

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 1293/DEL/2014 [A.Y 2009-10]

Polycom [United Kingdom] Ltd
India Branch Office
3rd Floor, Tower C, Building No. 10
Phase II, DLF Cyber City
Gurgaon, Haryana

Vs.

The D.C.I.T.
Circle 2(1)
[Intt. Taxation]
New Delhi

PAN: AADCO 2347 K

(APPELLANT)

(RESPONDENT)

Assessee By : Shri Nageshwar Rao, Adv

Department By : Shri Subha Kant Sahu, Sr. DR

Date of Hearing : 15.10.2019

Date of Pronouncement : 30.10.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 23.01.2014 framed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The grievances of the assessee read as under:

“1. The learned TPO / AO / DRP have erred in making an addition of INR 21,864,889 to the total income of the appellant in respect of international transaction pertaining to provision of marketing and sales support services by the appellant to its associated enterprise (‘AE’) (hereinafter referred to as ‘impugned transaction’).

2. The learned TPO / AO / DRP have erred in not accepting the economic analysis undertaken by the appellant in accordance with provisions of the Act and modifying the economic analysis for determination of arm’s length price (‘ALP’) of the impugned international transaction to hold that the same is not at arm’s length

The learned TPO / AO / DRP have erred in:

- a. *Not accepting the use of multiple year data, as adopted by the appellant in its Transfer Pricing (‘TP’) documentation; and*
- b. *Determining the arm’s length margins / prices using data pertaining only to financial Year (‘FY’) 2008-09 which was not available to the assessee at the time of complying with the Indian TP documentation requirements.*

4. The learned TPO / AO / DRP have erred in adopting a separate benchmarking approach by:

a. *Bifurcating the impugned transaction into two separate transactions/activities; namely 'marketing support services' and 'technical support services'; and*

b. *Application of inappropriate keywords for searching comparable companies.*

6. *The learned TPO / AO / DRP have erred in rejecting certain comparable companies selected by the appellant by applying inappropriate comparability criteria such as :*

a. *Turnover less than INR 1 crore;*

b. *Employee cost lesser than 25 percent of total cost;*

c. *Diminishing revenue; and*

d. *Different accounting year*

6. *The learned TPO / AO / DRP have erred in erroneously rejecting the comparable companies selected by the appellant and proposing his own set of comparables for the impugned transaction on an ad-hoc basis, thereby resorting to cherry picking of comparables to determine ALP for the impugned transaction.*

7. *The learned TPO / AO / DRP have erred in passing an order which has computational errors in the margin of comparable companies used in determination of arm's length margin for the impugned transaction.*

8. The learned TPO / AO / DRP have erred in not making suitable adjustments to account for differences in the risk profile of the appellant vis-a-vis the comparable companies.”

3. Briefly stated the facts of the case are that Polycom Group is headquartered in California, U.S.A. This group delivers end-to-end media collaborative applications for voice, video, data and the World Wide Web through its 2600 employees. The group continues to be a major player in unified collaboration solutions world-wide. The group's video solutions provide an integrated, end-to-end capability, enabling geographically dispersed individuals to communicate. Its video solutions include high definition, telepresence, HD and standard definition group video conferencing, HD and standard definition desktop video conferencing, voice and video media servers, and network management solutions. The voice communications products enhance business communications in conference rooms, desktops and mobile applications.

4. Polycom Branch Office [assessee] was established as a branch office of Polycom Limited (United Kingdom) to render marketing and post-sales support services to Polycom group. Polycom BO commenced its operations on 14.11.2003.

5. The international transactions undertaken by the assessee company with its AEs during the year under consideration are summarised in the table as under:

No.	Nature of transaction	Method	Value of transaction
1	Provision of marketing and sales support services	TNMM	179,221,762/-
2	Purchase of demonstration equipments	TNMM	17,129,962/-
3	Reimbursement of expenses to AEs	TNMM	13,110,127/-
4	Reimbursement of expenses by AEs	BNR	5,116,322/-

6. The entire quarrel before us in relation to the provision of marketing and sales support services. In this segment, Polycom offers professional and maintenance services to assist end-users in implementing and managing Polycom group's video conferencing, voice communication and network systems products, as mentioned elsewhere. These services are rendered directly by Polycom group

through its channel partners. It also offers installation and implementation services and a range of training offerings.

7. From the above chart, it can be seen that during the year, the assessee had entered into an international transaction of provision of market and sales support services amounting to Rs. 17,92,21,762/-. The said transaction was bench marked using Transactional Net Margin Method [TNMM] as the Most Appropriate Method with return on operating cost as the Profit Level Indicator.

8. In TP study report, the assessee has shown margin of 9.54% on cost and for benchmarking of this transaction, the assessee has used a set of 15 comparables. The average margin of these comparables is 8.57%, and since the margin of the assessee was shown at 9.54%, transaction was shown to be at arm's length.

9. After going through the documents submitted by the assessee, the TPO issued a show cause notice to justify the selection of comparables for bench marking the international transactions representing market support services provided to AEs. The TPO further objected to the filters used by the assessee and after detailed

discussion and deliberations, the TPO came to the conclusion that the market support services and technical support services have to be treated as segregate segment and after considering the detailed submissions of the assessee, the TPO considered the following 9 set of comparables in respect of market support services:

1. Apitco Limited
2. Basiz Fund Service Private Limited
3. Global Procurement Consultants Limited
4. Orient Engineering & Commercial Co. Limited
5. TSR Darashaw Private Limited
6. Killick Agencies & Marketing Limited
7. Cameo Corporate Services Limited
8. Cyber Media Research Limited (IDC India Limited)
9. HCCA Business Services Private Limited

Arithmetic mean (as per TPO) (%) - 24.15%

10. And considered the following set of comparables in respect of technical support services:

1. Engineering India Limited
2. WAPCOS Limited
3. Rites Limited

Arithmetic mean (as per TPO) (%) - 26.38%

11. The assessee raised objections before the DRP and objections of the assessee were summarily dismissed by the DRP as under:

“8.2 Comparables companies selected by the TPO in the final set of comparable list and objected by the assessee in Marketing & Sales Support Services.

8.2.1 Apitco Ltd.: This company is also in the technical consultancy service. Therefore, the same should be taken as comparable.

8.2.2 Basiz Fund Service Pvt. Ltd.: This company provides accounting services. The TPO has correctly identified this company as a comparable to the assessee.

8.2.3 Cameo Corporate Services Ltd.: This company is also a service provider like the assessee. Therefore, it should be retained in the list of comparables.

8.2.4 Global Procurement Consultants Ltd.: This company is also in the similar line of business as that of the assessee. Therefore, it should be retained in the list of comparables.

8.2.5 HCCA Business Services Pvt. Ltd.: This company provides payroll supporting service. Therefore, it is broadly comparable to the assessee.

8.2.6 Killick Agencies & Marketing Ltd.: This company provides marketing support service. Therefore, it should be retain in the list of comparables.

8.2.7 Orient Engineering & Commercial Company Ltd.: These companies provide technical services, among other things, to its clients. These activities are comparable to the activities of the assessee.

8.2.8 TSR Darashaw: This company is also in the business of payroll, record management and registrar and transfer agent for its clients. These activities are comparable of the activities of the assessee.

8.3 The following comparables companies rejected/ accepted by the TPO in Technical Support Services are discussed in the following paragraphs.

8.3.1 Archohm Consults Pvt. Ltd.: Characteristics of the services provided by the company are not comparable, accordingly, the same cannot be considered as a comparable company.

8.3.2 Engineers India Ltd., L&T Ramboll Consulting Engineers Ltd., Rites Ltd. and Zipper Trading Enterprises Ltd.:

These comparables are in the similar line of activity and providing technical services in the market. Therefore, it is not possible to hold that they are totally not comparable to the

case of the assessee. Further, it is also noticed that these 4 companies are in the similar line of business of those comparables chosen by the assessee itself. Therefore, DRP holds that they should be retained in the list of comparables.

8.3.3 Mahindra Engineering: The assessee has pointed out that this company does not satisfy all the filters adopted by TPO. However, TPO has stated that it passes all the quantitative filters and it is also functionally comparable. Therefore, this company should be retained in the list of final comparables.

8.3.4 IBI Chematur Engineering and Consultancy Ltd.: This company is an engineering service provider. The broad contours of the activity of this company are similar to that of the assessee. Therefore, this company should be retained in the list of comparables.

8.3.5 Mahindra Consulting Engineers Ltd.: This company is providing consultancy services on various subjects. The activities of this company are broadly similar to that of the assessee. Therefore, this company should be retained.

8.3.6 Semac Ltd.: This Company is engaged in design consultancy, project management, etc. The activities of the company are clearly and unambiguously comparable to the activities of the assessee. Therefore, this company should be retained in the list of comparables.

8.3.7 TCE Consulting Engineers Ltd.: The assessee has given a long list of activities conducted by this company. However,

what is important is the broad functional similarity between the assessee and the comparable chosen. The TPO has considered this and came to the conclusion that this company is broadly comparable since it is providing engineering consultancy services. DRP agrees with the TPO.

8.3.8 Wapcos Ltd.: This is a company which is comparable to the assessee. The objection of the taxpayer is mainly on verticals of the company. WAPCOS is inter alia involved in offering market intelligence and feasibility studies which is broadly akin to the functional profile of the taxpayer. The objection of the taxpayer to the use of Wapcos as a comparable on the ground of its receiving grant in aid from the government is also not acceptable as the comparable has been getting grant to only carry out certain projects and same has not affected its overall profitability. Therefore, this company should be retained in the list of comparables.

12. Aggrieved by this, the assessee is before us.

13. At the very outset, the ld. counsel for the assessee stated that though during the TP assessment proceedings he has strongly objected to the segregation of market support services and technical support services, but for the year under consideration only he would not seriously object to the said segregation. The ld. counsel for the assessee further stated that he is objecting for inclusion of 5

comparables in marketing support services and 3 comparables in technical support services.

14. Placing reliance on the decision of the lower authorities, the ld. DR vehemently stated that all the objections of the assessee have been duly considered by the DRP and, therefore, final set of comparables taken by the TPO should be upheld.

15. We have given thoughtful consideration to the orders of the authorities below. The business profile of the assessee has been discussed elsewhere. We will now consider the comparables under marketing support services, which the ld. counsel for the assessee has objected for inclusion.

I. APITCO LIMITED

16. The Annual Report of this company is placed at pages 1 to 25 of the paper book. This company is engaged in providing high end technical consultancy related to asset reconstruction and management services, micro enterprise development, skill development, entrepreneurship development, Tourism & Research

Study, cluster development among other activities. A cursory look at the business profile of Apitco Limited clearly suggests that it is engaged in diversified functions which do not match with the functions of the assessee. For this very reason, the co-ordinate bench in the case of M/s Philip Morris Services India SA in ITA No. 827/DEL/2014 has excluded this company from the final set of comparables. The relevant findings of the co-ordinate bench read a under:

“9. Assessee objected the included of this company on the ground that this company provides high-end services, diversified activities which includes asset reconstruction and management services, projects related services, like a enterprises development, infrastructure planning and allotment, research studies and tourism, skilled allotment, and adornment management, and entrepreneur development and training, cluster allotment, energy-related services, emerging areas etc. Attention of the Ld. TPO was brought to the revenue breakup of various services with reference to the annual report of the company.

10. Ld. TPO, however, held that the revenue breakup of services given constitute much lower percentage of total services and most of the services rendered by Apitco Ltd., or in the nature of business services and predominantly Apitco Ltd., is a company providing various support services for allotment of tourism and industry, as such the objection of the assessee was not acceptable. Ld. TPO further held that the assessee has

experienced employees in the field of engineering, marketing, management and therefore the employee profile of assessee with the Apitco Ltd., is comparable.

11. It is the argument of the Ld. AR that the profile of the company as narrated by the Ld. TPO itself suggests the non-compatibility of Apitco Ltd., with the assessee inasmuch as the assessee is providing only simple support services whereas the services provided by the Apitco Ltd., are very diverse and high-end ones rendering Apitco Ltd., non-comparable with the assessee.

12. It is submitted by Ld. DR that as rightly recorded by the Ld. TPO, most of the services rendered by the Apitco Ltd., are in the nature of business services and predominantly Apitco Ltd., is a company providing various support services for allotment of tourism and industry. Further, it could be seen that the margins of Apitco Ltd., are quite consistent and in the range of 37% to 49% from FY 2005-06/02/2009-10 in this era of volatile business conditions, forex fluctuations etc. Basing on these observations made by Ld. TPO, Ld. DR justifies the inclusion of this company in the set of comparables.

13. As could be seen from the annual report of this company, is company is one of the 18 TCOs was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise Apitco Ltd., was established to provide technical services to other government companies and body corporate. Further this company is engaged in providing services such as asset reconstruction and management, clustered allotment for mega footmarks, and environment services, energy-related

services, infrastructure planning and development, energy audit etc. and undoubtedly this company is a high-end consultancy service provider. The annual report further reveals that this company is engaged in providing high-end technical services also.

*14. Ld. AR brought to our notice that they Apitco Ltd., was rejected by a catena of decisions rendered by different Benches of this Tribunal including a coordinate Bench of this Tribunal in [Ciena India \(P\) Ltd vs. DCIT](#) in ITA No. 2948 and 3224/del/2013 following which in *Avaya India private limited versus DCIT* in ITA No. 146/del/2013. He also placed reliance on the nation reported in *Kobelco Cranes India Private Limited vs. ITO* in ITA No. 802/del/2016. In *international SOS services India private limited versus DCIT* ITA No. 1631/del/2014 this company was excluded on account of being hundred percent government organisation and the appeal against this decision of the tribunal was dismissed by the Hon'ble jurisdictional High Court.. Further it could be seen in *Vestegaard Asia private limited verses DCIT* in ITA No. 6670/del/2015 and *H & M Mouritz India private limited verses DCIT* in ITA 282/bankg/2015 it is held that the Apitco Ltd., is not a good comparable with any company rendering business support services on the ground that this company is a public sector undertaking and its operations are mainly based the on the policy requirements of the government.*

*15. Further reliance is placed by the counsel on the decision of the Mumbai bench of this tribunal in *TysokKrupp industries India private limited verses ACIT* in ITA No. 6460/mum/2012 wherein it was held that this company being a government*

enterprises is not comparable with a private business service provider because in case of government enterprises profit motive is not irrelevant consideration, and government companies work for other public sector undertakings and in that sense the related party transactions are much more than the filter of 25%. This decision of the tribunal was upheld by the Hon'ble Bombay High Court in ITA number 20/02/2018 of 2013.

16. The reasons recorded by the Tribunal in all the decisions referred to above hold good for the assessee also inasmuch as the assessee is a private company in the field of providing business support services. We, therefore, while respectfully following the ratio laid down in the above decisions hold that Apitco Ltd., is not a good comparable with the assessee and is accordingly liable to be excluded. We, therefore, directly Ld. TPO to exclude this company from the finalist of comparables to benchmark the international transaction relating to the market support services provided by the assessee to its AEs.”

17. Considering the business profile of the appellant-company, vis a vis that of Aptico Limited, in the light of the decision of the coordinate bench, we direct the TPO to exclude this company from the final set of comparables.

II. BASIZ FUND SERVICE PRIVATE LIMITED

18. The Annual Report of this company is placed at pages 26 to 70 of the Paper Book. This company is engaged in providing NAV support services and consulting support services in the nature of fund accounting services to administrators. Insurance companies, prime brokers, private equity funds, hedge funds etc. The company has applied for copyrighting its financial statement proprietary processes.

19. A perusal of the Profit and Loss Account of this company shows that under the head Revenue from operations, this company has shown revenue from operations, revenue from international Revenue, preparation of financial statements, liquidity monitoring services, NAV accounting for international funds, consulting charges, US taxation and domestic revenue is shown from domestic PMS accounting whereas the appellant company is providing only simple support services.

20. For this very reason, this company was excluded by the co-ordinate bench in the case of Microsoft Corporation India Pvt Limited in ITA No. 1206/DEL/2014. The said order of the co-ordinate bench has been upheld by the Hon'ble High Court of Delhi in ITA No. 874/2019. The relevant findings of the Hon'ble High Court read as under:

“The appellant has preferred the present appeal to assail the order dated 22.06.2018 passed by the Tribunal, inter alia, in ITA No. 1206/Del/2014 preferred by the Revenue for assessment year 2009-10. The said appeal had been preferred to assail the order passed by the DRP, whereby the DRP had deleted M/s Basiz Fund Services Private Limited from the list of comparable enterprises. The order of the DRP was premised on its earlier order in relation to the assessment year 2008-09. The DRP held that M/s Basiz Fund Services Private Limited was not appropriate for the purpose of comparison, on account of functional dissimilarity. The Tribunal held the finding of the DRP - that the company M/s Basiz Fund Services Private Limited is functionally dissimilar to the assessee, is founded on the circumstances that the said company is involved in fund accounting services; it possesses significant intangible assets, and; it had different employees profile, which resulted in significant growth at 57.61% and earning of profits at 46.75% at supernormal level. Even if the supernormal level of profit at 46.75% were not to be

considered as a reason to treat the said enterprises as not comparable, the fact remains that the Tribunal concurred with the view of the DRP on functional dissimilarity. Aforesaid being the position, in our view, no question of law arises in the present appeal since concurrent findings of fact have been returned by the DRP and the Tribunal. The same is, accordingly, dismissed.”

21. Considering the business profile of the appellant-company, vis a vis that of Basiz Fund Service Private Limited, in the light of the decision of the Hon'ble High Court of Delhi and the co-ordinate bench, we direct the TPO to exclude this company from the final set of comparables.

III. GLOBAL PROCUREMENT CONSULTANTS LIMITED

22. This company is engaged in procurement consultancy services. The Annual Report of this company is placed at pages 71 to 120 of the Paper Book. The Annual Report of this company suggests that it has been established primarily to provide comprehensive management services required by the government departments or their project execution agencies to carry out procurement in a time bound energy-

efficient manner within the framework of government regulations and guidelines of international institutions. The training and capacity building in the institutional aspects of procurement management forms an integral part of these activities, besides which, the consortium base of Global Procurement Consultants Ltd., ensures that all major sectors of the economy including Health, Education, Urban and Rural Development are covered. This company has gained diversified project experience and technical expertise in handling procurement and related program management activities for a large number of development programs funded by World Bank, DFID, UNICEF, African Development Bank and others.

23. Further, this company acts as the client's representative in taking on the total responsibility of procurement, by providing a comprehensive range of procurement related advisory services and inter-allied activities for projects in India and abroad.

24. The consultancy services of this company encompass preparing and reviewing technical specifications, estimation of costs, selection of vendors, inspection and expediting, quality control and time management. The sectors catered by this company includes power, water resources, transportation, industries and other sectors including

Health, Education, Environment, Financial, Infotech, Computer Systems and Modelling and Asset Valuation.

25. For these very reasons, this company was excluded by the coordinate bench in the case of Terex Equipment Pvt Limited in ITA No. 1882/DEL/2014. The relevant findings of the Hon'ble High Court read as under:

“27. This comparable has been included on the ground that it is engaged in providing procurement support services. Since procurement support services are in the nature of business services, it is a correct comparable.

28. The nature of business in the Annual Report for the year ended 31.03.2008 clearly shows that the business description of the company is “the company is primarily into review of procurement activities for the two large bank financed projects in Indonesia whereas the assessee has a sourcing team which provides market support services to Benford Limited, UK in relation to sourcing the components from vendors/ suppliers in India. In our considered opinion, this company is functionally different as it is engaged in providing full fledged procurement and financial management support services. Moreover, this company was taken as comparable in assessment year 2011-12 by the TPO but has been rejected by the DRP as

comparable. Considering these facts, we direct for exclusion of this comparable.”

26. Considering the business profile of the appellant-company, vis a vis that of Global Procurement Consultants Limited, in the light of the decision of the co-ordinate bench, we direct the TPO to exclude this company from the final set of comparables.

IV ORIENT ENGINEERING & COMMERCIAL CO. LIMITED

27. This company is engaged into the business of commission agent and technical services. The Annual Report of this company is placed at pages 148 to 197 of the Paper Book. From its Annual Report, it can be seen that this company has shown its types of business as “Besides sale of paints, the company is also functioning as commission agents and providing technical services to its clients”. No segmental reporting is found. Therefore, considering the business profile of this company with that of the appellant-company, we are of the considered view that this is not a good comparable and accordingly, direct the TPO to exclude this company from the final set of comparables.

5. TSR DARASHAW PRIVATE LIMITED

28. This company is an established Business Process Outsourcing (BPO) service provider, engaged in providing services in relation to records management activity, registry and share transfer, Payroll & Trust Fund activity. The Annual Report of this company is placed at pages 198 to 228 of the paper book. Surprisingly, this company was rejected by the TPO in Assessment Year 2008-09 in assessee's own case on account of being functionally different. The only reason for including this company is that the TPO is of the opinion that records management and pay roll service provided by this company are also business services, hence, broadly comparable with the appellant. We are not convinced with the logic given by the TPO. The assessee being a simple support service provider, cannot be considered as a comparable with this company.

29. A perusal of the schedule forming part of the financial statement shows that this company has shown job work charges under the head "Management Expenses" and data processing charges also. This itself shows that this company is an established BPO. In our considered opinion, therefore, this company cannot be considered as

a good comparable being functionally different from that of the assessee. We, accordingly direct the TPO to exclude this company from the final set of comparables.

30. We will now address to the following companies objected by the assessee in respect of Technical support services:

- i) Engineering India Limited
- ii) WAPCOS Limited
- iii) RITES Limited.

31. First of all, these companies are government of India undertakings and the co-ordinate benches across have been taking a consistent view in excluding government companies from the final set of comparables. To name a few, Thyssun Krupp Industries ITA No. 640/MUM/2012, Boeing International Corporation ITA No. 1127/DEL/2015, AT&T Communication India Pvt. Limited, ITA No. 1016/DEL/2016 and Eli Lily & Co. in ITA No. 6819/DEL/2014.

32. Moreover, Engineering India Limited is engaged in providing engineering related technical services for petroleum refining and other industrial projects. The services provided by this company include feasibility studies, project management, planning and scheduling cost engineering process and equipment business, and construction management. Similarly, WAPCOS is also engaged in providing engineering and technical consultancy services in water resources, power and infrastructure sector. RITES Limited is providing services in all facets of transportation. RITES also provides services in the field of pre-project management for railway tracks and electrification together with traffic and software consultancy assignment to Malaysian Railways.

33. So, it can be seen that not only these are government of India undertakings, but their functional profiles is different from that of the appellant company which is a simple service provider. Considering the profile of the assessee vis a vis these three comparable companies, we direct the TPO to exclude all these three comparables from the final set of comparables, since the ld. counsel for the assessee emphasized for exclusion of the aforesaid comparables only.

34. In the result, the appeal of the assessee in ITA No. 1293/DEL/2014 is allowed.

The order is pronounced in the open court on 30.10.2019.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 30th October, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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