

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "J", MUMBAI  
Before Shri R.C. Sharma (A.M.) & Shri Pawan Singh (JM)  
ITA No. 7619/Mum/2012 (Assessment year : 2008-09)

Western Union Services India Private Ltd, Fortune 2000 Building, Ground Floor, Unit No. G- 101, Bandra Kurla Complex, Bandra (E), Mumbai 400 051 PAN : AAACW5943M	Vs	Dy.CIT, Cir.10(1), Mumbai
<b>APPELLANT</b>		<b>RESPONDEDNT</b>

Appellant by	Shri Arijit Chakravarty & Shri Abhishek Tilak AR's
Respondent by	Shri Udal Raj Singh CIT-DR
Date of hearing	09-01-2020
Date of pronouncement	15-01-2020

**ORDER**

**Per Pawan Singh, JM :**

1. This appeal by assessee is directed against the assessment order passed under section (u/s) 143(3) read with section (r.w.s.) 144C(3) of the Income-tax Act, 1961 dated 15-10-2012, passed in pursuance of direction of Dispute Resolution Panel (DRP) Mumbai, for assessment year 2008-09.
2. Brief facts of the case are that assessee is a company engaged in the business of consultancy and ancillary services, filed its return of income for the relevant assessment year on 28-09-2008 declaring income at Rs.4.31 crores. The assessee, while filing return of income, has reported international transactions with its

associate enterprise (AE) about rendering of consultancy and ancillary support services of Rs.27.08 crores. Consequent upon reporting of international transactions, a reference u/s 92CA was made to transfer pricing officer (TPO) for computation of arm's length price (ALP) with regard to the said international transaction. The assessee adopted transaction net margin method (TNMM) as most appropriated method and selected assessee as tested party. The assessee selected five comparables companies for benchmarking on the basis of which, the assessee claimed its transaction at arm's length price. The assessee has shown its profit level indicator (PLI) at 16.33%. The margin of five comparables as per transfer pricing study report (TPSR) was 16.52% and accordingly, the assessee claimed its international transaction with its AE at Arm's Length Price (APL). The TPO, while making transfer pricing adjustment, out of five comparable companies, excluded Empire Industries Ltd and Times Innovative Media Ltd on functional dissimilarities. And on the basis of the remaining three/ final set of comparables, suggested upward adjustment of Rs.1.5 crores in the following manner:-

Sr.No.	Name of the company	Average	Updated Margin FY 2007-08
1	Agrima Consultants International Ltd	-2.69%	35.08%

2	IDC(India) Ltd	15.09%	14.71%
3	Priya International Ltd (Indenting segment)	19.03%	19.17%
	Arithmetic Mean		22.98%
	Assessee's Margin		16.33%
Particulars		Year ended 31-Mar-08 Amounts in Rs.	
Total Operating cost		23,28,30,131	
Arm's Length PLI (OP/OC) as per 3 final comparables @22.98%		5,35,04,364	
95% of AL Revenue (95% of (A))		27,20,17,770	
Transaction Price (Actual Revenue received)(B)		27,08,39,759	
Amount of adjustment to total income (A-B)		1,54,94,736	

3. On the receipt of report of TPO, the AO passed draft assessment order under section 143(3) rws 144C(3), copy of which was served on the assessee. The assessee, on receipt of draft assessment order, filed objection before dispute resolution penal (DRP). The DRP, rejected the objections filed by the assessee and upheld the upward adjustment suggested by TPO vide its direction dated 29-09-2012. On receipt of DRP direction dated 29-09-2012, the AO passed the final assessment order dated 15-10-2012 u/s 143(3) r.w.s. 144C(13) of the Act. Thus, aggrieved by the upward adjustment in the assessment order, the assessee has filed present appeal before us. The assessee has raised the following grounds of appeal:-

**“Ground 1 - Transfer Pricing Adjustment relating to international transaction of provision of support services of Rs. 15,494,736**

1. On the facts and in the circumstances of the case, the learned Transfer Pricing Officer ('TPO') and the learned Assessing Officer ('AO') under the directions of the Hon'ble Dispute Resolution Panel ('DRP') erred on facts and in law in making an addition of Rs. 15,494,736 to the provision of support services transaction of the Appellant based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').
  2. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law by arbitrarily rejecting two of the lower margin companies from the set of comparables arrived at by the Appellant, thereby resorting to cherry picking those companies with higher margins and arbitrarily deleting two lower margin comparables without appreciating the broader comparability required under the transactional net margin method.
  3. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in not allowing appropriate adjustments namely; risk adjustment to the comparables as is required to be done in accordance with the provisions of Rule 10B(1)(e)(iii) of the Income-tax Rules, 1962 to account for difference between the risk profile of the Appellant and the alleged comparables selected by the learned AO/TPO.
  4. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in upholding / confirming the action of the TPO of arbitrarily rejecting the without prejudice contention of the Appellant to provide the benefit / reduction of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, while determining the arm's length price for the international transaction.”
4. We have heard the learned authorised representative (Ld. AR) of the assessee and learned departmental representative (Ld. DR) for the revenue and perused the material available on record. The Ld.AR of the assessee submits that Ground No. 1 of the appeal is

general and needs no specific adjudication. Considering the statement of the Ld.AR of the assessee the Ground No.1 of the appeal is dismissed, as being general in nature.

5. Ground 2 relates to selection / exclusion / inclusion of comparables. The Ld. AR of the assessee submits that he presses only for the exclusion of Agrima Consultants Ltd. from final set of comparables. The Ld.AR further submits that in case of Agrima Consultants Ltd is excluded from final set of comparables, the margin of assessee would be within the tolerance range and he would not press for inclusion or exclusion of other comparable and any other grounds of appeal. The Ld.AR for the assessee further submits that this comparable chosen by assessee while making Transfer Pricing Study Report (TPSR). However, later on, the assessee realised that in fact, this comparable is actually not comparable with the assessee. The function performed by this comparable is entirely different. Agrima Consultants Ltd is engaged in the area such as sugar, cement, chemical engineering, power transmission and is in the field of market research and intelligence governing; hence different from the activities of

marketing support services of the assessee. There is difference in the salary cost in the business module.

6. The Ld.AR further submits that there is no bar in the law to seek the exclusion of comparables, if the same is selected by assessee and in fact is not comparable with the functions of the tested party. In support of his submission, the Ld.AR of the assessee relied upon the decision of Hon'ble Bombay High Court in CIT Vs Tata Power Solar Systems Ltd in ITA No.1120 of 2014 dated 126-12-2016 and in PCIT vs Visteon Engineering Centre (India) Pvt Ltd (ITA No.1336 of 2017) dated 03-09-2019.
7. On functional dissimilarity, the Ld.AR submits that the assessee company (tested party) is mainly engaged in marketing support services and the services rendered by the assessee to its associate enterprises are not disputed by the AO. The Ld.AR submits that in the following cases, Agrima Consultants Ltd held to be not comparable with the company engaged in marketing support services:-
  - Haworth (India)(P) Ltd vs DCIT (2017) 88 taxmann.com 316 (Pune Trib) AY 2009-10
  - Dover India (P) Ltd vs DCIT (2017) 81 taxmann.com 245 (Pune Trib) AY 2009-10
  - Dover India (P) Ltd vs DCIT (2015) 59 taxmann.com 53 (Pune Trib) AY 2009-10

- Akzo Nobel Chemicals (India) Ltd vs ACIT (2014) 51 taxmann.com 117 (Pune Trib) AY 2009-10.
8. In alternative submission, the Ld.AR submits that due to high fluctuation of its revenue in earlier and subsequent assessment year this comparable was rejected/ excluded. The Ld.AR submits that profit margin of this comparable in AY 2006-07 was -.62% in A.Y. 2007-08; it was .51% in AY 2008-09; it was 35.08%; no data for AY 2009-10 is available; however, in AY 2010-11, the profit margin was again -79.43%. The Ld.AR submits that various benches of Tribunal in following cases held that wide fluctuation in margin earned by the said concern over a period of time, therefore, cannot be included for comparison.
- Rampgreen Solutions Pvt Ltd vs CIT (2015) 60 taxmann.com 355 (Delhi HC),
- Exxon Mobil Co Ltd (2011) 12 taxmann.com 84 (Mumbai Trib)
- Maersk Global Centres (India)(P) Ltd vs ACIT (2014) 43 taxmann.com 100 (Mum)(SB)
- Lubrizol Advanced Materials India P. Ltd vs DCIT (2015) 64 taxmann.com 135 (Ahd) (Legal PB Pg.167.Para 17)
- Cummins Turbo Technologies Limited ITA No.161 &269/PN/2013
9. On the other hand, the Ld. DR for the revenue supported the order of TPO / DRP. The Ld. DR for the revenue submits that at pages 22 & 23 of the TPSR, the assessee itself has shown it as a primary consultancy service provider. M/s Agrima Consultants Ltd is also providing consultancy services. The Ld. DR further submits that

assessee itself selected this comparable. The assessee has not objected to the inclusion either before the TPO or before DRP. The Ld. DR for the revenue submits that in case the Tribunal comes to the conclusion that Agrima Consultants Ltd is liable to be excluded from final set of comparables, the matter may be restored to the file of TPO / AO for consideration of the matter afresh.

10. In the rejoinder submission, the Ld.AR of the assessee submits that at page 27 of TPSR in functional analysis, the assessee has clearly mentioned that the assessee has entered into support services agreement with its AE for rendering consultancy and ancillary support services. The function performed by assessee is carrying out market research, statistical analysis, identifying new location, sub contract and execution of sub representative agreement in compliance with standard agreement. The Id.TPO in his report has clearly accepted that the function of assessee primarily comprise assisting in appointment of sub representative agreement, maintaining existing representative relationship, marketing and promotion, training and support and business support to AE as recorded at para 3 of report / order of TPO.

11. The Ld.AR further submits that in case the submission of assessee about exclusion of Agrima Consultants Ltd is accepted, the other grounds of appeal raised by assessee would become academic.
12. We have considered the submission of both the parties and have gone through the orders of lower authorities. We have also deliberated on various case laws relied upon by representatives of the parties. We have noted that the function performed / undertaken by assessee is duly identified by Ld. TPO at para 3 of his order, which consists of assisting in appointment of sub-representative agreement, maintaining existing representative relationship, marketing and promotion, training and support and business support to AE. The international transaction reported by assessee is also related with consultancy and ancillary support services, thus, the assessee in the year under consideration is in primarily in supported services. In our view, the only short dispute in present appeal is, if the comparable company, Agrima Consultants Ltd is liable to be retained in final set of comparables or to be excluded, on the basis of functional dissimilarity and fluctuating margin and / or different business module.

13. There is no dispute that this comparable was initially selected / included by assessee itself while preparing TPSR. Before us, the Ld. AR of the assessee vehemently submitted that this comparable company is not at all comparable with the assessee as the same is engaged in different business, so far as the exclusion of assessee's own comparable is concerned. The Hon'ble jurisdictional High Court in CIT vs Tata Power Solar Systems Ltd (supra) while considering the question of law if the a comparable selected by the assessee, in the list of comparables for the purpose of arriving at the ALP in respect of its international transactions with its AE and later on sought to withdraw the comparable from the list of comparables on the ground of functional difference, the Hon'ble Court held that there is no bar in law from withdrawing from the list of comparables, and if the same is found to be included on account of mistake, as of facts is not comparable. Hon'ble High Court held that comparison has to be made between like companies and require carrying out of Function undertaken, Asset employed and Risk assumed (FAR) analysis to find out to find the same and in case of FAR analysis found with comparable are not comparable

and they are in different area, then such question would not give rise to any substantial question of law.

14. Further, the Hon'ble jurisdictional High Court in Visteon Engineering Centre (India) Pvt Ltd (supra), while considering similar question of law held that withdrawing of a comparable company selected by assessee as a comparable, is no longer res Integra in view of its earlier decision on CIT vs Tata Power Solar Systems Ltd (supra). Thus, considering the aforesaid factual and legal position, we are of the view that under law, there is no bar to seek the exclusion of comparable, if it is found not functionally comparable with the assessee company.
15. Now adverting to the functional comparability of Agrima Consultants Ltd, the Ld.AR of the assessee while making his submission has drawn our attention on the business profile of Agrima Consultants Ltd as extracted from website of this comparable, wherein this comparable is shown to have engaged in cement and building material, rigid packaging, sugar, horticulture and floriculture, engineering, consultancy in agro chemical financial services international trade, support entertainment and food services. The P&L account of this comparable is also placed

on record on pages 50 & 51 of the paper book. The co-ordinate bench of Pune Tribunal in Dover (India) P Ltd (supra) while considering the comparability of Agrima Consultants Ltd held that a company engaged in software services function marketing support services, distribution and manufacturing functions held that Agrima Consultants Ltd is providing consultancy services of a leading financial institution in outside India and that assessee was providing market support services to its group companies, is not comparable with the activity of Agrima Consultants Ltd. The relevant part of decision of co-ordinate bench is extracted below:-

“10. However, during the course of hearing, the learned Authorized Representative for the lessee restricted his objections to the inclusion of Agrima Consultants International Limited 'The plea of the learned Authorized Representative for the assessee before us was that the assessee was a BPO type of company, whereas Agrima Consultants International Limited was a knowledge based company. Our attention was drawn to the website extract of M/s. Agrima Consultants International Limited, which is placed at page 52 of the Paper Book, in which it is provided that Agrima Consultants International Limited was an approved consultancy concern to leading financial institutions and was offering its services in fields such as sugar, cement chemical engineering, power, etc. The plea of the assessee before us in this regard was that the said company was functionally different from the tested party and hence, the margins of the said company could not be applied to benchmark international transactions of the assessee.

11. The learned Departmental Representative for the Revenue referred to the orders of authorities below and pointed out that Agrima Consultants International Limited was broadly comparable to the functions undertaken by the assessee.

12. On the perusal of the record and information furnished by the assessee, Agrima Consultants International Limited was formed in 1972 and engaged in areas such as sugar, cement, chemical engineering, power transmission, etc, which services are offered to clients in developing countries. Further, Agrima Consultants International Limited is providing consultancy services to leading financial institutions in and outside India. On the other hand, the assessee was aiding marketing support services to various group entities and the same is not comparable to the activities of Agrima Consultants International Limited. While benchmarking the international transactions of the tested party and while applying the TNM method, endeavors have been to select such companies, which are functionally similar. Where the comparables are functionally dissimilar to the tested party, the margins of such companies cannot be utilized for determining the arm's length price of international transactions carried out by the tested party. In the above said facts and circumstances, we find no merit in the selection process carried out by the TPO and we direct the TPO to exclude the margins of Agrima Consultants International while benchmarking the arm's length price of international transactions of the assessee and applying the margins of other comparables as selected by the DRP, to determine the arm's length price of international transactions of the assessee."

16. Further, in *Akzo Nobel Chemicals (India) Ltd vs ACIT* (supra), while considering the comparability of Agrima Consultants Ltd with an assessee engaged in marketing sales support services held that this comparable is engaged in providing support services with respect to market research (market intelligence function and related

services). The services in the field of market research and gathering of intelligent gathering are quite distinct.

17. So far as the high fluctuating margin is concerned, this comparable has shown negative margin profit margin of 8.62% in AY 2006-07, 0.51% in A.Y. 2007-08 and 25.0-8% in the current assessment year. The Hon'ble Delhi High Court in Rampgreen Solutions Pvt Ltd Vs CIT (supra) held that it is necessary to keep in mind that supernormal profit may in certain cases indicates a functional dissimilarity or dissimilarity with respect to a feature that has a material bearing on the profitability.
18. Further, the Mumbai Tribunal in Exxon Mobil Co Ltd (2011) 12 taxmann.com 84 (Mumbai) accepted the exclusion of comparable on account of abnormal fall in turnover. Further, the Ahmedabad Tribunal in Lubrizol Advanced Materials India P. Ltd Vs DCIT (supra) excluded the comparable due to fluctuating margin. In view of the aforesaid factual and legal discussion, we direct the AO / TPO to exclude Agrima Consultants Ltd from the final set of comparables and recompute the ALP on the basis of remaining comparable companies.

19. Considering the fact that we have accepted the primary and foremost contention of Ld.AR of the assessee that in case Agrima Consultants Ltd is excluded from the final set of comparables, the other grounds of appeal raised by assessee would become academic. Therefore, considering the fact that we have allowed the exclusion of Agrima Consultants Ltd from final set of comparables, therefore, the discussions on the other comparables and grounds of appeal raised by the assessee have become academic.

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

Order pronounced in the open court on 15-01-2020.

Sd/-

Sd/-

(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 15<sup>th</sup> January, 2019

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai