

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

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.320/Del/2016
Assessment Year: 2011-12

Outotec India Pvt. Ltd.,
507, 5th Floor, Copla Corporation Suites,
Jasola Commercial Complex,
New Delhi.

Vs DCIT,
Circle 19(1),
New Delhi.

PAN: AAACD9433A

ITA No.6587/Del/2015
Assessment Year: 2010-11

DCIT,
Circle 19(1),
New Delhi.

Vs. Outotec India Pvt. Ltd.,
8, Community Centre,
New Friends Colony,
New Delhi.

PAN: AAACD9433A

(Appellant)

(Respondent)

Assessee by : Shri G.C. Srivastava, Advocate,
Shri Suvinay K Dash, Advocate &
Shri Prichay Solanki, CA

Revenue by : Ms Nidhi Sharma, Sr. DR

Date of Hearing : 15.10.2019
Date of Pronouncement : 23.10.2019

ORDER

PER R.K. PANDA, AM:

ITA No.320/Del/2016 filed by the assessee is directed against the order dated 23.11.2015 of the Assessing Officer passed u/s 143(3) r.w.s.

144C(1)/144C(5)/144C(13) of the IT Act, 1961 and ITA No.6587/Del/2015 filed by the Revenue is directed against the order dated 15th October, 2015 of the DRP, Panel-2, New Delhi, relating to assessment year 2011-12.

2. For the sake of convenience these were heard together and are being disposed of by this common order.

3. Facts of the case, in brief, are that the assessee is a company incorporated in 2007 and is ultimately held by Outotec Finland. Outotec India is a subsidiary of Outotec Finland. During the impugned assessment year, the company was primarily engaged in the provision of market support and manpower & design services to AEs and rendering engineering services to third parties. It filed its return of income on 28.11.2011 declaring total loss of Rs.3,67,18,795/-. Since the assessee had entered into international transactions with various associated enterprises as per Form No.3CEB filed along with the return of income, the Assessing Officer referred the matter to the TPO for determination of the arm's length price of the international transaction u/s 92CA(3) of the IT Act. The TPO analysed the functions performed, assets employed and the risk assumed by the assessee and noted that the segment of market support services has been benchmarked by the assessee using TNMM as the most appropriate method and operating profit/total cost (OP/TC) as the PLI. He noted that the assessee was showing OP/TC at 10.75%. Based on three years' data, the assessee had used four comparables weighted average margin of which comes to 7.33%. He noted that

the assessee has selected the following comparables whose OP/TC using the current year data was 11.20%:-

S.No.	Company Name	OP/TC (%)
1.	Quadrant Communication Ltd.	14.58
2.	Cyber Media Research Ltd. (IDC India Ltd.)	10.71
3.	Entertainment Network (India) Ltd. (Consolidated)	1.35
4.	India Exposition Mart Limited	18.16
	Average	11.20

4. The TPO applied his own filter and added nine more comparables and determined the average OP/TC at 19.29% and made an upward adjustment of Rs.56,78,697/-. The list of comparables proposed by the TPO are as under:-

S.No.	Particulars	OP/TC (%)
1.	Entertainment Network (India) Ltd. [Event (Consolidated)]	1.33
2.	Aptico Ltd.	25.25
3.	Concept Communication Ltd.	4.49
4.	Crystal Hues Ltd.	7.23
5.	Cyber Media Research Ltd. (IDC India Ltd.)	10.71
6.	DHFL Property Services Ltd.	12.04
7.	Global Procurement Consultants Ltd.	30.99
8.	ICRA Management Consulting Services Ltd.	15.32
9.	Info Edge (India) Ltd.	46.25
10.	MMTV Ltd.	32.49
11.	India Exposition Mart Limited	13.52
12.	Quadrant Communications Ltd.	14.58
13.	TSR Darashaw Ltd.	36.56
	Average	19.29

5. The Assessing Officer, in the draft order, accordingly proposed the adjustment of Rs.56,78,697/- as suggested by the TPO.

6. Further, during the course of assessment proceedings, the Assessing Officer noted that the assessee has made a payment of Rs.1,62,88,677/- to Outotec Oyj as service fees on which no tax has been deducted. The Assessing Officer, therefore, asked the assessee to explain as to why provisions of section 40 (a)(i) should not be applied. It was explained by the assessee that tax was not deducted on payments made to Outotec Oyj since Outotec Oyj is a tax resident of Finland and, therefore, the provisions of DTAA between India and Finland will be applicable. The provisions of section 90(2) was brought to the notice of the Assessing Officer according to which a non-resident has the option to be governed by the provisions of the Act or DTAA which ever is more beneficial to them. Therefore, Outotec Oyj being a tax resident of Finland can avail the benefit under the provisions of DTAA. It was explained that the services rendered by Outotec Oyj are not taxable as FTS under the Article 13(4)(c) of the DTAA due to restrictive function provided under the Indo-Finland DTAA. Article 13 of the India-France DTAA, Article 12 of India-Singapore DTAA were also brought to the notice of the Assessing Officer. Relying on various decisions, it was submitted that the services rendered to the assessee do not qualify for TDS under the India-Finland DTAA but the services availed outside the purview of technical services either on the ground that they are managerial in nature and, hence, outside the fees for technical services as defined in the India-Finland DTAA. So even if they are assumed to be technical in nature, they do not 'make available' any technology, know-how, skill, etc. to the recipient during the course of rendition of such services. It was accordingly submitted that

the provision of services by the assessee would not fall under the definition of FTS provided under the India-Finland DTAA and hence not taxable as FTS.

7. However, the Assessing Officer was not satisfied with the explanation advanced by the assessee. He noted that the services provided by Outotec Oyj is very well covered under the 'Fee for technical services' as defined in the Indo-Finland Treaty. Therefore, the contention of the assessee that as per the provisions of section 90(2) of the Act Outotec Oyj is allowed to take the benefit of the beneficial provision of DTAA is not correct. He referred the provisions of section 195 of the Act, according to which any person responsible for paying to any non-resident not being a company or to a foreign company any interest or any other sum chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode whichever is earlier deduct income-tax thereon at the rates in force. The payment made to Outotec Oyj is 'fee for technical services' and such services are chargeable to tax as per source rule within the meaning of section 9 of the Act. Therefore, the assessee was liable to deduct TDS on this payment under the provisions of section 195 of the Act. Since the assessee has not deducted any tax, the Assessing Officer, invoking the provisions of section 40(a)(i) has made an addition of Rs.1,62,88,677/-. He accordingly determined the total income of the assessee at Rs.1,47,51,420/-. The assessee approached the DRP who deleted the addition made by the Assessing Officer of

Rs1,62,88,677/- u/s 40(a)(i) of the Act. So far as the comparables are concerned, the ld. DRP directed the TPO to exclude M/s Global Procurement Consultants Ltd., from the list of comparables. The Assessing Officer, thereafter, passed the order determining the total loss of the assessee at Rs.3,16,92,110/-.

8. Aggrieved with such order of the A.O./TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds:-

“That on facts and in the circumstances of the case, the order of the Transfer Pricing Officer (hereinafter referred to as “Ld. TPO”) passed u/s 92 CA(3) of the Income-tax Act, 1961, (hereinafter referred to as the ‘Act’), subsequently to the extent confirmed in part by the Dispute Resolution Panel, Kolkata (hereinafter referred to as “Ld. Panel”) and consequently incorporated by the Deputy Commissioner of Income Tax (hereinafter referred to as “Ld. AO”) in the assessment order u/s 143(3) read with section 144C(13) of the Act, is erroneous on facts and bad in law.

1. That on the facts and in the circumstances of the case the Ld. Panel erred in making an adjustment of Rs. 50,26,689/- to the international transactions pertaining to rendering of marketing support services (MSS) to its Associated Enterprises (hereinafter referred to as 'AEs').

2. That the Ld. panel has erred in rejecting the economic analysis and conducting a fresh search by application of certain arbitrary filters in determining the arm's length price with respect to international transaction pertaining to rendering of MSS, without providing any cogent reasons.

3. Without prejudice to Ground 2 and on the facts and circumstances of the case the Ld. Panel had erred in confirming the adjustment made by the Ld. AO and selecting comparable companies which are engaged in rendering services other than MSS and are therefore functionally not comparable with the assessee.

4. That the appellant craves leave to add to and to alter, amend, rescind or modify the grounds raised hereinabove before or at the time of hearing of the appeal.”

9. Aggrieved with the order of the DRP, the Revenue is in appeal before the Tribunal by raising the following grounds:-

“1. On the facts and in the circumstances of the case, the Hon’ble DRP-II has erred in excluding M/s Global Procurement Consultants Ltd. from the list of comparables.

2. On the fact and under the circumstances of the case, Hon’ble DRP-2 has erred in deleting the addition made by the AO on account of payment of Rs.1,62,88,677/- made to Outotex Oyj which was chargeable to tax in India and was liable for TDS under the provisions of section 195 and the assessee had failed to deduct TDS u/s 195 of the IT Act in view of the provisions of section 40a(i) read with section 9 and section 195 of the Income Tax Act, 1961.

3. The Appellant craves to be allowed to add any fresh ground (s) of appeal and/or delete or amend any of the ground (s) of appeal.”

10. The ld. counsel for the assessee submitted that Ground Nos.1, 2 and 4 are general in nature. So far as ground No.3 is concerned, he submitted that the assessee is only challenging the following four comparables, namely,

- (i) Aptico Ltd.;
- (ii) Info Edge (India) Ltd.;
- (iii) MMTV Ltd.; and
- (iv) TSR Darashaw Ltd.

11. The ld. counsel drew the attention of the Bench to page 2 of the TPO’s order and submitted that the TPO in his order itself has mentioned that the company was primarily engaged in the provision of market support and manpower & design services to AEs and rendering engineering services to third parties. Referring to page 3 of the TPO’s order, he drew the attention of the Bench to the FAR analysis made by the TPO and submitted that this company has no intangibles

and has got only manpower. So far as the four comparables proposed by the TPO and upheld by the DRP are concerned, he submitted that all the above four comparables have been held to be not comparable in various decisions. Referring to the decision of the coordinate Bench of the tribunal in the case of *Adobe Systems India Pvt. Ltd. vs. ACIT and vice versa vide ITA No.6165/Del/2015 and 6287/Del/2015, order dated 6th July,2018*, he submitted that this company was also engaged in marketing and promoting the products and services of Adobe group. After considering the comparables selected by the TPO in the market support service segment, the Tribunal has held MMTV Ltd., Aptico Ltd. and TSR Darashaw Ltd. and Info Edge (India) Ltd., as not comparable and has directed the TPO to exclude these companies from the list of comparables. Referring to the decision of the coordinate Bench of the Tribunal in the case of *DCIT vs Tejin India Pvt. Ltd., vide ITA No.6625/Del/2015, order dated 25th January, 2019*, he submitted that following the above decision, the Tribunal had directed the TPO to exclude MMTV Ltd., TSR Darashaw Ltd. and Info Edge (India) Ltd., from the list of comparables. Referring to the decision of the Bangalore Bench of the Tribunal in the case of *H&M Mauritz India Pvt. Ltd. vs. DCIT, vide IT(TP)A No.282/Bang/2015, order dated 19th August, 2016*, he submitted that the Tribunal in the said decision has directed the TPO to exclude Aptico Ltd. and TSR Darashaw Ltd., from the list of comparables. He accordingly submitted that the four companies included by the TPO and upheld by the DRP should be excluded

from the list of comparables.

11.1 So far as the comparable, namely, M/s Global Procurement Consultants Ltd., is concerned, he submitted that the DRP has rightly excluded the said company from the list of comparables. Referring to the decisions cited earlier, he submitted that M/s Global Procurement Consultants Ltd., has been held to be not a good comparable by the coordinate Benches of the Tribunal. So far as the deletion of Rs.1,62,88,677/- by the DRP is concerned, the Id. counsel for the assessee drew the attention of the Bench to the decision of the Kolkata Bench of the Tribunal in the case of *Outotec Oyj vs. DCIT reported in 76 taxman.com 33/(2016) 162 ITD 541* and submitted that the Tribunal at para 8.8 of the order has held that the amounts received by the assessee from Outotec India Pvt. Ltd. does not qualify as FTS as per the DTAA. He submitted that when the payee is not liable to tax, there is no question of any TDS by the assessee company. He further submitted that the Revenue has accepted the decision of the Tribunal and has not preferred any appeal, therefore, on this very issue the assessee company is not liable to any TDS from the payments made to Outotec Oyj and, therefore, the ground raised by the Revenue should be dismissed.

12. The Id. DR, on the other hand, heavily relied on the order of the A.O./TPO/DRP. She submitted that the various decisions relied on by the Id. counsel are not applicable since the functions performed by them are not exactly similar to that of the assessee and, therefore, those decisions cannot be relied.

Further, the assessee has not given all the requisite details before the TPO. She accordingly submitted that the order of the A.O./TPO should be upheld.

13. The ld. counsel, in his rejoinder, submitted that in the case of Adobe Systems India Pvt. Ltd., the Tribunal while deciding the issue has discussed the provision of market support segment and has directed the TPO to exclude the comparables and, therefore, the argument of the ld. DR that the functions performed by Adobe Systems India Pvt. Ltd., is different from that of the assessee is not correct.

14. We have heard the rival arguments made by both the sides and perused the record. We find, the assessee, in the instant case is engaged in the business of providing marketing, supervising and support services for the mining/meteorological/metals & minerals processing industry. The segment of market support services has been benchmarked by the assessee using TNMM as the most appropriate method and OP/TC as the PLI. The assessee has considered four comparables with average margin of 11.20%. Since the margin of the assessee was shown at 10.75%, therefore, it was argued that the transactions with its AEs are at arm's length. We find the TPO disregarding the TP study analysis made by the assessee made fresh search and added nine more comparables whose weighted average was 19.29% and, accordingly, proposed addition of Rs.56,78,697/-. We find the DRP directed to exclude M/s Global Procurement Consultants Ltd., from the list of comparables. While the Revenue is challenging

the exclusion of this company from the list of comparables, the assessee is basically challenging the inclusion of four comparables, namely,

- (i) Aptico Ltd.;
- (ii) Info Edge (India) Ltd.;
- (iii) MMTV Ltd.; and
- (iv) TSR Darashaw Ltd.

15. We find the coordinate Bench of the Tribunal in the case of *Adobe Systems India Pvt. Ltd. vs ACIT (supra)*, while discussing the inclusion/exclusion of certain comparables in the provision of market support services segment, has directed the A.O./TPO to exclude MMTV Ltd., Aptico Ltd., Global Procurement Consultants Ltd., TSR Darashaw Ltd. and Info Edge (India) Ltd. The relevant observations of the Tribunal while excluding each comparable are as under:-

“25. We have considered the rival arguments made by both the sides and perused the material available on record. So far as MMTV Limited is concerned, the DRP excluded this company from the list of comparables on the ground that this is functionally different entity and does not make a good comparable to the assessee in MSS function. Further, the submission of the assessee that it has significant intangibles could not be converted by the Id. DR. Since the above company is engaged in the business of television broadcasting and related operations and it has got significant intangibles, therefore, we hold that this company cannot be compared with that of the assessee company. The order of the DRP is accordingly upheld.

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29. So far as Aplitco Limited is concerned, we find this company was rejected by the Tribunal in assessee's own case for assessment year 2009-10. Similarly, the DRP has rejected this company from the list of comparables in assessment year 2013-14. Since the company provides technical consultancy services which is evident from the page 27 of the annual report and it fails the export turnover filter having 0.57%, therefore, we uphold the order of the DRP in

holding that this is a functionally different entity and hence does not make a good comparable to the assessee in MSS function.

30. So far as Global Procurement Consultants Limited is concerned, we find this company is engaged in procurement related advisory services and financial audit for projects in India and abroad which is evident from page 1, 3, 15 and 16 of the annual report. We further find this company was rejected by the Tribunal in assessee's own case for assessment year 2010-11 and no appeal was filed by the Department before the Tribunal. We, therefore, uphold the order of the DRP in holding that this is a functionally different entity and hence does not make a good comparable in MMS function.

31. So far as TSR Darashaw Limited is concerned, we find this company is engaged in share registry and transfer services, depository services, record management, payroll and provident fund management and corporate fixed deposit management which are in the nature of IT enabled services as evident from page 21 of the annual report. We, therefore, uphold the order of the DRP in holding that this is functionally different entity. Further, this company was rejected by the Tribunal in assessee's own case for assessment year 2009-10 and the DRP in assessee's own case for assessment year 2010-11 and no appeal was filed by the Revenue before the Tribunal. We, therefore, uphold the order of the DRP in excluding the company from list of comparables. The ground no.2 by the Revenue is accordingly dismissed.

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40. After hearing both the sides, we find the Info Edge (India) Limited was included by the TPO holding that it is functionally comparable which has been upheld by the DRP. We find the Tribunal in the case of Rolls-Royce India Pvt. Ltd. (supra) while directing the TPO to exclude this company as comparable from the market support services segment has observed as under :-

"21. Regarding Infoedge India Pvt. Ltd we are of the view that this company has been included by the TPO holding that it is functionally comparable. Assessee contended before the Id. TPO as well as DRP that this company is functionally not comparable in view of it engaged in management of online portals and also has major sources of revenue as advertisement income. Both the lower authorities rejected the contention of the assessee. We have carefully considered the rival contentions. It is apparent that the comparable selected by TPO is engaged in online portal activities such as employment website, matrimonial website and its major revenue is advertisement and subscriptions. It has diversified services such as recruitment related, real estate related, matrimonial related services and owns significant Rolls Royce India Private Limited V DCIT ITA No 6636 Del 2015 A.Y. 2011- 12intangibles/websites such as naukri.com, 99 acre.com etc. Therefore this company is functionally

different as it is providing an advertisement space as well as online portal based on subscription by the buyer and seller of the services compared to services provided by the assessee of marketing support services . In view of this we direct ld. TPO for exclusion of this comparable."

41. Similarly, the Tribunal in the case of LinkedIn Technology Information Private Limited (*supra*) has directed the TPO to exclude this company from the list of comparable.

42. Following the above two decisions and considering the fact that the functions of Info Edge (India) Limited is different from that of the assessee, we hold that the above company is not a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company from the list of comparables.”

16. We find, following the above decision the coordinate Bench of the Tribunal in the case of *Teijin India Pvt. Ltd. (supra)* and various other decisions, has directed the A.O./TPO to exclude: MMTV Ltd.; TSR Darashaw Ltd. and Info Edge (India) Ltd., from the list of comparables by observing as under:-

“7. We have heard both the parties and perused the material available on record. From the annual reports of each of the comparables contested by the Revenue it can be seen that comparables are functionally dissimilar to the assessee company. These comparables are considered in case of Adobe Systems India Pvt. Ltd. (*supra*) for the same Assessment Year 2011-12 and from the perusal of the Tribunal's order it can be seen that these comparables are functional different than assessee's company. The Tribunal held as under for each of the comparables for A.Y. 2011-12 regarding marketing support services:

"25. We have considered the rival arguments made by both the sides and perused the material available on record. So far as MMTV Ltd. is concerned, the DRP excluded this company from the list of comparables on the ground that this is functionally different entity and does not make a good comparable to the assessee in MSS function. Further, the submission of the assessee that it has significant intangibles could not be converted by the Ld. DR. Since the above company is engaged in the business of televisions broadcasting and related operations and it has got significant intangibles, therefore, we hold that this company cannot be compared with that of the assessee company. The order of the DRP is accordingly upheld.

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31. So far as TSR Darashaw Ltd is concerned, we find this company is engaged in share registry and transfer services, depository services, record management, payroll and provident fund management and corporate fixed deposit management which are in the nature of IT enabled services as evident from page 21 of the annual report. WE, therefore, uphold the order of the DRP in holding that this is functionally different entity. Further, this company was rejected by the Tribunal in assessee's own case for Assessment Year 2009-10 and the DRP in assessee's own case for Assessment Year 2010-11 and no appeal was filed by the Revenue before the Tribunal. We, therefore, uphold the order of the DRP in excluding the company from list of comparables. The Ground No.2 by the Revenue is accordingly dismissed.

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40. After hearing both the sides, we find the Info Edge (India) Ltd. was included by the TPO holding that it is functionally comparables which has been upheld by the DRP. WE find the Tribunal in the case of Rolls-Royce India Pvt. Ltd. (supra) while directing the TPO to exclude this company as comparable from the market support services segment has observed as under:-

"21. Regarding Infoedge India Pvt. ltd we are of the view that this company has been included by the TPO holding that it is functionally comparable. Assessee contended before the Ld. TPO as well as DRP that this company is functionally not comparable in view of it engaged in management of online portals and also has major sources of revenue as advertisement income. Both the lower authorities rejected the contention of the assessee. We have carefully considered the rival contentions. It is apparent that the comparable selected by TPO is engaged in online portal activities such as employment website, matrimonial website and its major revenue is advertisement and subscriptions. It has diversified services such as recruitment related, real estate related, matrimonial related services and owns significant Rolls Royce India Pvt. Ltd. Vs. DCIT ITA No. 6636/Del/2015 Assessment Year 2011-12 intangibles/websites such a naukri.com, 99 acre.com etc. Therefore, this company is functionally different as it is providing an advertisement space as well as online portal based on subscription by the buyer and seller of the services compared to services provided by the assessee of marketing support services. In

view of this we direct Ld. TPO for exclusion of this comparable."

41. Similarly, the Tribunal in the case of LinkedIn Technology Information Pvt. Ltd. (supra) has directed the TPO to exclude this company from the list of comparable.

42. Following the above two decisions and considering the fact that the functions of Info Edge (India) Ltd is different from that of the case of the assessee, we hold that the above company is not a comparable. We accordingly direct the Assessing Officer /TPO to exclude this company from the list of comparables."

The assessee company is engaged in provisions of marketing support services to Teijin-Japan and other group companies, while the comparables are functionally different from the assessee companies which can be seen from the Annual reports of each of the comparables. The DRP has given proper direction for excluding these comparables contested by the Revenue. The Ld. DR also was not able to demonstrate that the functional profile of these comparables is similar to that of assessee company. Therefore, the appeal filed by the Revenue is dismissed."

17. Similarly, the Bangalore Bench of the Tribunal in the case of *H & M Mauritz India Pvt. Ltd. (supra)*, while directing to exclude Aptico Ltd., Global Procurement Consultants Ltd, and TSR Darashaw Ltd., from the list of comparables, has observed as under:-

"10. We have considered the rival submissions. We find that as per para-13 of the TPO's order, he has considered six companies as good comparables having average profit of 27.74%. On page-3 of the TPO's order, the assessee's profit margin has been noted as 12.06%. Now as per arguments of the ld. AR of the assessee, two companies M/s Aptico Ltd., (Supra) and M/s Global Procurement Consultants Ltd., (Supra) should be excluded from the list of final comparables on the basis of functional dissimilarity in view of the Tribunal order rendered in the case of M/s Adidas Technical Services Pvt.Ltd., (Supra).

11. The ld. DR of the revenue could not point out any difference in facts in the present case and in that case i.e. of M/s Adidas Technical Services Pvt.Ltd., (Supra). Para-8.3 of this Tribunal order is reproduced below. The Tribunal in

that case held to exclude three companies i.e. M/s Aptico Ltd., M/s Global Procurement Consultants Ltd., and M/s TSR Darashaw Ltd.

"8.3. We first take up the case of Apitco Ltd.,

(a) Apitco Ltd.:- Apitco Ltd. is a Public Sector Undertaking providing various support services for the development of tourism industry. Later the functional profile of the company had undergone a change, and it is now engaged in providing technical consultancy relating to asset reconstruction companies, management services, micro enterprise development, skill development etc. This is a government company. The fact that its operations are mainly based on the policy requirements of the government and the fact that it is a preferred company of the Government of India for entrustment of works, cannot be ignored. Be it as it may, in our considered opinion, the functional profile of this company is different from that of the assessee company and hence the same should be excluded from the list of comparable companies while computing the ALP.

(b) Global Procurement Consultants Ltd.:-

The Ld.Counsel for the assessee submitted that the functional profile of the company is different and that Global Procurement Consultants Ltd. is merely rendering services to government bodies and international organisations. It was further submitted that it is engaged in providing varied services in consultancy segment which are as follows.

(a) Bid support services; (b) Performance review;

(c) Valuation assignments;

(d) Financial advisory services and other assignments.

It was further argued that no segmental details are available and hence it cannot be taken as a comparable. The Ld.D.R. submitted that this comparable company as a client's representative in taking on the total responsibility of procurement by providing the comprehensive range of procurement related advisory services at inter-allied activities for projects in India and abroad and hence is functional comparable. The ITAT Delhi I-2 Bench in the case of International SOS Services Ltd. vs. DCIT in ITA 1631/Del/2014 order dt. 8.12.2015, at para 4 has held as follows.

"4. Global Procurement Consultant Limited:

12.6 The Id. Counsel for the assessee submitted that this is an 100% Government owned company as it is promoted by Exim Bank. He vehemently contended that functionally, this company is not a comparable, as it works with in the field of power, water resources, transportation industry such as

economic, textile, mining, cement, leather, health education, environment, InfoTech etc. The pith and substance of the submission are that the areas in which this company provides support services is totally different from the type of support services provided by the assessee. He placed reliance on the decision of the Hon'ble Delhi High Court in the case of [Rampgreen Solutions Pvt. Limited vs. CIT, ITA No. 102/2015](#) judgment dated 10/08/2015 for the proposition that functionally dissimilar companies cannot be taken as comparables. He pointed out that decision of the Spl. Bench of the Tribunal in the case of Global India Pvt. Limited has been overruled by the Hon'ble Delhi High Court in ITA No. 7466/M/11 judgment dated 07/03/2004.

12.7 The Id. Departmental Representative on the other hand, pointed out that Global Procurement Limited is not a 100% Government of India owned company and that it is being promoted by export import bank of India, as a private sector company in partnership with Leading corporate groups like MECON, ICCI, TCE Consulting Engineers Ltd. etc. She submitted that the functional profile is that of specialized support services, which required high profile skill and timely delivery of quality services, which is comparable with the functional profile of the assessee.

12.8 On a careful consideration of these arguments, we are of the considered opinion that this company should be taken as a comparable for the following reasons:

a) This is not a 100% Government owned company as claimed by the assessee. Under the head "corporate synergy" it is stated that this company is co-promoted by the Export Import Bank of India as private sector Company along with a number of other Private Companies.

b) The functional profile of this company is rendering of highly specialized procurement support services. The quality of service, the skills are comparable with the quality and skill of support services provided by the assessee, though in functionally different areas. As the Id. Counsel for the assessee has accepted before us that comparable companies rendering services in the same field as that of the assessee company cannot be found companies rendering support services in other fields have to be taken as comparables.

c) We have also perused the decision of the Hon'ble Jurisdictional High Court in the case of Rampgreen Solutions Pvt. Ltd.(supra). The claim of the Id. Counsel for the assessee is based on the propositions laid down in this case law. If on such an argument, the comparable Global Procurement Consulting Limited is excluded, then all the other comparables cited by the assessee as well as the Id.TPO have to be excluded on the same principle. This will leave us with no other comparable. The assessee cannot advance contradictory arguments. As it has been accepted by both the parties before us that, companies having a broad functional profile of rendering skilled professional

support services, should be taken as comparable companies, the proposition laid down in Rampgreen Solutions Pvt. Ltd.(supra), cannot be applied to the facts of the case on hand. In view of the above discussion. we are of the considered opinion that Global Procurement Consulting Limited has rightly be taken as the comparable by the TPO. Hence we dismiss this argument of the assessee. Consistent with the view taken therein, we agree with the Ld.TPO that this company has to be taken as functionally comparable. But this company is also undertaking many other activities such as valuation etc. The issue for consideration would be as to whether segmental data is available. If such data is available then the company has to be taken as a comparable. As the argument of the Ld.Counsel for the assessee is that there are no segmental results available, this company is directed to be excluded as a comparable.

.....

(d) TSR Darashaw Ltd.:- The TPO included this company on the ground that the company is providing business out sourcing services to clients in India. These services are provided to local clients and not the foreign clients and hence they are not similar to ITES services. The TPO observed that ITES companies have the advantage of location savings, while the business service companies do not have advantage. Since in this case the services are predominantly provided in India, the company is a correct comparable. He also held that the assessee had not gone into the verticals or high end or low end distinctions while selecting the comparables and has selected companies operating in various verticals. The TPO has also selected comparables which are broadly engaged in the field of marketing support services which has similar to the services provided by the assessee.

The Ld.Counsel for the assessee on the other hand submitted that the company is not functionally comparable. It is contended that there can be no comparison between a specific pay roll service rendered and marketing support service provided. It was contended that TSR Darashaw Ltd. is a broking and investment banking house and as 57.4% of its income is from the share registry services segment and hence not a comparable. Reliance is placed on the following decisions.

- i. Microsoft Corporation P.Ltd. vs. DCIT in ITA no.5766/Del/2011;
- ii. Premier Exploration Services P. Ltd. vs. ITO in ITA No.4935/Del/2011.

In our considered opinion TSR Darashaw Ltd. cannot be taken as a comparable as 57.4% of its income is from share registry services segment. This shows the functional profile of the assessee is different.

In the case of Microsoft Corporation Ltd. (supra) at para 1 the Tribunal has held as follows.

"Coming to the merits of comparability, we find that this company has three segments, which inter alia include: 'Pay Roll and Trust Fund activity (Pay Roll)'. It is this segment which has been considered by the assessee as comparable. This company on an overview is a broking and investment banking house. Its other segments are : 'Registrar and Transfer Agent activity (R&D)' and 'Records management activity (Records)'. The segment of 'Pay Roll' was considered by the assessee as comparable in its TP study report and the same is now assailed. Under the 'Pay Roll' segment, this company undertakes pay roll and employee trust fund administration and management. When we compare the nature of pay roll activity undertaken by this company with the marketing support services rendered by the assessee to its AEs, we find that both are way apart from each other. There can be no logical comparison between a specific pay roll services rendered by a company to its clients with the marketing support services rendered by the assessee to its AEs. This company is, therefore, directed to be excluded from the final set of comparables."

Consistent with the view taken in the above case, we direct the AO/TPO to exclude this comparable.

12. Respectfully following this Tribunal order, and the absence of any difference in facts having been pointed out by the Id. DR of the revenue, we direct the AO/TPO to exclude these three companies i.e. M/s Aptico Ltd., M/s Global Procurement Consultants Ltd., and M/s TSR Darashaw Ltd. from the list of final comparables and since, the average profit of the remaining three comparable i.e. M/s Cyber Media Research Ltd., 14.85%, M/s HCCA Business Services Pvt. Ltd., 20.05% and M/s Quadrant Communications Ltd., 1.11% is around 16% which is within $\pm 5\%$ range of the assessee's profit margin of 12.06%, no TP adjustment is required to be made. We hold accordingly."

18. Respectfully following the decisions cited (supra), we hold that Aptico Ltd.; Info Edge (India) Ltd.; MMTV Ltd.; TSR Darashaw Ltd. and Global Procurement Consultants Ltd., cannot be considered as comparables with that of the assessee company. Accordingly, the TPO is directed to exclude these comparables. The grounds raised by the assessee are accordingly allowed and the ground of appeal No.1 raised by the Revenue is accordingly dismissed.

19. So far as the ground of appeal No.2 of the Revenue is concerned, it relates to the order of the DRP in directing to delete the addition of Rs.1,62,88,677/- made by the Assessing Officer on account of non-deduction of tax from the payment made to Outotec Oyj. We find the Id. DRP while directing to delete the addition made by the Assessing Officer has observed as under:-

“6.0 Finding:

6.1 DRP has duly examined the issue. Article 13(4) of Indo-Finland DTAA (1984) provides as under:

4. The term "fees for technical services" as used in this Article means payments of any kind to any person, other than payments to an employee of the person making the payments and to any individuals for independent personal services mentioned in Article 15, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.

Indo-Finland Protocol (1998) amended Article 13(4) as under:

4. For the purposes of paragraph 2, and subject to paragraph 5, the term 'fees for technical services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in sub-paragraph (a) of paragraph 3 is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in sub-paragraph (b) of paragraph 3 is received; or

(c) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

However. Indo-Finland DTAA (2010) defines FTS in Article 12(3)(b) as under:

b) The term 'fees for technical services' as used in this Article means payments of any kind, other than those mentioned in Articles 14 and 15 of this

Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

Notification No. 36/2010, Dated: May 20, 2010 of Indo-Finland DTAA (2010) provides as under:

And, whereas, the date of entry into force of the said Agreement is the 19th day of April, 2010, being thirty days after the date of later of the notifications of completion of the procedures as required by the respective laws for entry into force, of the said Agreement, in accordance with paragraph 2 of Article 29 of the said Agreement;

And, whereas, sub-paragraph (b) of paragraph 2 of Article 29 of the said Agreement provides that the provisions of the said Agreement shall have effect in India in respect of the taxes withheld at source, for amounts paid or credited on or after 1st April of the calendar year next following the year in which the Agreement enters into force; and in respect of taxes on income, for any fiscal year beginning on or after 1 April of the calendar year next following the year in which the Agreement enters into force;

6.2 Perusal of above provisions reveals that Indo-Finland DTAA (2010) is applicable to income arising in FY beginning on or after 01.04.2011 ie AY 2012-13 onwards. In present case, AY involved is 2011-12 and therefore, it shall be governed by provisions of Indo-Finland Protocol (1998) wherein management services are not included in definition of FTS and also definition of FTS is subject to 'make available' clause.

6.3 As per provisions of section 195 of the Act, liability to deduct tax arises if any payment made to non-resident is chargeable to tax in India in hands of payee. In present case, majority of services provided by Outotee Oyj are in nature of management services as per Annexure 1 to service agreement dated 01.07.2009. In any case, there is 'make available' clause in definition of FTS which has not been satisfied in present case. There is no provision for training in service agreement. The AO has simply taken a position that meaning given to 'make available' in Indo- USA treaty cannot be imported in Indo-Finland treaty is not correct as per various judicial authorities on the issue. In view of above, the panel is of considered view that payment made by the assessee to Outotee Oyj is not in nature of FTS and hence not chargeable to tax in India in absence of PE of Outotee Oyj in India. Therefore, provisions of section 195 are not attracted and hence disallowance u/s 40a(i) is not warranted.

6.4 The panel has further noted that delivery of management services has not been disputed and the AO could not establish that payments made were not wholly and exclusively for the purpose of business of the assessee. Therefore, provisions of section 37(1) of the Act are not attracted. The objection is accordingly allowed.”

20. We find the Kolkata Bench of the Tribunal in the case of Outotec Oyj (supra) has held that the amounts received by the assessee from Outotec India Pvt. Ltd., does not qualify as FTS as per DTAA. We find the Tribunal at para 3 of the order has brought out the facts as under:-

“3. The brief facts of this issue is that the assessee company is a tax resident of Finland and is engaged inter alia in the business of providing innovative and environmentally sound solutions for a wide variety of customers in metals and mineral processing industries. The assessee filed a NIL return for the Asst Year 2010-11 on 28.3.2012. During the year under ITA No.558/Kol/2014 & 462/Kol/2015 Outotec Oyj, AY 2010-11 & 2011-12 consideration, the assessee earned revenue from management support and other services. These services are provided to its group company Outotec India Pvt Ltd and the revenue earned was Rs. 82,22,381/-. The ld AO proposed to bring this amount to tax as 'Fee for Technical Services (FTS)' . The assessee contended before the ld AO that the services provided by it are managerial services and these services fall outside the definition of FTS under India -Finland DTAA. The assessee also contended that no services have been made available so as to tax the amount as FTS.”

20.1 Finally, at para 8.8, the Tribunal has held as under:-

“8.8. In view of the aforesaid facts and findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the amounts received by the assessee from Outotec India Pvt Ltd does not qualify as FTS as per the DTAA. Accordingly, the grounds raised by the assessee in this regard are allowed for both the Asst Years.”

21. We, therefore, find merit in the argument of the ld. counsel for the assessee that when the payee is not liable to tax on the payments received from the assessee company, the question of deduction of tax does not arise. The ld. counsel for the assessee also made a statement at the bar that the Revenue has accepted the decision of the Tribunal and has not filed any appeal before the Hon'ble High Court. We, therefore, dismiss the ground raised by the Revenue challenging the

deletion of Rs.1,62,88,677/- made by the Assessing Officer for non-deduction of tax from the payments made to Outotec Oyj. The ground raised by the Revenue is accordingly dismissed.

22. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

The decision was pronounced in the open court on 23.10.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 23rd October, 2019

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi