

आयकर अपीलीय अधिकरण दिल्ली न्यायपीठ "आई-1", दिल्ली में

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं डॉ. बी आर आर कुमार, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER &
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं / ITA No:- 2526/Del/2016
निर्धारण वर्ष / Assessment Year: 2011-12

Mentor Graphics (Sale & Service)अपीलार्थी / Appellant
Pvt. Ltd., B-92, 9th Floor, Himalaya
House, 23, K.G. Marg, New Delhi

PAN-AADCM9516F

Vs.

The DCIT, Circle-16(2), प्रत्यर्थी / Respondent
New Delhi

अपीलार्थी की ओर से / Appellant by :Sh. Himanshu S. Sinha, Adv
Ms. Vrinda Tushan, Adv
Sh. Bhuwan Dhoopar, Adv

प्रत्यर्थी की ओर से / Respondent by :Sh. Sanjay I. Bara, CIT. DR

सुनवाई की तारीख / Date of Hearing : 26.09.2019	घोषणा की तारीख / Date of Pronouncement: 30.10.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The present appeal filed by assessee is against the order of the learned Assessing Officer passed under section 143(3) r.w.s. 144C(1) order dated 23.11.2015 relating to Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal which read as under:-

“1. On the facts and in law, the learned Transfer Pricing Officer - 11(2), New Delhi (‘Ld. TPO’) and the learned Deputy Commissioner of Income Tax -Circle 16(2) (‘Ld. AO’) erred in determining and the Hon’ble Dispute Resolution Panel (‘Hon’ble DRP’) erred in confirming the addition of Rs. 1,71,96,956 to the value of international transactions pertaining to provision of marketing and sales support services by the Appellant to its Associated Enterprises (‘AEs’) under Section 92CA(3) of the Income-Tax Act, 1961 (‘the Act’).

2. On facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in determining the arm’s length price at 21.14 percent [being Net Cost Plus Mark-up (‘NCP’) margin] under Transactional Net Margin Method (‘TNMM’) even though Appellant’s intercompany pricing of NCP margin of 13.99 percent and 15.41 percent was determined to be at arm’s length by the learned Commissioner of Income Tax (Appeals) and Ld. TPO in immediately preceding year (AY 2010-11) and immediately succeeding year (AY 2012-13) and there has been no change in the facts and circumstances in AY 2011-12 vis-a-vis aforesaid years.

3. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in selecting certain alleged companies as comparable, without appreciating that in cognizance of Rule 10B(2), the functional, asset and risk profile of these alleged companies are dissimilar to that of the Appellant and thereby erred in disregarding various judicial pronouncements.

4. On facts and in law, the Hon’ble DRP erred in confirming the action of the Ld. TPO, when conducting the comparability analysis, by modifying/rejecting certain filters applied by the Appellant and adding certain filters without any cogent reason.

5. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in violating the provisions of Rule 10B(2) by alleging Apar Chemtek Lubricants Ltd. as comparable to the Appellant.

6. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in violating the provisions of Rule 10B(2) by alleging Info Edge (India) Ltd. as comparable to the Appellant.

7. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in violating the provisions of Rule 10B(2) by alleging MMTV Ltd. as comparable to the Appellant.

8. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon’ble DRP erred in violating the provisions of Rule 10B(2) by alleging Media Research Users Council as comparable to the Appellant.

9. On the facts and in law, the Ld. TPO, the Ld. AO and the Hon'ble DRP erred in rejecting Technicom Chemie (I) Limited without appreciating that in cognizance of Rule 10B(2), the functional, asset and risk profile of the aforesaid comparable company are similar with that of the Appellant.

10. On facts and in law, the Ld. TPO, the Ld. AO and the Hon'ble DRP erred in grossly misinterpreting the requirement of 'contemporaneous' data in the Rule 10B(4) by necessarily using current year ' data (i.e. financial year 2010-11), thereby breaching the principles of natural justice and 'impossibility of performance'.

11. On facts and in law, the Ld. TPO, the Ld. AO and the Hon'ble DRP erred in law and on facts in not allowing appropriate adjustments under 10B(1)(e)(iii) and Rule 10B(3) to account for differences in risk profile of the comparables vis-a-vis the Appellant.

12. On facts and in law, the Ld. AO/ Ld. TPO and the Hon'ble DRP erred in initiating penalty proceedings under Section 271(1)(c) of the Act.

13. On the facts and circumstances of the case and in law, the Ld. AO erred in not granting the credit of advance tax of Rs.9,55,000 paid by the Appellant for Assessment Year 2011-12.

14. On the facts and circumstances of the case and in law, the Ld. AO erred in computing and levying interest of Rs.348,824 under Section 234B of the Act as per the impugned assessment order consequential to the above grievances.

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

The Appellant craves leave to alter, amend and/ or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing."

3. The issue raised in the present appeal is against the Transfer Pricing Adjustment made in the hands of the assessee. The limited issue which has been addressed by the learned AR for the assessee before us is in connection with the comparables finally selected to benchmark the international transaction of the assessee. Hence we proceed to decide the appeal accordingly.

4. Briefly in the facts of the case, the assessee had furnished the return of income declaring total income of Rs. 5,86,47,271/-. The assessee was engaged in sale of Software licenses and rendering support services to customers in India of the AE. The said services included rendering marketing, promotional and customer liasoning and after sale services of the computer aided engineering systems to the parent company. The assessee had entered into various international transactions totaling Rs. 42,15,45,837/-. The AO made reference to the TPO to benchmark the international transactions under section 92 CA (1) of the Act. The TPO noted that the assessee was engaged in two activities. One was of distribution of software i.e. direct sales; admittedly there is no dispute with regard to the said activity. The second activity undertaken by the assessee was marketing and sale support services provided by it to its AEs. The assessee has selected Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the said transaction. The PLI applied by the assessee was operating profits over total cost and the PLI of the assessee worked out to 11.57%. The assessee had selected nine companies as comparables, whose mean margins of multiple year data was 7.06%. The TPO issued a show cause notice to the assessee in respect of the proposed filters to be applied and also pointed out that final set of comparables would be at variance. The assessee filed its reply to the said show cause notice wherein the

current year data was to be used for comparability analysis and also in respect of other filters to be applied. The TPO in the final analysis rejected six comparables out of the list finally selected and adopted 15 companies as comparable to the assessee after meeting with the objections raised by the assessee in this regard. The final list of comparable is at page 40 of the TPO's order. The AO issued draft assessment order with regard to the proposed upward adjustment of Rs. 2,24,98,003/-. The assessee filed objections before the DRP which rejected certain concerns as not comparable and mean margins of the balance comparables worked out to 21.14%. The AO in the final assessment order made an adjustment of Rs. 1,71,96,956/-, against which the assessee is in appeal before us.

5. The learned AR for the assessee pointed out that certain companies which have been finally selected are not functionally comparable to the assessee and / or do not fulfill the filters which were proposed to be applied by the TPO and hence the same needs to be excluded. We will deal with the concerns to be excluded in the paras below.

6. The learned DR for the Revenue objected to the submissions of the learned AR for the assessee and placed heavy reliance on the order of the AO/TPO. He fairly pointed out that in case any of the

concerns do not fulfill the RPT filter, then the same merits to be excluded.

7. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the Transfer Pricing Adjustment made in the hands of the assessee of Rs. 1.71 Crores. The assessee is aggrieved by the final selection of the companies as comparables on various grounds. The only issue raised is with regard to the marketing and sales support services provided by the assessee to its AE. The assessee had selected TNMM method as the most appropriate method and had applied PLI OP/OC. The margins of the assessee was 11.57%. The selection process was revised by the TPO on applying different set of filters and also by using data for the contemporaneous period. The TPO thus arrived at the final set of 15 comparables, whose arithmetic mean PLI worked out to 24.09%. The final list of comparables selected by the TPO reads as under:-

Sl. No.	Company Name	OP/TC (%)
1.	<i>Apar Chematek Lubricants Ltd.</i>	42.31
2.	<i>Apitco Ltd.</i>	25.17
3.	<i>Concept Communication Ltd.</i>	4.73
4.	<i>Crystal Hues Ltd.</i>	11.69
5.	<i>Cyber Media Research & Services Ltd.</i>	10.60
6.	<i>DHFL Property Services Ltd.</i>	14.86
7.	<i>Global Procurement Consultants Ltd.</i>	30.86
8.	<i>ICRA Management Consulting Services Ltd.</i>	16.14
9.	<i>Info Edge (India) Ltd.</i>	45.53
10.	<i>MM TV Ltd.</i>	32.94
11.	<i>Media Research Users Council</i>	40.53
12.	<i>Power System Operation Corpn. Ltd.</i>	22.52

13.	<i>Quardrant Communications Ltd.</i>	14.58
14.	<i>Quippo Valuers & Auctioneers Pvt. Ltd.</i>	7.23
15.	<i>TSR Darashaw Ltd.</i>	41.60
Average		24.09

8. The DRP directed the exclusion of Apitco Limited, Power System Operation Corporation Ltd., Global Procurement Consultants Ltd and TSR Darashaw Ltd. from the final set of comparable companies. The DRP also directed certain adjustments in working of the PLI against which no issue has been raised before us. The revised margins of the comparable companies, after the directions of the DRP worked out to 21.14%.

9. The first grievance of the assessee is against the selection of Apar Chematek Lubricants Ltd., on the ground that it fails the related party transaction filter. The TPO while applying the said filter of RPT at page 19 of the order applies the filter of 25% threshold. The learned AR for the assessee pointed out that as far as Apar Chematek Lubricants Ltd., was concerned, which was having 100% earnings from its holding company. In this regard, reference was made to the annual report of the holding company of the said concern. The learned AR for the assessee pointed out that this aspect was brought to the knowledge of the DRP, however the said fact was not accepted. Further reliance was on the decision of the Delhi Tribunal in *Kobelco Cranes India (P.) Ltd., vs. Income Tax Officer [2016] 70 taxmann.com 3 (Delhi-Trib.)*.

10. The learned DR for the Revenue fairly pointed out that since the RPT filter fails, then Apar Chematek Lubricants Ltd needs to be excluded from the final set of comparables.

11. On the perusal of the annual report of the holding company which is placed at page 12 of the paper book and as the TPO himself at page 14 had applied the RPT filter with 25% threshold, we find no merit in the order of the authorities below in including sale Apar Chematek Lubricants Ltd as functionally comparable to the assessee. The earnings of the said concerns were 100% of the Revenue earned from its holding company. Since the concern fails to fulfill the RPT filter, the same is directed to be excluded from the final list of the comparables. Accordingly, we hold so. The Tribunal in Kobelco Cranes India (P.) Ltd., have also accordingly held.

12. Now coming to the next concerns i.e. Info Edge (India) Ltd. The learned AR for the assessee in this regard pointed out that the said concern was engaged in Internet based service delivery, operating in four service verticals through web portals in respective vertical, namely, (i) Naukri.com for recruitment related services; (ii) Jeevansathi.com for matrimony related services; (iii) 99 acres.com for real estate related services and (iv) Shiksha.com for education related services. It was further stated by the learned AR for the assessee that the assessee was providing marketing and sale support services to the

companies to whom the AE of the assessee sells the products. Hence the said concern was not functionally comparable to the assessee. It was also pointed out that Info Edge (India) Limited possesses certain intangible assets and on this account also the concern cannot be said to be comparable. Again reliance was placed on the decision of Delhi Bench in Kobelco Cranes India (P.) Ltd., (supra). The learned DR for the Revenue placed reliance on the orders of the authorities below.

13. We have heard the rival contentions and are of the view that where the assessee was provided marketing and sales support services to its AE then a concern which is engaged in providing Internet based services through web portal for different services i.e. recruitment / matrimony related services, estate services, education related services, then such a concern is not functionally comparable to the assessee. The said concern cannot be included in the final set of comparables. Accordingly, we hold so.

14. The next concern which has been included in the final list of comparables is MM TV Limited. The assessee pointed out that the said concern was engaged in Television broadcasting business and related operations and also runs Kerala's No. 1 news and entertainment channel and news channel. He further pointed out that the main source of income was from advertising. The said concern also owned significant intangibles i.e. Broadcasting rights and

licenses etc., and hence was not comparable. It was pointed out by the learned AR for the assessee that in the case of Rolls Royce India (Pvt) Ltd., which was engaged in providing sales support services to its AE, the Tribunal directed the exclusion of MM TV Limited reported in Rolls Royce India (Pvt) Ltd., vs. DCIT [2016] 69 taxmann.com 426.

15. We find merit in the plea of the assessee that a concern which is engaged in running Broadcasting business and is involved in related operations in the said field i.e. by running entertainment channel, news channel and infotainment channel, cannot be held to be functionally comparable to the assessee, which was providing marketing and sale support services. The source of Revenue in the case of MM TV Limited is from advertising income and it also owned intangibles; as against the assessee which was providing support services and did not own any intangibles. Accordingly, we hold that such a concern cannot be held to be functionally comparable to the assessee and has to be excluded from the list of the comparables. Accordingly, we hold so.

16. The last concern which the assessee wants to be excluded is Media Research Users Council registered as not-for-profit body of members representing advertisers, advertising agencies, publishers, and broadcast/other media. The learned AR for the assessee pointed out that the said concern was section 25 company and undertook

research for the benefit of its members, wherein the members were from the Media field. The total revenue shown by the said concern was from membership fee only. He pleaded that the same could not be functionally compared with the assessee.

17. We find merit in this plea of the assessee on the ground that the said concern was registered as not-for-profit body of members representing advertisers, advertising agencies, publishers, and broadcast/other media. It undertook research work for the benefits of its own members only and the revenue earned was from the membership fee charged to the members. On the other hand, the assessee was providing marketing and sale support services to its AE. Accordingly, we direct its exclusion from the final set of comparables.

18. The learned AR for the assessee fairly pointed out that in case the four concerns Apar Chematek Lubricants Ltd., Info Edge (India) Limited ("Info Edge"), MM TV Limited ("MM TV") and Media Research Users Council ("MRUC") are excluded from the final list of comparables, then the margins shown by the assessee would be at arm's length with the mean margins of the balance comparable companies selected. Since we have already directed the exclusion of the said concerns, the grounds of appeal raised by the assessee are allowed. No other issue was raised by the learned AR for the assessee

during the course of hearing; hence the grounds of appeal of the assessee stand allowed.

19. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30th day of October, 2019.

Sd/-

(B.R.R. KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(SUSHMA CHOWLA)

न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली / दिनांक Dated : 30th October, 2019.

SH

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, दिल्ली / DR, ITAT, Delhi
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार,
आयकर अपीलीय अधिकरण ,दिल्ली
AR, ITAT, Delhi