

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

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

**ITA No.5980/Del./2016
(Assessment Year : 2003-04)**

M/s. Microsoft Corporation (India) Private Ltd.,
807, New Delhi House,
Barakhamba Road,
New Delhi – 110 001.

vs. Addl.CIT,
Range – 6,
New Delhi.

(PAN : AAACM5586C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate
REVENUE BY : Shri Sanjay I. Bara, Senior DR

Date of Hearing : 03.10.2019
Date of Order : 28.11.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER

The Appellant, M/s. Microsoft Corporation (India) Pvt. Ltd. (MCIPL) (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 18.07.2016 passed by the Commissioner of Income-tax (Appeals)-44, New Delhi in an appeal challenging the orders passed by the Id. TPO/AO qua the assessment year 2003-04 on the grounds inter alia that :-

“Transfer Pricing Grounds

1. *On facts and in law, the Ld. TPO/AOI CIT(A) have erred in making an adjustment of INR 71,092,606 to the returned income of the Appellant in respect of the international transaction pertaining to provision of marketing support services ("impugned transaction").*

2. *That the Ld. TPO/CIT(A) has erred in law and on facts and circumstances of the case, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules.*

3. *That on facts and in law, the Ld. TPO/AOI CIT(A) have grossly erred by not appreciating the correct functional profile of the Appellant and drawing an erroneous conclusion that the Appellant is engaged in providing high-end services and thereby determining the arm's length price ("ALP") using functionally dissimilar companies as comparables.*

4. *That on facts and in law, while determining the operating margin of the tested party, the Ld. TPO/AOI CIT(A) erred by:*

- *Failing to appreciate that the entire business of the Appellant is integrated and overall margin of the Appellant from the business as a whole should be considered to arrive at the ALP;*
- *Failing to consider the revised segmental profit and loss account submitted by the Appellant wherein the operating profit margins of the Appellant from provision of marketing support services, Microsoft Consulting Services ("MCS"), Product Support Services ("PSS") were based on appropriate allocation of overheads among these segments;*
- *Treating "Seminar & training expenses" and "Provision for doubtful debts" as non-operating items;*
- *Without prejudice to other contentions, even if the "Seminar & training expenses" and "Provision for doubtful debts" are excluded as non-operating items while determining operating profitability, the provision in respect of employee retirement benefits shall also be excluded as the Ld. TPO has held that provisions are only estimations;*

5. *That on facts and in law, the Ld. TPO/AOI CIT(A) have erred by selecting functionally / dissimilar companies to the final set of comparables for the impugned transaction to determine the ALP for the impugned transaction.*

6. *That on facts and in law, the Ld. TPOI AOI CIT(A) have passed an order which has computational errors in the margin of comparable companies, used in the determination of the ALP.*

7. *That on facts and in law, the Ld. AO has erred in making a reference to the Ld. TPO despite the absence of requisite preconditions being met in law.*

Corporate Tax Grounds

8. *That on the facts & in the circumstances of the case and in law, the Ld. CIT(A) has erred in law in confirming the disallowance of deposits made to MTNL of INR 7,65,214 & security deposits for rental premises of INR 10,00,000 written off by the Appellant claimed as business loss under section 28 read with section 29 of the Act.*

8.1 *That the Ld. CIT(A) erred on facts and in law in not appreciating that the amount so written off was non-recoverable in nature being a trading loss on a revenue account and was incidental to the business of the Appellant.*

9. *That on the facts and in the circumstances of the case, the Ld. AO has erred in charging interest under section 234B & 234C of the Act.*

10. *That the Ld. AO erred on facts and in law in initiating the penalty proceedings against the Appellant under section 271 (1)(c) of the Act.”*

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Microsoft Corporation (India) Private Limited (MCIPL), the taxpayer is a wholly owned subsidiary of Microsoft Corporation, US. The taxpayer creates awareness of Microsoft products in India in general through seminars, conferences, advertising in public media and promotional campaigns. Microsoft software in India is sold through a network of independent unrelated distributors. The taxpayer does not sell software in India on its own account but renders marketing services

viz. maximizing the markets for Microsoft retail products including all local advertising and performing other activities including dissemination of information to potential customers, commenting on any developments in the territory affecting the software industry, investigating feasibility of new markets for Microsoft retail products, and also provides Microsoft Consultancy Services and Product Support Services to support its sale and marketing efforts in India.

4. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AE) as reported in Form 3CEB as under :-

<i>S.No.</i>	<i>International Transaction</i>	<i>Method</i>	<i>Value (in Rs.)</i>
<i>1</i>	<i>Provision of marketing support services</i>	<i>TNMM</i>	<i>1,07,87,13,104</i>
<i>2</i>	<i>Service fee received for software consulting services</i>	<i>TNMM</i>	<i>1,29,96,683</i>
<i>3</i>	<i>Assignment of personnel</i>	<i>TNMM</i>	<i>89,91,796</i>

5. The taxpayer in order to benchmark its international transactions applied Transactional Net Margin Method (TNMM) with Operating Profit / Total Cost (OP/TC) as Profit Level Indicator (PLI). The taxpayer chosen 8 comparables with margin of 9.89% as against its own margin of 11.79% and found its international transactions qua market support services at arm's length.

6. However, the Transfer Pricing Officer (TPO) in its analysis disagreed with the taxpayer who has segregated the transactions with third parties which includes providing product support services and marketing consulting services with marketing support services rendered to the Associated Enterprises (AE) and accordingly, TPO has treated the product support services received from unrelated parties not includible in market support services segments and consequently, calculated operating margin of the taxpayer at 3.07%. TPO, after taking weighted average operating profit margin for FYs 2000-01 and 2001-02, included CRISIL Limited, ICRA Limited and Vimta Labs Ltd. in the final set of comparables. TPO finally selected 11 comparables with average of 17.60% after taking into account the economic cost of owning net working capital and the effect of such cost on operating income computing the adjusted operating margin of comparables at 16.13% and proposed the arm's length price qua marketing support services at Rs.118,15,53,563/- and added the difference of Rs.10,28,40,459/- to the total income of the taxpayer.

7. The taxpayer carried the matter before the Id. CIT (A) by way of filing appeal, who has partly allowed the same. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

9. Ld. TPO in order to benchmark the international transactions viz. marketing support services transactions computed average at 16.13% after taking into account the adjustment qua economic cost of owning net working capital and the effect of such cost of operating income which is as under :-

<i>S. No.</i>	<i>Name of the Company</i>	<i>Adjusted Operating Profit Margin (weighted average for 99-00 and 00-01)</i>
<i>1</i>	<i>CRISIL Ltd.</i>	<i>48.49%</i>
<i>2</i>	<i>Gilcon Project Services Ltd.</i>	<i>-2.90%</i>
<i>3</i>	<i>ICRA Ltd.</i>	<i>39.67%</i>
<i>4</i>	<i>E I L</i>	<i>17.16%</i>
<i>5</i>	<i>KITCO Ltd.</i>	<i>-.89%</i>
<i>6</i>	<i>NIS Sparta Ltd.</i>	<i>7.59%</i>
<i>7</i>	<i>Water & Power Consultancy (I) Ltd.</i>	<i>14.37%</i>
<i>8</i>	<i>Vimta Labs Ltd.</i>	<i>23.50%</i>
<i>9</i>	<i>Priya International Ltd.</i>	<i>11.39%</i>
<i>10</i>	<i>Rites Limited</i>	<i>18.05%</i>
<i>11</i>	<i>Ujjawal Limited</i>	<i>1.05%</i>
	<i>ARITHMETIC MEAN</i>	<i>16.13%</i>

10. Undisputedly, business transactions qua marketing support services of the taxpayer with its AE is identical to the preceding as well as succeeding years which have already been decided in its favour.

11. Before Id. CIT (A), the taxpayer challenged 6 comparables eg. CRISIL Ltd., ICRA Ltd., Vimta Labs, Engineers India Ltd., Rites Ltd. and WAPCOS. Ld. CIT (A) has not agreed with the findings returned by the Id. DRP in the various assessment years in case of the taxpayer by observing that services under the agreement, namely, marketing representation agreement cannot be said to be “low end” rather characterized the services rendered by the taxpayer to its AE under the master service agreement as “services of high end” which are not relating to only marketing but also relating to research & development and thereby retained all the aforesaid six comparables in the final list to benchmark the international transactions qua marketing support services.

11.1 Ld. CIT(A) has also preferred not to follow the judicial precedents relied upon by the Id. AR for the taxpayer in its own case in the succeeding as well as preceding years for the reasons that *“functionality of the taxpayer was not brought before the Court properly specially Research & Development (R&D) of various technical product of Microsoft Corporation as profit in marketing representation agreement”*.

12. Perusal of para 5.2 of the TP order dated 18.09.2009, available on the file, for AY 2006-07 shows that FAR of the taxpayer was done as under :-

“5.2 The details of the services rendered by the assessee to Microsoft Corporation USA

These services are governed by Master Service Agreement with Microsoft Corporation USA. The Agreement is titled parent subsidiary Agreement dated 01/07/2003. Where Microsoft Corp. USA is called MSFT. The assessee is referred to as "subsidiary". The following services as per agreement are being rendered.

2. RESEARCH AND DEVELOPMENT

Subsidiary hereby agrees to undertake such research and development work as requested and approved in writing by MSFT from time to time. Subsidiary may subcontract with third parties to perform some all of such work upon MSFT's approval. In the event that MSFT contracts directly with vendors in country MSFT may requested the subsidiary to provide assistance with regard to such contracts.

3. OTHER INTERCOMPANY SERVICES

3.1 Services: *MSFT and subsidiary acknowledge that MSFT and/or its affiliated companies may from time to time provide corporate and other services to subsidiary and subsidiary may from time to time provide corporate and other services to MSFT and/or its affiliated companies.*

3.2 Sales: *MSFT and subsidiary acknowledge that MSFT and/or its affiliated companies may from time to time provide sales and sales related services to subsidiary and subsidiary may from time to time provide sales and sales related services to MSFT and/or its affiliated companies.*

The payment terms are defined in the agreement as under :

4. FEE: PAYMENT TERMS

4.1 Marketing; Research and Development

In consideration of Subsidiary's research and development activities under Article 2 MSFT shall pay subsidiary a fee equal to one hundred and ten percent (110%) of Subsidiary's actual expenses, less revenues, incurred in connection with its duties provide such expenses comply with subsidiary budget, as adjusted from time to time, and provide, further such expenses are not already compensated pursuant to another section of this Agreement or another agreement between Subsidiary and MSFT and any MSFT affiliate. The fee shall be exclusive of any

applicable consumption tax such as a Value Added Tax or a Goods and Service Tax, which consumption tax shall be the responsibility of MSFT.”

13. Aforesaid FAR of the taxpayer in AY 2006-07 under the same master service agreement titled as “parent service agreement dated 01.07.2003” considered Research & Development not marketing. Aforesaid FAR of the taxpayer has been duly considered by the coordinate Bench of the Tribunal vide *order dated 18.12.2014 in ITA No.5855/Del/2010 in taxpayer’s own case* by returning following findings :-

“13. Before embarking upon making an analysis of comparability, it is sine qua non to first ascertain the correct nature of the assessee’s activity under the segment of ‘Provision of marketing support services.’ The assessee’s Transfer pricing study report indicates that the assessee, a wholly owned subsidiary of Microsoft Corporation, provided marketing support services mainly to Microsoft Corporation Pte Ltd., Singapore and a small portion of revenue arose from services rendered to Microsoft Corpn., UK. The assessee was compensated for such services with actual costs incurred with a mark-up of 15% for services rendered to Microsoft Corporation Pte Ltd., Singapore and 10% for services rendered to Microsoft Corpn., UK. All the operating expenses, depreciation, realized foreign exchange gain/loss and bank charges were taken into account for calculating the markup. The TPO has reproduced relevant clauses of the assessee’s Agreement with Microsoft Corporation Pte Ltd., Singapore on page 4 onwards of his order. This Agreement stipulates that the assessee shall provide Product support services and consulting services for the Microsoft products in the defined territory. Clause 3 of the Agreement provides that the assessee ‘shall have a non exclusive right to market Microsoft Products in the Territory.’ Its duties have been set out in clause 3.2 by providing that the assessee shall use its best efforts to further the interest of MO and maximize the markets for Microsoft products in the territory. It has also been provided that the assessee in soliciting orders shall only be authorized to inform customers of price, payment delivery and other terms offered by MO in accordance with information received from MO or its affiliates. It further provides that the assessee ‘shall not enter into any agreements with customers

regarding Microsoft products, but shall instead promptly submit written customer orders to MO or its affiliates as appropriate, for its acceptance or rejection.’ The nature of services provided by the assessee to Microsoft Corporation, USA is also that of marketing research and development. Thus, it can be seen that the assessee is basically engaged in creating awareness of Microsoft products amongst existing and potential users of Microsoft products in India through seminars, conferences, advertisement in public media and promotional campaigns. All the expenses incurred by the assessee on such sales promotion activities have been completely reimbursed to the assessee with a mark-up of 15% by Singapore AE. Even though some marketing intangibles get created by the assessee’s spending on advertisement and marketing expenses, such intangibles belong to its AEs because the assessee is not indulging in any sale or purchase activities of Microsoft products at its own.

14. The TPO has referred to certain clippings, mostly relating to the period of October/November, 2008 to bring home his point that the assessee is providing high-end marketing services after identifying the customers and its job is not simply to create market awareness by performing a low-end non-complex function. This, in the opinion of the TPO, is done by the launching of the products with big advertisement campaigns, customer interface and provision for training and back-up for use of products and softwares. In this regard, it is firstly relevant to note that we are dealing with the AY 2006-07 and the relevant financial year ends on 31.3.2006. All the clippings referred to by the TPO relate to subsequent years. Be that as it may, it can be seen that the inference drawn by the TPO that the assessee is not only engaged in the dissemination of information, but also providing high-end marketing services leading to creation of marketing intangible for its AE, is not correct. It can be seen from the clipping dated 24th November, on page 19 of the TPO’s order that Microsoft Corporation India Pte Ltd., announced the availability of the Get Genuine Solutions (GGS) for Windows, Vista through which customers were able to legalise their counterfeit or unlicensed Windows XP Professional PCs under GGS by simply ‘place(ing) an order with their reseller to legalise their counterfeit software.’ From the above, it is clear that the assessee is nowhere engaged in the actual selling of the products to the customers directly. It is simply providing marketing support services by creating customer awareness for the Microsoft products and also in certain cases providing trainings and back-ups for the use of such products and softwares. With this background of the nature of the assessee’s activity under this segment, let us analyse as to whether the five companies chosen by the TPO are, in fact, comparables.”

14. When we examine the findings recorded by the Id. CIT (A) at page 43 of the impugned order recharacterizing the services rendered by the taxpayer under the master service agreement as “high end” by deviating from the earlier view taken by the Revenue confirmed by the Tribunal, we fail to find out any reason as to why the Id. CIT (A) has not followed the decision rendered by the Tribunal in *taxpayer’s own case for AY 2006-07* (supra). Ld. CIT (A) has treated the services rendered by the taxpayer to its AE as high end on the half-baked reasons which have been duly replied with decided by the coordinate Bench of the Tribunal in paras 13 & 14, extracted above, in favour of the taxpayer.

15. So, following the decision rendered by the coordinate Bench of the Tribunal in AYs 2006-07 and 2007-08, we are of the considered view that the taxpayer is a low end marketing support service provider on cost plus mark up basis by creating customer awareness for the Microsoft products and also in certain cases, training and back up for the use of such products and software and not creating any market intangibles for its AE. So, the view taken by the TPO that the taxpayer is into providing high end marketing services leading to creation of high end tangibles for its AE is not sustainable.

16. Now, the next contention raised by the ld. AR for the taxpayer that by treating marketing support services being provided by the taxpayer to its AE as high end services, the ld. TPO proceeded to include *CRISIL Ltd., ICRA Ltd., Vimta Labs Ltd., Water and Power Consultancy Services (India) Ltd. (WAPCOS) and Rites Ltd.* as comparables which approach is not sustainable because high end companies cannot be compared vis-à-vis routine low end marketing support services provider. We would proceed to examine the suitability of aforesaid comparables chosen by the TPO/CIT(A) vis-à-vis the taxpayer to benchmark the international transactions qua marketing support services one by one.

TRANSFER PRICING GROUNDS

CRISIL LTD. (CRISIL)

17. The taxpayer sought to exclude Crisil from the final set of comparables to benchmark the international transactions qua market support services on the grounds inter alia that Crisil is providing non-comparable services as it operates in three segments, viz., credit rating agency, advisory and R&D; that Crisil is premium service provider; that Crisil is a high risk bearing entity and is having significant intangibles; and that Crisil has been excluded by the Tribunal in taxpayer's own case for AY 2002-03, 2007-08 and 2008-09.

18. Ld. DR for the Revenue, on the other hand, relied on the orders of the lower Revenue authorities.

19. Perusal of Schedule 'G' forming part of the Accounts, available at page 392 of the paper book, shows that Crisil is having income from credit rating services, advisory services and research & information services. Moreover, TPO himself has acknowledged that the Crisil is engaged in providing premium Indian business advisory service in the business and financial advisory. Furthermore, perusal of the annual report under the head risk management, available at page 364 of the paper book, shows that Crisil is facing business risk, financial risk, legal and statutory risks, technology risk, audit & internal control and policy risks in its business operation whereas the taxpayer is working on cost plus mark up basis. Moreover, Crisil has been rejected by the Id. DRP in taxpayer's own case for AY 2007-08 and 2008-09 being engaged into niche advisory services of financial market.

20. Coordinate Bench of the Tribunal in *taxpayer's own case for AY 2002-03* excluded Crisil from the final set of comparables by returning following findings :-

“23. It is brought to our notice by the Id. AR for the taxpayer in tabulated form that continuously in AYS 2007-08 to 2009-10, CRISIL (Advisory and information segment) has been rejected by the DRP as a valid comparable vis-à-vis the taxpayer on the ground that, “CRISIL is engaged in providing niche advisory services of financial markets and as such financially different.”

24. *When the taxpayer is proved to have provided similar marketing support services to its AE as it has provided in AYs 2007-08 to 2009-10, no cogent reason has been brought on record by the TPO/CIT (A) to depart from the consistent view taken in the succeeding years. Moreover, the company providing advisory services cannot be compared with the taxpayer who is into providing routine marketing support services to its AEs.*

25. *Moreover, audited financial of CRISIL, available at page 426 of the paper book (Annual Report), shows that 74% of its income is from rating services. Rating services have been explained in the annual report, available at page 411 of the paper book, as under :-*

“Some landmarks achieved by the Ratings division in 2001-02 are highlighted below :

- *Grading of healthcare institutions launched with the announcement of grades assigned to three hospitals*
- *Introduction of a new rating symbol (with “r” subscript) to indicate non-credit risk*
- *First rated debt transaction for an acquisition*
- *Two new State Government ratings*
- *Government of India guaranteed debt ratings*
- *First rated take-out cum guarantee facility by an infrastructure development finance institution.*

Corporate Sector Rating Services (CSRS)

Revenue growth in corporate sector ratings was mainly driven by refinancing of debt due to the continuous drop in interest rates. New offerings such as the Advance Rating Services and structured ratings have grown significantly and account for 30% of the CSRS billings. The 42 new companies rated during 2001-02 constituted 30% of CSRS initial rating fees. The CSRS has also made significant progress in generating business from standard and Poor’s. Although this is still a small component of its revenues, there is a significant order book as on date and CSRS expects to double its international revenues in the current year. Government’s disinvestment programme and a further round of refinancing by stronger corporate, are expected to drive CSRS revenues in the coming year.”

26. *Furthermore, from the financial conditions explained at page 423 of the annual report, it has come on record that huge intangibles have been employed by CRISIL in order to achieve its targets, which make it incomparable vis-à-vis the taxpayer. Consequently, we order to exclude CRISIL from the final set of comparables.”*

21. In view of what has been discussed above and following the decision rendered by the coordinate Bench of the Tribunal in

taxpayer's own case (supra) in the similar facts and circumstances wherein there is no change in the business model and taxpayer is providing services under the same master service agreement, Crisil being owner of huge intangibles having been employed in order to achieve its target and that it is a high risk profile entity cannot be a suitable comparable vis-à-vis the taxpayer who is a non-risk bearing routine marketing service provider to its AE working on cost plus mark up basis, hence ordered to be excluded.

ICRA LIMITED (ICRA)

22. The taxpayer sought to exclude ICRA on the grounds inter alia that it is providing rating services, advisory services and information services; that ICRA is into providing premium advisory services segment; and that ICRA has been excluded by the coordinate Bench of the Tribunal in *taxpayer's own case in AY 2002-03* (supra) on ground of functional dissimilarity.

23. Perusal of the annual report available under the head Director's Report at pages 918, 923 & 924 shows that ICRA is into rating services, advisory services and information services. Furthermore, perusal of the TP order itself shows that TPO himself acknowledged in para 7.9 that ICRA is into providing premium financial advisory services as the rate of its employee cost is

extremely high indicating that its personnel are key drivers of these businesses. Moreover, coordinate Bench of the Tribunal in *taxpayer's own case for AYs 2002-03 and 2007-08* (supra) has excluded ICRA from the final set of comparables. The relevant findings returned in *AY 2002-03* (supra) is reproduced for ready perusal as under :-

“ICRA LIMITED (ICRA)

27.Undisputedly, ICRA has been rejected as a valid comparable by the Revenue on the objection of functional dissimilarity raised by the taxpayer in AYs 2006-07 to 2009-10, as per compilation given by the taxpayer during the course of arguments available on record.

28. Moreover, perusal of the annual report, available at pages 547, 553 & 557 of the paper book, shows that there is no segmental information available and keeping in view the diversified function performed by ICRA, it cannot be taken at entity level. Moreover, under TNMM, the TPO has a wide discretion of choosing comparables as there is wide range of such comparables available for benchmarking the international transactions.

29. Furthermore, ICRA has been held to be incomparable vis-à-vis the taxpayer by the coordinate Bench of the Tribunal in the taxpayer's own case for AY 2007-08 (supra) by holding that since ICRA has been providing advisory services, it can be a no match to the company providing actual marketing support services. Since there is no change in the profile of the taxpayer during the year under assessment as it has been providing similar marketing support services to its AE, ICRA is not a valid comparable vis-à-vis taxpayer, hence ordered to be excluded.”

24. In view of what has been discussed above and following the order passed by the coordinate Bench of the Tribunal in *taxpayer's own case for AYs 2002-03 and 2007-08* (supra), we are of the considered view that ICRA is not a suitable comparable vis-à-vis the taxpayer on ground of functional dissimilarity but being into

providing advisory services which is no match to the company providing actual marketing support services, hence ordered to exclude ICRA from the final set of comparables.

WATER AND POWER CONSULTANCY SERVICES (INDIA) LTD. (WAPCOS)

25. The taxpayer sought exclusion of WAPCOS on the grounds inter alia that WAPCOS is functionally dissimilar being into non-comparable companies; that it is a 100% Government owned entity and that it has been ordered to be excluded by the coordinate Bench of the Tribunal in *taxpayer's own case for AY 2002-03, 2007-08 and 2008-09* (supra).

26. Perusal of annual report at pages 628 to 640 of the paper book, shows that WAPCOS is into distinct activities viz. commercial and informatics centre for providing services in publishing of publicity material, technical bulletins, status report, providing consultancy services in the major field of irrigation, drainage, watershed management, etc., it is also providing services in the field of hydro-power, thermal power, transmission and distribution etc. and is into conducting environmental studies for mega projects in hydropower, water resources, ports and harbours, mining, industrial sector etc., ports and harbours division is involved in carrying out techno-economic feasibility studies,

preparation of project reports, detailed engineering project implementation and monitoring, it is into providing planning and designing of rural and urban water supply schemes, sewage treatment and disposal schemes, laboratory testing, inspection etc.

27. Coordinate Bench of the Tribunal excluded WAPCOS from the final set of comparables in taxpayer's own case for AY 2006-07 by returning following findings :-

“18.2. We find that this company operates in two segments, namely, Consultancy & engineering projects and Lumpsum turnkey projects. This company provides consultancy services, such as, pre-feasibility report of hydroelectric projects, field investigation drilling of tube wells, etc. From the above description of the nature of activities performed by this company, it can be seen that the same is engaged in providing engineering and consultancy services, which can be of no match to the assessee's marketing support services. This company is also directed to be excluded from the list of comparables.”

28. Keeping in view the facts and circumstances of the case, WAPCOS is into providing distinct services and is a 100% Government owned company, being not driving by profit motive and following the decision of the coordinate Bench of the Tribunal in *taxpayer's own case for AY 2006-07* (supra), it cannot be a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

RITES LTD. (RITES)

29. The taxpayer sought exclusion of Rites on grounds inter alia that it is functionally dissimilar and that it is a Government of India

undertaking under the aegis of Indian Railways; that Rites has been excluded by the DRP in *taxpayer's own case for AY 2007-08* on the ground that it is functionally different being in niche area of engineering consultancy.

30. Rites has been excluded by the Tribunal in *taxpayer's own case for AY 2006-07* (supra) by returning following findings :-

“16.2. We find that this company is primarily a consultancy organization rendering consultancy services in all facets of transportation. Its major areas of operations are consultancy services; Export of Rolling Stock, Equipments and Spares; and leasing of Railway Rolling Stock and Equipments. It can be seen that the functional profile of this company is nowhere near the assessee, which is simply providing marketing support services by largely creating customer awareness for the Microsoft products in India. This company is, therefore, directed to be excluded.”

31. Keeping in view the facts and circumstances of the case that Rites being into providing engineering and consultancy services and is an international recognised company engaged in transport infrastructure has been excluded by the Id. DRP in taxpayer's own case for AY 2007-08 on ground of functional dissimilarity being in niche area engineering consultancy and following the order passed by the *coordinate Bench of the Tribunal in AY 2006-07 in taxpayer's own case* is not a suitable comparable vis-à-vis the taxpayer who is a routine low end marketing support services provider on cost plus mark up basis, hence ordered to be excluded.

VIMTA LABS LTD. (VIMTA)

32. The taxpayer sought exclusion of Vimta as a comparable vis-à-vis the taxpayer on grounds inter alia that it is functionally different; that it has high proportion of plant and machinery applied and it has significant intangibles; that it is a high risk bearing entity; that it has been ordered to be excluded by the coordinate Bench of the Tribunal in *taxpayer's own case for AY 2006-07 and 2007-08* (supra).

33. Perusal of annual report, available at page 517 of the paper book, shows that Vimta is engaged in contract research (clinical and pre-clinical), clinical specialty diagnostics, analytical testing of water, food, drugs, chemicals, petroleum products, minerals, metals, etc. and environmental monitoring and impact assessment. Perusal of schedule forming part of the Accounts at page 527 of the paper book shows that it has displayed high proportion of plant and machinery.

34. Coordinate Bench of the Tribunal in *AY 2007-08 in taxpayer's own case* excluded Vimta in taxpayer's own case on ground of functional dissimilarity by returning following findings:-

“22. We do not find any force in the functional comparability of this company with the assessee. Spectrum of the services rendered by this company covers analytical food and drugs; clinical reference lab services to address the specialties and central lab services for clinical trials; clinical trials phase-I-IV and BA/BE studies; pre-clinical safety assessments; and

environmental assessments. A cursory look at the nature of services provided by this company divulges that the same is functionally dissimilar from the assessee. How a company conducting clinical trials on foods and drugs can be considered as comparable with the assessee undertaking marketing support services, is anybody's guess. This company being in the nature of business totally alien to that of the assessee, cannot be considered as a comparable. Similar view has been taken by the Tribunal in the case of the assessee for the immediately preceding assessment year. We, therefore, direct the exclusion of this company from the list of comparables."

35. In view of facts and circumstances of the case and following the order passed by the coordinate Bench of the Tribunal (supra), we order to exclude Vimta from the final set of comparables on ground of functional dissimilarity vis-à-vis the taxpayer, hence ordered to be excluded from the final set of comparables.

CORPORATE GROUNDS

36. Assessing Officer made disallowance of Rs.17,82,532/- claimed by the taxpayer on account of deposit made to MTNL of Rs.7,65,214/- and security deposit for rental premises of Rs.10,00,000/- written off as business loss u/s 28 read with section 29 of the Act on the ground that the taxpayer has not provided exact details as to when the relatable credit entries were passed resulting into income of the taxpayer and order passed in the AY 2002-03.

37. Ld. CIT (A) has also confirmed the disallowance except the amount of Rs.17,318/-.

38. No doubt, aforesaid advances/deposits have been made by the taxpayer to carry out the business activities in the normal course of business but to claim the same as business losses, the condition laid down u/s 36 (2) of the Act has to be fulfilled. There is not even a whisper in the assessment order as well as not brought on record during the argument that conditions u/s 36(2) of the Act have been fulfilled. Therefore, the same cannot be allowed as bad debt as argued by the Id. AR for the taxpayer. So far as the claim of the Id. AR for the taxpayer that the same should be alternatively allowed as business loss, we are of the considered view that the issue is required to be remitted back to the AO to give an opportunity to the taxpayer to substantiate as to how the same can be allowed as business loss. AO shall also determine the year of allowability if otherwise proved. Consequently, corporate grounds are allowed for statistical purposes.

39. Resultantly, the appeal filed by the taxpayer is allowed for statistical purposes..

Order pronounced in open court on this 28th day of November, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 28th day of November, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-44, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.
