portion of its work and its employee cost is 1.25% whereas in the case of the assessee, the employee cost is 46.95% approximately of the operating cost. Referring to the decision of the Hon'ble Delhi High Court in the case of *Rampgreen Solutions vs. CIT*, reported in 60 taxman.com 355, he

submitted that the Hon'ble High Court in the said decision has held that Vishal Information Technologies Limited could not be considered as a comparable since its business model was completely different. Referring to the decision of the Tribunal in assessee's own case in ITA No.1713/Del/2014, order dated 08.05.2015, for assessment year 2009-10, he submitted that the Tribunal has directed the exclusion of Vishal Information Technologies Limited on the ground that it has a different business model which rendered it incomparable with the assessee. Referring to the decision of the Hon'ble High Court in assessee's own case, vide ITA No.894/2015, order dated 23.11.2015, he submitted that the order of the Tribunal has been upheld by the Hon'ble High Court and the appeal filed by the Revenue has been dismissed. Relying on various other decisions as per the synopsis filed, he submitted that Vishal Information Technologies Limited cannot be compared with that of the assessee and, hence, should be excluded from the list of comparables.

9.1. So far as Asit. C. Mehta Financial Services Ltd. (Seg.) is concerned, he submitted that this company is also functionally dissimilar since a perusal of the annual report indicates that the income from operation is derived from portfolio management fees, IT enabled services and software development. Further, no segmental details are available although the comparable is engaged in both IT and IT enabled services. He submitted that Asit C. Mehta Financial Services Ltd. (Seg) has a distinct business model and the total employee cost to revenue from operations is 23.35% whereas in the case of the assessee this percentage is 46.74%.

This lower ratio of employee cost to turnover is unusual in BPO business. Further amalgamation of Nucleus Netsoft & GIC (India) Ltd. and Asit C. Mehta Financial Services Ltd. was concluded in the assessment year 2006-07. Referring to the decision of the Hyderabad Bench of the Tribunal in *HSBC Electronic Data Processing India Ltd. vs. Addl. CIT, 38 taxman.com 141*, copy of which is placed at pages 64-78 of the paper book, he submitted that this company was excluded from the list of comparables for failing the employee cost filter and amalgamation during the year which has changed the business model of the company. It was observed that as against 0.24 crores of employee cost in F.Y. 2004-05, the employee cost increased to 1.33 crores in F.Y. 2005-06. Further, the data processing charges increased from Rs.nil to Rs.1.04 crores during the same period which proves a change in the business model and also outsourcing of work. Referring to the decision of the Hon'ble Delhi High Court in the case of *PCIT vs. Ameriprise India Pvt. Ltd, vide ITA No.461/2016*, he submitted that the Hon'ble High Court upheld the decision of the ITAT excluding certain comparables due to extraordinary events which disturbed the profitability thereby increasing the margin of comparables. Relying on various other decisions as per synopsis and case law compilation, he submitted that this company should be excluded from the list of comparables.

10. So far as Maple eSolutions Limited is concerned, the ld. counsel for the assessee submitted that this company should be excluded from the list of

comparables since it is a tainted company as the promoters were involved in fraud and, therefore, the financial data is not reliable. Further, the statement of income of the comparable includes change in inventories and purchases, the details of which are not given. The comparable company being a service provider, it is important to understand the nature of these purchases/inventories in order to determine its comparability with the assessee as it is unusual for back office service providers to hold inventory. Further this comparable has seen a wide range of fluctuations in its margins. Referring to the decision of the Mumbai Bench in the case of *M/s Deutsche Networking Services Pvt. Ltd. vs. DCIT, in ITA No.8972/Mum/2010, order dated 14th September, 2018*, he submitted that this company was excluded from the list of comparables on the ground that the financials of the company for the assessment year 2006-07 and 2007-08 were not reliable as no separate segmental appeared in the audited financials of the entity. Further, the reliability of the financials was also doubted on account of fraudulent activities committed within the company. Referring to the decision of the Tribunal in the case of *ITO vs. CRM Services India Pvt. Ltd., vide ITA No.4068/Del/2009 and 4796/Del/2010, order dated 30th June, 2011*, he submitted that the Tribunal in the said decision has held that the business reputation of Rastogi group owning Maple eSolutions Limited and Triton Corp Limited is under serious indictment and, therefore, these companies cannot be taken as comparables. Referring to various other decisions placed in the case law compilation and the synopsis, he

submitted that the Maple eSolutions Limited also cannot be considered as a comparable.

11. So far as Triton Corp Limited is concerned, he submitted that this company also should be excluded from the list of comparables on the ground of amalgamation with three companies during the year. Further, the company is in BIFR and is declared a sick company and now being discharged. Further, this company is functionally dissimilar since it is engaged in IT peripherals. Further, the comparable is engaged in both IT and IT enabled services, but, no segmental information is available. He submitted that the statement of income of the comparable includes change in inventories and purchases the details of which are not given. Referring to the order of the TPO in assessee's own case for assessment year 2008-09, he submitted that the TPO himself has rejected this comparable on the ground that it is functionally incomparable. Referring to the decision of the coordinate Bench in the case of CRM Services India Pvt. Ltd. (supra), he submitted that this company was excluded from the list of comparables on the ground that the business reputation of Rastogi owning Maple eSolutions Limited and Triton Corp Limited is under serious indictment and these comparables cannot be taken as comparable. He submitted that similar view has been taken by the Panaji Bench in the case of Pentair Water India Pvt. Ltd. vs. Addl.CIT and vice versa for assessment year 2006-07, vide ITA No.02/PNJ/2013 and ITA

No.05/PNJ/2013, order dated 17th April, 2014. He accordingly submitted that the above comparables should be excluded from the list of comparables.

11.1 The Id. counsel for the assessee further submitted that although working capital adjustment has been granted to the assessee in its own case for assessment year 2007-08 and 2008-09 by the TPO himself and the DRP in assessment year 2011-12 and since there has been no change in the business model of the assessee, therefore, working capital adjustment should be given to the assessee for this year also. He accordingly submitted that the grounds raised by the assessee should be allowed.

12. The Id. DR, on the other hand, heavily relied on the order of the TPO/DRP. He submitted that the DRP has thoroughly discussed the issues raised by the assessee and has rightly directed for inclusion of the four comparables. Therefore, these four comparables should not be excluded from the list of comparables. So far as working capital adjustment is concerned, the Id. DR submitted that the assessee has to substantiate with evidence to the satisfaction of the TPO/A.O./DRP for working capital adjustment which the assessee has failed to do. He accordingly submitted that the order of the A.O./TPO/DRP should be upheld.

13. We have considered the rival arguments made by both the sides, perused the orders of the A.O./TPO/DRP and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee, in the instant case, is engaged in the provision of information technology

(IT) enabled back office support service in the nature of customized proprietary research and analytic support to Copal group. The assessee in the year under consideration has entered into international transaction to the tune of Rs.12,02,77,693/- on account of provision of Information Technology Enabled Services. We find the TPO, rejecting the economic analysis submitted by the assessee undertook a fresh search and considered nine comparables with OP/TC of 23.76% and made an upward adjustment of Rs.1,28,30,310/-. It is the submission of the Id. counsel for the assessee that out of nine comparables so selected by the DR/TPO/A.O., four comparables, namely, Vishal Information Technologies Limited, Maple eSolutions Limited, Triton Corp Limited and Asit C Mehta Financial Services Ltd. (segmental) (Nucleus Netsoft and GIS India Ltd.) should be excluded from the list of comparables.

14. So far as Vishal Information Technologies Limited is concerned, we find this company (earlier known as Coral Hub Ltd.) was excluded by the Tribunal in assessee's own case for assessment year 2009-10. When the Revenue challenged the order of the Tribunal, the Hon'ble High Court, vide ITA No.894/2015, order dated 23rd November, 2015, dismissed the appeal filed by the Revenue on the ground that detailed reasons have been given by the ITAT for coming to the conclusion regarding exclusion of this entity and, therefore, no substantial question of law arises from the conclusion of the ITAT on the above issue. Further, the Id. counsel for the assessee also demonstrated with details that Vishal Information

Technologies Limited provides agency services by way of outsourcing services to third party vendor and acting as an intermediary between final customer and vendor. This intermediary functions of Vishal Information Technologies Limited can only be compared with that of a distributor which takes title to service/product for resale to the customer whereas the assessee is a provider of back office support services to its AE. Further, Vishal Information Technologies Limited adopts a completely different business model from that of the assessee. Vishal Information Technologies Limited outsources a substantial part of its work which is 74% of the operating cost and the employee cost of Vishal Information Technologies Limited is 1.25% whereas in the case of the assessee the employee cost is 46.95% of the operating cost. Further, Vishal Information Technologies Limited is involved in provision of diversified high end services like e-publishing, data digitalization and digital library services which are different from that of the business undertaken by the assessee. We further find the Hon'ble Delhi High Court in the case of *Rampgreen Solutions (supra)* has upheld the exclusion of Vishal Information Technologies Limited on account of its distinct business model by observing as under:-

“20. Any factor, which has an influence on the PLI, would be material and it would be necessary to ensure that the comparables are also equally subjected to the influence of such factors as the tested party. This would, obviously, include business environment; the nature and functions performed by the tested party and the comparable entities; the value addition in respect of products and services provided by parties; the business model; and the assets and resources employed.....

.....

38. In our view, even Vishal could not be considered as a comparable, as admittedly, its business model was completely different. Admittedly, Vishal's expenditure on employment cost during the relevant period was a small fraction of the proportionate cost incurred by the Assessee, apparently, for the reason that most of its work was outsourced to other vendors/service providers. The DRP and the Tribunal erred in brushing aside this vital difference by observing that outsourcing was common in ITeS industry and the same would not have a bearing on profitability. Plainly, a business model where services are rendered by employing own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing of services by Vishal would have no bearing on the profitability of the said entity.”

15. In view of the above discussion and in view of the decisions taken by the coordinate Benches of the Tribunal excluding Vishal Information Technologies Limited from the list of comparables on account of functional dissimilarities, we direct the A.O./TPO to exclude Vishal Information Technologies Limited from the list of comparables.

16. So far as Asit C Mehta Financial Services Ltd. (segmental) is concerned, we find this company is functionally dissimilar since a perusal of the annual report indicates that the income from operation is derived from portfolio management fees, IT enabled services and software development. Although this company is engaged in both IT and IT enabled services we find no segmental information is available. It also adopts a different business model since total employee cost to revenue from operations is 23.35% whereas in the case of the assessee this is 46.74%. We also find that amalgamation of Nucleus Netsoft and GIS India Ltd. and Asit C Mehta Financial Services Ltd. was concluded during the assessment

year 2006-07. We find the Hon'ble Delhi High Court in the case of *PCIT vs. Ameriprise India Pvt. Ltd. (supra)* has held that a company should be excluded from the list of comparables due to extraordinary events which distorted the profitability thereby increasing the margin of comparable. The Hyderabad Bench of the Tribunal in the case of *HSBC Electronic Data Processing India Ltd. (supra)* while excluding *Nucleus Netsoft and GIS India Ltd.*, from the list of comparables has held that this company cannot be selected as comparable not only on the reasons of failing the employee cost filter, but, also due to amalgamation during the year which has changed the business model of the company. In view of the above discussion and in view of the various decisions placed on the paper book excluding *Asit C Mehta Financial Services Ltd. (segmental)* from the list of comparables, we direct the TPO/A.O./DRP to exclude this company from the list of comparables.

17. So far as *Maple eSolutions Limited* is concerned, we are of the considered opinion that this company also should be excluded from the list of comparables on account of functional dissimilarities. The statement of income of the comparable includes change in inventories and purchases, the details of which are not given. Further, the comparable has seen a wide range of fluctuations in its margin and its financial data is not reliable since the promoters were involved in fraud. We find the coordinate Bench of the Tribunal in the case of *CRM Services India (P) Ltd. (supra)* has held that the business reputation of *Rastogi group* owning *Maple*

eSolutions Ltd. and Triton Corp Limited is under serious indictment and these companies cannot be taken as comparables. The Mumbai Bench of the Tribunal in the case of *M/s Deutsche Networking Services Pvt. Ltd. (supra)* has held that the financials of the company for assessment years 2006-07 and 2007-08 are not reliable as no separate segmental appeared in the audited financials of the entity Maple eSolutions. Further, the reliability of the financials are doubted on account of fraudulent activities committed. In view of the above discussion and in view of the decision of the coordinate Bench of the Tribunal excluding Maple eSolutions Limited from the list of comparables on account of fraudulent activities committed by the promoters and non-availability of segmental data, we direct the TPO/A.O./DRP to exclude this company from the list of comparables.

18. So far as Triton Corp Limited is concerned, this company, in our opinion, also should be excluded from the list of comparables on account of functional dissimilarities, non-availability of segmental data, unclear financials and extraordinary event that has taken place during the year. We find this company is engaged in the sale of IT peripherals. Although this comparable is engaged in both IT and IT enabled services, however, no segmental data is available. As mentioned earlier, the promoters of the company are involved in fraudulent activities and, therefore, the financials are not reliable. Further, the statement of income of the comparable includes change in inventories and purchases the details of which are not given. We also find this company was excluded by the TPO

himself in assessee's own case for assessment year 2008-09. In view of the above discussion and in view of the various decisions placed in the paper book (case law compilation) excluding this company from the list of comparables, we direct the A.O./TPO/DRP to exclude this company from the list of comparables.

19. So far as the denial of working capital adjustment to the assessee is concerned, we find the TPO himself has allowed working capital adjustment for assessment year 2007-08 and 2008-09 and the DRP in assessment year 2011-12. Since there has been no change in the business model of the assessee, therefore, we find no reason for not granting the working capital adjustment to the assessee. However, it needs verification at the level of A.O./TPO. We, therefore, restore this issue to the file of TPO with a direction to grant working capital adjustment to the assessee after verification of the necessary details. The A.O./TPO shall accordingly compute the final adjustment to the arm's length price of the international transaction undertaken by the assessee. The grounds raised by the assessee are accordingly allowed.

20. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 15.10.2019.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Dated: 15th October, 2019

dk

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi