

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI N.K. CHOUDHARY, JUDICIAL MEMBER

ITA No. 1701/DEL/2015
[Assessment Year: 2010-11]

Lockheed Martin India (P) Ltd
The Grand Plaza, The Grand Hotel
Nelson Mandela Road, Vasant Kunj
Phase - II, New Delhi

Vs.

The A.C.I.T
Circle 15(2)
New Delhi

PAN: AABCL 4556 E

[Appellant]

[Respondent]

Date of Hearing : 22.01.2020
Date of Pronouncement : 07.02.2020

Assessee by : Shri Sumit Mangal, Adv
Shri Devashish Poddar, Adv

Revenue by : Shri Dinesh Antil, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the assessment order dated 30.01.2015 framed u/s 143(3) r.w.s 144C of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] pertaining to assessment year 2010-11.

2. The grievances of the assessee can be summarised into the following parts:

“1. TP adjustment by including and excluding some comparables objected to by the assessee.

2. Treating some items as non-operating while computing margins of comparables.

3. Denial of risk adjustment.

3. Briefly stated, the facts of the case are that the appellant Lockheed Martin India Pvt Limited [LM IPL], incorporated in the F.Y. 2007-08, mainly acts as a communication channel between its parent entity and potential customers in India. Some of the main functions undertaken in India are as follows:

- a) Providing information about Lockheed Martin Corporation (LMC) to Indian companies;
- b) Undertaking market research and providing information on Indian market to the parent entity;
- c) Collating information about competitors of Lockheed Martin group in India and providing information on the same to its head office;

- d) Distribution of brochures to promote Lockheed Martin in India and provide information to potential customers;
- e) Acting as liaison and communication channel between potential Indian customer and group entities;
- f) Providing information on various queries raised by group entities

4. The appellant deploys necessary assets for performing marketing support services. But at the same time, it does not own any marketing or other intangibles for rendering these services. For providing the aforementioned services, the appellant employs non-technical people who possess general skills. Employees are not technical people like engineers, PhDs, software experts, etc. The appellant does not bear any risk since it is providing marketing support services and is compensated on cost plus basis @ 10%. Market risk and related product liability risk is borne by LMC and/or its group companies, since they sell the products to unrelated parties directly.

5. During the year under consideration, the appellant has undertaken the following international transactions with its AEs as disclosed in Form 3CEB:

<i>Sr No.</i>	<i>Nature of Transaction</i>	<i>Method</i>	<i>Value (in INR)</i>
1.	<i>Provision of marketing support services</i>	<i>Transaction Net Margin Method ("TNMM")</i>	<i>136,527,647</i>
2.	<i>Reimbursement of expenses by AE</i>	<i>No benchmarking required</i>	<i>221,724</i>
3.	<i>Reimbursement of expenses of AE</i>	<i>No benchmarking required</i>	<i>42,870,136</i>
Total			<i>179,619,507</i>

6. In order to bench mark the aforementioned international transactions, the appellant was selected as the tested party and TNMM was chosen as the most appropriate method with operating profit/operating cost being used as the profit level indicator. The assessee worked out the following set of companies undertaking comparable activities vis a vis the provision of marketing support services by the assessee:

<i>Name of the company</i>	<i>Operating profits on operating costs (%)</i>			<i>Average operating profits on operating costs (%)</i>
	<i>2009</i>	<i>2008</i>	<i>2007</i>	
<i>Access India Advisors Ltd.</i>	<i>NA</i>	<i>6.62%</i>	<i>45.97%</i>	<i>34.77%</i>
<i>Asian Business Exhibition & Conference Ltd.</i>	<i>NA</i>	<i>19.52%</i>	<i>15.85%</i>	<i>18.10%</i>
<i>I C R A Management Consulting Services Ltd.</i>	<i>NA</i>	<i>-2.78%</i>	<i>3.22%</i>	<i>0.06%</i>
<i>I D C (India) Ltd.</i>	<i>NA</i>	<i>9.99%</i>	<i>14.87%</i>	<i>12.30%</i>
<i>Inhouse Productions Ltd.</i>	<i>NA</i>	<i>2.51%</i>	<i>0.56%</i>	<i>1.51%</i>

<i>India Tourism Development Corporation Ltd.</i>	<i>NA</i>	<i>-0.11%</i>	<i>9.43%</i>	<i>5.31%</i>
<i>Technicom Chemie (India) Limited</i>	<i>NA</i>	<i>NC</i>	<i>5.68%</i>	<i>5.68%</i>
<i>Times Innovative Media Ltd.</i>	<i>NA</i>	<i>NC</i>	<i>-2.21%</i>	<i>-2.21%</i>
<i>Arithmetic mean</i>				<i>9.44%</i>

7. Since the assessee earned an operating margin of 10% on operating cost, and since the average mean of the assessee was at 9.44%, the assessee treated its international transaction for marketing support services at arm's length.

8. During the TP assessment proceedings, the TPO did not concur with the analysis undertaken by the assessee to bench mark the transactions pertaining to provisions of marketing support services to its AE. On the alleged functional incomparability, the TPO rejected six out of 8 comparables selected by the assessee. The comparables rejected are as under:

- i) Access India Advisors Ltd
- ii) Asian Business Exhibition & Conference Ltd
- iii) Inhouse Productions Ltd
- iv) India Tourism Development Corporation Ltd

- v) Technicom Chemie [India] Ltd
- vi) Times Innovative Media

9. The TPO further selected the following comparables:

- i) Aptico Ltd
- ii) Cameo Corp Services
- iii) Global Procurement Consultants Ltd
- iv) HCCA Business Services Pvt Ltd
- v) Quadrant Communications Ltd
- vi) TSR Darashaw Limited

10. The operating margin computed by the TPO is as under:

<i>Name of the company</i>	<i>Operating profits / Operating Cost(%)</i>
<i>Apitco Ltd</i>	<i>40.09</i>
<i>Cyber Media Research Ltd.</i>	<i>14.85</i>
<i>Global Procurement Consultants Ltd.</i>	<i>37.19</i>
<i>HCCA Business Services Pvt. Ltd.</i>	<i>20.05</i>
<i>ICRA Management Consulting Services Ltd.</i>	<i>1.94</i>
<i>Quadrant Communication Ltd.</i>	<i>13.11</i>
<i>TSR Darashaw Ltd</i>	<i>41.15</i>
<i>Cameo Corporate Services Ltd</i>	<i>8.26</i>
<i>Arithmetic mean</i>	<i>22.08%</i>

11. Objections were raised before the DRP and pursuant to the DRP's directions dated 12.12.2014, the TPO, vide order dated 28.01.2015 provided working capital adjustment to the comparables selected by the TPO for bench marking the international transactions of the appellant and computed the revised additions as under:

S No.	Name of Company	Adjusted OP/OC (in %)
1.	Apitco Ltd.	28.63
2.	Cameo Corporate Service Ltd.	4.72
3.	Cyber Media Research Ltd.	10.63
4.	ICRA Management Consulting Services Pvt. Ltd.	-4.81
5.	Global Procurement Consultants Ltd.	32.95
6.	HCCA Business Services Pvt. Ltd.	17.85
7.	Quadrant Communications Ltd.	12.28
8.	TSR Darashaw Ltd.	39.04
	Average	17.66

Hence, the revised addition was computed by the Ld TPO as under:

Particulars	Amount in INR
Operating Cost	12,411,6043
Arm's length price at a margin of 17.66%	146,034,936
Price Received	136,527,647
Revised addition	9,507,289

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

13. Before us, the ld. counsel for the assessee argued for the exclusion of four comparables and inclusion of two comparables.

14. We will now address to the exclusion of four comparables as under.

(i) APTICO LIMITED

15. It is the say of the ld. counsel for the assessee that Aptico Ltd provides technical and engineering services and wide range of consulting services, which cannot be compared with the market support services provided by the assessee.

16. Per contra, the ld. DR strongly supported the findings of the TPO. It is the say of the ld. DR that while comparing the comparables under TNMM, a broad similarity of functions has to be considered and Aptico Ltd fulfills all the criteria.

17. We have gone through the Annual Report of Aptico Ltd which is placed on record. We find that other than providing technical and engineering and wide range of consulting services, Aptico Ltd even

executes projects on turnkey basis, which tantamount to construction in certain projects. Aptico Ltd is also a public sector undertaking. Its income from operations include income from Micro Enterprises Development, Skill Development, Entrepreneurship development, tourism and research studies, project related services, infrastructure planning and development, environmental management, energy related services, cluster development, asset reconstruction and management services and emerging areas.

18. The co-ordinate bench in the case of Adidas Technical Services (P) Ltd 69 Taxmann.com 401 has, for the diversified activities of Aptico Ltd, has excluded this company. The relevant findings of the co-ordinate bench read as under:

"a) Apitco Ltd.:- Apitco Ltd. is a Public Sector Undertaking providing various support Services for the development of tourism industry. Later the functional profile of the company had undergone a change, and it is now engaged in providing technical consultancy relating to asset reconstruction companies, management services, micro enterprise development, skill development etc. This is a government company. The fact that its operations are mainly based on the policy requirements of the government and the fact that it is a preferred company

of the Government of India for entrustment of works, cannot be ignored. Be it as it may, in our considered opinion, the functional profile of this company is different from that of the assessee company and hence the same should be excluded from the list of comparable companies while computing the ALP."

19. In the case of Trend Micro India (P) Ltd 64 Taxmann.com 462, again Aptico Ltd was excluded for the reasons given below:

"7.3 A careful perusal of the operations carried out by Apitco Limited reveals that this company is providing services in the nature of Project report preparation, Technical and economic studies, Feasibility studies, Micro enterprise development, Skill development, Project management consulting, Industrial cluster development, Environmental management consulting, Energy management consulting, Market and social research and Asset reconstruction management services. No segment-wise profitability data of these services is available. The TPO has considered this company as comparable on entity level. We find that there is a tiny resemblance of 'Market and social research' functions performed by this company with the overall activities undertaken by the assessee. All other services are entirely different. We fail to appreciate as to how all the above listed services can be considered as comparable with the services provided by the assessee, which are restricted to identifying customers of antivirus products in India, sending such input to

its AE, finalizing sales and, thereafter, rendering basic technical assistance in resolving the use of such products, if any, which are eventually made and sold by the AE.

7.4 The Id. DR strenuously argued that all the activities done by this company are basically Business services and the assessee is also rendering business services. He submitted that differentiation of functions in the overall 'Business services' umbrella is taken care of under the TNMM. He harped on the contention that there is no requirement to have identical services for the purpose of making comparison under the TNMM.

7.5 We are unable to accept this argument in view of the judgment of the Hon'ble jurisdictional High Court in the case of Rampgreen Solution (P.) Ltd. v. CIT [2015] 377 ITR 533/234 Taxman 573/60 taxmann.com 355 (Delhi) in which it has been held that the comparables are to be selected on the basis of similarity even under TNMM. The Hon'ble High Court has laid down that selection of comparables does not differ with the method adopted. Ex consequenti, it is no more open to argue that the functional dissimilarity of the companies under the overall broader category can be ignored under the TNMM.

7.6 In view of the foregoing discussion, we find that the functionally similarity of Apitco Limited is lacking on entity level with the assessee company. As such, we order for its exclusion from the final set of comparables. "

20. It is pertinent to mention here that segmental information of this company is not available in its Annual Report for F.Y. 2009-10. Assuming that even some of the services provided by Aptico Ltd can be considered comparable to the appellant, then also, due to lack of segmental data, this company has to be rejected. Considering the facts in totality, we direct the TPO to exclude Aptico Ltd from the final set of comparables.

Global Procurement Consultants Ltd [GPCL]

21. The ld. counsel for the assessee argued that GPCL is functionally different as it is not engaged in providing procurement support services but is, in fact, engaged in providing consulting services and review of procurement processes for various projects funded by the World Bank.

22. Dismissing the contentions of the assessee, the TPO referred to the Annual Report of this company but that Annual Report pertains to F.Y. 2010-11 and cannot be used for F.Y. 2009-10. In our considered opinion, GPCL provides high-end technical consultancy in international funding regulations and cannot be compared to market

support services provided by the appellant. The services provided by the assessee, as extracted from its Annual Report for F.Y. 2009-10, exhibited at page 93 and 94 of the paper book is as under:

<p>Services:</p> <p>Initial Stages:</p> <ul style="list-style-type: none"> • <i>Identify purpose / constraints upon the project e.g. major milestones, potential bottlenecks.</i> • <i>Agree upon roles/operating methods with donor/recipient.</i> • <i>Agree upon procurement plan.</i> <p>Estimation:</p> <ul style="list-style-type: none"> • <i>Provide budgetary prices if required.</i> <p>Specifications:</p> <ul style="list-style-type: none"> • <i>Check/raise queries/agree with all parties.</i> • <i>“Open up” for tendering whether general or by direct invitation.</i> • <i>Ensure general requirements appropriate to developing countries.</i> <p>Bid Preparation:</p> <ul style="list-style-type: none"> • <i>Prepare instructions to bidders.</i> • <i>Ensure donor/old procedures are complied with.</i> • <i>Decide payment terms/retention/bid and performance bond.</i> • <i>Stipulate local representation.</i> • <i>Specify evaluation conditions.</i> • <i>Determine delivery requirements.</i> <p>Contract matters:</p> <ul style="list-style-type: none"> • <i>Ensure conditions of contract are appropriate to protect the client.</i> 	<ul style="list-style-type: none"> • <i>Obtain Statement of compliance with specifications and tender conditions.</i> • <i>Review preferred tenderer’s capability</i> • <i>Prepare reports to cover full commercial, contractual and donor procedural factors, Technical evaluation reports if agreed upon.</i> • <i>Make recommendation.</i> <p>Contract:</p> <ul style="list-style-type: none"> • <i>Draft contract.</i> • <i>Negotiate as necessary.</i> • <i>Place order.</i> • <i>Progress and report, applying liquidated damages as appropriate.</i> • <i>Provide for inspection.</i> • <i>Advance/ stage/ final payments.</i> • <i>Ensure performance test covered.</i> • <i>Ensure warranty is implemented.</i> <p>Shipping:</p> <ul style="list-style-type: none"> • <i>Arrange by most appropriate method.</i> • <i>Consolidate/ containerize.</i> • <i>Arrange to site if necessary.</i> • <i>Distribute documentation.</i> <p>Payment and Accounting :</p> <ul style="list-style-type: none"> • <i>Prepare withdrawal application.</i> • <i>Authorise.</i> • <i>Record</i> • <i>Report</i> <p>Co-ordination:</p>
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<ul style="list-style-type: none"> • Services contract for Installation. • Training and maintenance contracts. • Check eligible sources. • Shipping specifications, methods and terms <p>Sourcing :</p> <ul style="list-style-type: none"> • Knowledge of suppliers. • Grouping of items for bid packages. <p>Advertising:</p> <ul style="list-style-type: none"> • As required, including circulation within the country. <p>Bid Documents:</p> <ul style="list-style-type: none"> • Arrange issue and return under secure arrangements. <p>Evaluation :</p> <ul style="list-style-type: none"> • Obtain clarification / missing information. 	<ul style="list-style-type: none"> • All the time, between the parties. <p>Know – how Transfer: Training – though state of the art tailor made training modules and “Hands - on” transfer of expertise. GPCL has entered into on MOU with administrative staff college of India to provide comprehensive training on procurement for capacity building of project implementing agencies.</p> <p>Bid Support Services: Advice to Export Community on care and approach to be taken in submission of bids in international funded projects, so that success rate is better and bids are not rejected for want of compliance with procurement guidelines.</p>
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Further, the "Careers - Empanelment " page of the website of GPCL

(http://www.gpcl.in/Career_Empanelment.html), throws some light on the nature of qualifications and experience that GPCL requires from its employees.

"Career - Empanelment

Global procurement consultants Limited invites applications for empanelment from expert who have the requisite experience possessing impeccable track record in the areas of procurement and project management particularly in bid technical

specifications for goods/works, bid evaluation, contract management, inspection, audit, etc., in sectors such as health, education urban and rural development etc. Experience in internationally funded projects and foreign language proficiency would be an advantage."

23. A bare perusal of the aforementioned extracts shows that the services provided by GPCL are more akin to those provided by consultants who assist the clients to prepare for large scale infrastructure projects and review their supply chain processes to ensure that the same are operating efficiently and economically.

24. In our considered view, GPCL cannot be considered to be an appropriate comparable and we direct for exclusion of the same. We find support from the following decision of the co-ordinate bench in the case of Trend Micro India Pvt. Ltd 64 Taxmann.com 462 wherein it has been held as under:

"8.1. The TPO included this company in the list of comparables despite the assessee's objection that it is engaged in providing consultancy services and review of procurement processes for various projects funded by the World Bank. The assessee failed to convince even the DRP for its exclusion.

8.2. After considering the rival submissions and perusing the relevant material on record. We consider it expedient to first discuss the nature of activities carried out by Global Procurement Consultants Ltd. A copy of Annual report of this company for the relevant year is available on record. As per this Report. this company is promoted by Export- Import Bank of India in association with leading Indian Public Sector and Private Sector consultancy organisations on the basis of Public-private partnership model that offers collective Indian experience and expertise through the provision of a range of advisory services with particular focus on 'Procurement'. This company provides technical assistance in enhancing quality, transparency, efficiency and effectiveness of procurement and implementation service to help attain desired institutional and corporate objectives. The expertise of this company is available to various sectors including power, water resources, transportation, industries, etc. Its services have been outlined in the Annual report. From such services rendered by this company, it can be noticed that it is conducting Independent Procurement Review of multilaterally funded projects spread across the globe. It also undertakes Procurement audits, this company is providing full time advice on procurement and contract related aspects to several agencies across the globe. For example, in Georgia, it provided advice on procurement and contract related services to Municipal Development Fund (MDF), Republic of Georgia. In Iran, this company provided procurement advisory services to international forums, such as, Bam Reconstruction Office of

Ministry of Housing, Tehran. In Guyana, this company was selected through an international competitive process in assisting the Government of Guyana in 'strengthening of its procurement administration under Technical Assistance Credit from the World Bank. In India, it provided Procurement Advisory Services to IIT, Baramathy, Pune, India in the implementation of World Bank administered 'Empowering Poor: A pilot ICT programme for rural areas of Pune District funded by Japan Social Development Fund Grant. It has also carried out review of Procurement Systems and Organisation in the State of Madhya Pradesh, particularly, covering the health, public health, engineering and women and child development departments. When we go through the nature of services provided by this company, which basically aim at providing advice on procurement and also carrying out procurement audit, it becomes palpable that there is an absolute mismatch with the services provided by the assessee. The services provided by Global Procurement Consultants Ltd. are miles apart from those rendered by the assessee, which, in turn, are confined to assisting its AE in identifying customers and, then, facilitating the sales of antivirus products. By no standard. Global Procurement Consultants Ltd., can be considered as comparable with the assessee company. We, therefore, order for the elimination of this company from the list of comparables. "

25. Similar view was taken by the co-ordinate bench in the case of Adidas Technical Services Pvt Ltd [supra] wherein it has been held as under:

"But this company is also undertaking many other activities such as valuation etc. The issue for consideration would be as to whether segmental data is available. If such data is available then the company has to be taken as a comparable. As the argument of the Ld. Counsel for the assessee is that there are no segmental results available, this company is directed to be excluded as a comparable."

26. Considering the facts of the case in totality, we direct the TPO to exclude GPCL from the final set of comparables.

HCCA Business Services Pvt Ltd

27. The ld. DR strongly supported the inclusion of this company by relying upon the observations of the TPO.

28. Per contra, the ld. counsel for the assessee vehemently argued for exclusion of this company from the final set of comparables stating that this company is engaged in providing payroll processing

services and some other HR services. The ld. counsel for the assessee further pointed out that this company also offers specialized services for certified processes, policies on data security, confidentiality, disaster management, business continuity and compliance with SOX guidelines. It is the say of the ld. counsel for the assessee that this company is engaged in providing business process outsourcing services that are akin to an IT enabled service provider and not to a market/business service provider like the assessee.

29. At the very outset, we have to state that considering the activities of this company, vis a vis those of the appellant, this company cannot be considered as a good comparable. For this reason, ITAT Bangalore in the case of Electronics for Imaging India [P] Ltd 70 Taxmann.com 299, has excluded this company by holding as under:

"41. The assessee objected against inclusion of this company in the list of comparables on the ground that this company is engaged in providing payroll process services and therefore it is functionally different. In support of its contention, the assessee referred to Notes to the Accounts wherein the company's operations comprise of payroll processing services is mentioned

and hence it is not possible to give the quantitative details of sales and certain information separately.

42. The DRP after considering the annual report noted that except the Note 2.14, there is no other observation in the annual report from which it can be established that the company is engaged in marketing and sales support services comparable to the assessee. Accordingly, the DRP directed the AO to exclude the said company from the comparables.

43. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. The DRP has considered the fact that payroll processing services was main part of the operations of the company and Quantitative details of sales and certain information as required under Part II of Schedule VI to Companies Act was not possible. Thus, in the absence of any contrary fact on record brought before us, we do not find any reason to interfere with the finding of the DRP, when the functions and business activity of this company was found to be different from marketing and sales support services of the assessee. Accordingly, the objection of the Revenue is rejected."

30. The ITAT Delhi bench in the case of Genzyme India Pvt Ltd Vs. ACIT 93 Taxmann.com 222 has held as under:

"36. So far as HCCA Business Services Private Limited is concerned, we find its operations comprise of payroll processing services. Further, it cannot be established from the Annual Report that the company is engaged in marketing support services. It is seen that it has developed software for rendering payroll services and such software development expenses constitutes approximately 21% of the total operating cost which is verifiable from page 165, 166 & 177 of the Annual Report Compendium.

37. We find the Bangalore Bench of the Tribunal in the case of Aruba Networks India (P.) Ltd. (supra) has directed the TPO to exclude HCCA by observing as under :-

"32. The learned counsel submitted that

HCCA Business Services is engaged in Payroll processing. Therefore this company is functionally different from the Appellant and should be rejected. Reliance is placed on IT AT decision in the case of DCIT v. M/s Electronics for Imaging India Pvt. Ltd. IT (TP) A No.212/Bang/2015-AY 10-11, wherein it is held as under:

38. In view of the above discussion, we direct the TPO to exclude HCCA Business Services Private Limited from the list of comparables. "

31. Considering the business profile of this company, in the light of judicial decisions referred to hereinabove, we direct for exclusion of this company from the final set of comparables.

TSR Darashaw Ltd

32. The ld. counsel for the assessee vehemently stated that this company is functionally different and cannot be compared with the business profile of the assessee.

33. On the other hand, the ld. DR supported the findings of the TPO.

34. On perusal of the Annual Report of this company, we find that this company operates in three different segments, namely:

(a) Registrar and Transfer Agent Activity,

(b) Record Management Activity and

(c) Payroll and Trust Fund Activity.

No segmental data is available. For similar reasons, the co-ordinate bench in the case of Trend Micro India Pvt Ltd [supra] has excluded this company. The relevant findings read as under:

9.1 The assessee objected to the inclusion of this company by arguing that the business segments of this company are, Registrar and Transfer Agent activity; Records management activity; and Payroll and trust fund activity. Not convinced with the assessee's submissions, the TPO treated it as comparable on entity level against which the assessee is before us.

9.2 Having heard the rival submissions and perused the relevant material on record, we find that this company is a broking and investment banking house with its three segments, namely, Registrar and transfer agent activity (R&T); Records management activity (Records); and Payroll and trust fund activity (Payroll). Under the Registrar and Transfer Agent activity, this company undertakes registrar and transfer agent activity functions for Equity and preference shares, debenture instruments and bonds, commercial paper and private placements. It also undertakes transfer processing, customer/query handling and correspondence, split/consolidation/renewal of certificates, processing and distribution of interest/dividend warrants, payments by physical warrants/through ECS/Direct Credit. Under Records Management Activity, this company undertakes storage, retention & retrieval of physical and/or

electronic records. Under Payroll and Trust Fund Activity, this company handles the activities normally handled by "Payroll and Retirement Funds" section in any organization, including interface with regulatory authorities. When we compare all the three broader activities undertaken by this company, namely, R&T, Records and Payroll, with the overall pre and post sale services rendered by the assessee to its AE, on a cost plus basis, we find that there is a huge functional disparity between the two. That apart, the consideration of this company on an entity level by the TPO has rendered the entire exercise of comparison meaningless. Finding striking dissimilarities between this company and the assessee, we order to exclude this company from the final set of comparables. "

35. Similar view was taken by the co-ordinate bench in the case of Adidas Technical Services Pvt Ltd wherein it has been held as under:

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

- i. *Microsoft Corporation India (P.) Ltd. v. Dy. CIT [2015] 63 taxmann.com 178 (Delhi).*
- ii. *Premier Exploration Services India (P.) Ltd. v. ITO [2013] 35 taxmann.com 422/[2014] 146 ITO 580 (Delhi).*

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

36. Considering the diversified three segments of this company, in the light of the decision of the co-ordinate benches [supra], we direct the TPO to exclude this company from the final set of comparables.

37. Now we will deal with the inclusion of two comparables.

In house Production Limited

38. The ld. counsel for the assessee vehemently stated that this company was erroneously excluded by the TPO whereas this company fulfills all the criteria of comparability with the assessee. The ld. counsel for the assessee further stated that even segmental data is

available for healthcare division. Therefore, this company can be compared with that of the assessee on the basis of segmental data.

39. Per contra, the ld. DR read the observations of the TPO for excluding this company.

40. We find that the main reason for excluding this company given by the TPO is that it also runs a knowledge process outsourcing centre. Hence this company is more akin to an ITES provider. In our considered view, since the segmental data is available for healthcare information, the same can be compared with the assessee. We, accordingly, restore this issue to the file of the TPO. The TPO is directed to decide the inclusion of this company afresh after considering the segmental data of this company.

India Tourism Development Corporation Limited

41. The main reason for excluding this company given by the TPO is that its segment Ashok Reservation and Marketing Service Division [ARMS] can be considered as comparable to the assessee but other segments like Sound and Light Shows [SEL] and miscellaneous

operations cannot be considered a company as they are not even in the nature of business services. The TPO further observed that it is not clear from the Annual Report whether ARMS is the predominant sub-segment out of three sub-segments. Income bifurcation of this segment can be understood from the following chart:

Division	Income in AY 2010-11 (in Crores)	In %
Ashok Reservation and Marketing services ("ARMS")	7.2	58%
Sounds and Light Show ("SEL")	0.73	6%
Ashok Institute of Hospitality and Tourism Management ("AIH & TM")	4.45	36%
Total	12.38	100%

42. From the above chart, it can be seen that ARMS segment is the dominant sub-segment and since the TPO himself has accepted that ARMS can be compared with the assessee, looking to the aforementioned chart, we are of the considered view that this company should be taken as good comparable.

43. Before us, the ld. counsel for the assessee also argued that certain comparables were excluded on application of employee cost filter of 25%. The ld. counsel for the assessee stated that employee

cost is not necessarily a true indicator of comparability of companies or their profitability. It is the say of the ld. counsel for the assessee that since the assessee has used TNMM to bench mark the impugned transactions, there is no need to arbitrarily reduce the number of comparables by applying employee cost to total cost ratio as long as the companies selected for comparison are functionally comparable to that of the tested party.

44. We find force in the contention of the ld. counsel for the assessee. We are of the considered view that if the functions are comparable with those of the assessee, then the companies cannot be excluded as they fail to pass the employee cost filter. Considering the business profile of the assessee, and in particular the marketing support services provided by it to its AE, we do not find any merit in applying employee cost filter of 25%. We, therefore, direct the TPO to include all those companies which are otherwise functionally comparable but fail to pass the employee cost filter.

45. Last argument put forth by the ld. counsel for the assessee relates to the treatment of certain items as non-operating while computing margins of comparables which are foreign exchange gain/loss, bank charges and provision for doubtful debts.

46. In our considered opinion, forex gain/loss arise in normal course of business due to realization of export proceeds, settlement of import payables or adjustment of customer advances at a different rate than the rate at which it was booked, and should be considered as operating while computing operating margins of comparables.

47. Similarly, bank charges are levied by banks for maintenance of bank accounts and various other facilities intrinsically linked to business operations of an assessee and hence should be considered as operating while computing operating margins of comparables.

48. In our considered opinion, provision for doubtful debt is an estimated percentage of debtors that are not expected to pay during the year and hence directly relate to business operations of assessee

and should be considered as operating while computing operating margins of comparables.

49. In so far as risk adjustment is considered, there is no quarrel that the assessee has a cost plus business model operating in a low risk or almost risk mitigated environment as compared to the comparable companies who are independent service providers and bear significant risks.

50. In our considered opinion, the assessee is very much entitled for risk adjustment accordingly.

51. In the result, the appeal of the assessee in ITA No. 1701/DEL/2015 is allowed in part for statistical purposes.

The order is pronounced in the open court on 07.02.2020.

Sd/-

**[N.K. CHOUDHARY]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 07th February, 2020.

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	