

आयकर अपीलिय अधिकरण, दिल्ली न्यायपीठ "आई-1", नई दिल्ली में

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

सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, VP & SHRI PRASHANT MAHARISHI, AM**

**[THROUGH VIDEO CONFERENCING]**

आयकर अपील सं. / ITA No.4035/Del/2016

निर्धारण वर्ष / Assessment Year 2010-11

Intercontinental Hotels Group (India) Pvt.Ltd.,  
11<sup>th</sup> Floor, Building 10, Tower-C,  
DLF Cyber City, Phase-II,  
Gurgaon-122002.  
PAN-AAGCS7613G

.....अपीलार्थी/ Appellant

vs

The DCIT,  
Circle-II, Gurgaon.

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Atul Jain, CA

प्रत्यर्थी की ओर से / Respondent by : Sh. M.Barnwal, Sr.DR

सुनवाई की तारीख/ Date of Hearing : 19.08.2020	घोषणा की तारीख / Date of Pronouncement: 14 .10.2020
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**आदेश/ORDER**

**PER SUSHMA CHOWLA,VP**

The present appeal filed by assessee is against order of CIT(A)-1, Gurgaon dated 29.03.2016 relating to assessment year 2010-11 against the order passed under section 143(3) r.w.s 144C of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised following grounds of appeal:-

1. *“On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals) - 1 ("Hon'ble CIT(A)) has erred in confirming the addition to the extent of INR 1,30,45,059 to the taxable income of the Appellant on account of adjustment to the Arm's Length Price ('ALP') of the Appellant's international transaction of provision of ancillary management support services with its Associated Enterprises ("AEs").*

2. *On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the TPO's action of including "Design and engineering expenses", an expense wholly attributable to the non-AE activities of the Appellant, to compute the operating margin for AE transactions. In doing so, the CIT(A) erred in-*

*2.1. Ignoring the functions, asset and risk profile of the Appellant and violated the provisions of Rule 10B(1)(e) of the Income Tax Rules, 1962.*

*2.2. Disregarding the fact that the design and engineering expenses are incurred by the Appellant to provide services only to third parties / non-AEs and not to its AEs; and*

*2.3. Confirming the TPO's action of limiting the amount of design and engineering expenses to the extent of revenue from technical services (earned from non-AEs) which violates the provisions of Section 92C(3) and Section 92CA(3) of the Income Tax Act, 1961;*

3. *On facts and in law, the Hon'ble CIT(A) erred in confirming Apitco Limited, Global Procurement Consultants Limited and TSR Darashaw Limited as alleged comparables to the Appellant, disregarding the significant difference in the functional profile of these companies vis-a-vis the Appellant.*

4. *On facts and in law, the Hon'ble CIT(A) erred in rejecting two comparable companies - Educational Consultants (India) Limited and Spectrum Business Solutions Limited, disregarding the fact that these two companies are appropriate comparables having functional profile similar to that of the Appellant.*

5. *On facts and in law, the Hon'ble CIT(A) erred in not agreeing to the Appellant's plea on the correct computation of margins of HSCC (India)*

*Limited at 8.96 percent vis-a-vis at 18.32 percent computed incorrectly by the Assessing Officer.*

6. *On facts and in law, the Hon'ble CIT(A) erred in not allowing a risk adjustment under Rule 10B(1)(e) of the Rules for determination of the ALP to account for the difference in the risk profile of the Appellant and of comparable companies.*

7. *On facts and in law, the Hon'ble CIT(A) erred in disregarding the Appellant's use of multiple year / prior years' data in contravention of the provision of section 92C of the Act read with Rule 10B and Rule 100(4) of the Rules.*

8. *On the facts and circumstances of the case and in law, the Ld. Deputy Commissioner of Income Tax, Assessing Officer ("Ld. AO") has erred in charging interest under section 234B of the Act on the assessed income.*

9. *On the facts and circumstances of the case and in law, the AO has further erred in initiating penalty proceedings u/s 271(1)(c) mechanically and without recording any adequate satisfaction for this initiation even when no such penalty is warranted in the present case.*

*All the above grounds are without prejudice to each other."*

3. The issue raised in the present appeal is against the benchmarking of international transaction of provision of Ancillary Management Support Services by providing marketing support services to the Associated Enterprises (in short "AE").

4. Briefly in the facts of the case the assessee was an Indian company and was part of Intercontinental Hotels Group (in short "IHG"), incorporated for managing and offering services mainly to the M/s. IHG. The assessee provided Ancillary Management Support Services to M/s. Continent Hotels INC. The Assessing Officer noted that the assessee had entered into several international transactions with its AEs and reference was made u/s 92CA(1) of the Act to

benchmark the Arm's Length Price of the international transaction undertaken by the assessee. The TPO has tabulated list of international transactions undertaken by the assessee at page 2 of the TPO's order. We are concerned with the provision of Ancillary Management Support Services segment only. The assessee was providing the said services to AEs on account of three segments:-

- (a) Marketing and Reservation System fund services;
- (b) Brand support services; and
- (c) Regional office services.

5. The assessee had entered into an Agreement with M/s. Continent Hotels INC for the provision of Ancillary Management Support Services with respect to hotels based in South West Asia region. The assessee received service fee based on the mark-up of 10% on service cost incurred for providing such services. The cost included costs and expenses of services incurred by the assessee company, directly or indirectly in connection with providing such services. The TPO noted that majority of risks were borne by the AE. The assessee had benchmarked its international transaction of provision of Ancillary Management Support Services and Operational Assistance Services by applying Transactional Net Margin Method with Operating Profit to Total Cost (in short (OP/TC) as Profit Level Indicator (in short "PLI"). The margins were calculated at 10.28% by the assessee as against average margins of the six comparables finally selected at 9.84%. Hence, the transaction was treated at Arm's Length. The filters applied by the assessee were also adopted by the

TPO, but show cause notice was issued on account of additional filters to be applied after search process adopted by the TPO. The TPO selected eight concerns as functionally comparable to the assessee whose mean margin worked out at 24.12% and proposed adjustment of Rs.1,76,76,141/- in the show cause notice. One of the filters which was applied by the TPO was the use of current year data as against multiple years data applied by the assessee. The assessee filed objections to the proposed adjustment made by the TPO against the final selection of comparables. However, the TPO in final analysis rejected two comparables of the assessee and introduced five new comparables working out the mean margins of the comparables at 21.66% and proposed an adjustment of Rs.1,30,45,059/-. The TPO also proposed an adjustment on account of outstanding receivables of Rs.72,62,421/-. The Assessing Officer passed draft assessment order and thereafter, final assessment order making the aforesaid adjustment, against which the assessee filed an appeal before the CIT(A). The adjustment on account of Provision of Ancillary Management Support Services was upheld in the hands of the assessee. However, adjustment made on account of outstanding receivable was deleted by the CIT(A). The appeal of the Revenue on this ground has been dismissed on the ground of low tax effect.

6. The assessee is in appeal against the adjustment made on account of Provision of Ancillary Management Support Services.

7. The Ld.AR for the assessee has objected to the inclusion of comparables which were introduced by the TPO i.e. (a) Apitco Ltd.; (b) Global Procurement

Consultants Ltd.; and (c) TSR Darashaw Ltd. The assessee is also aggrieved by the rejection of the comparable i.e. Spectrum Business Solutions Ltd. (in short "SBSL"). Another aspect which is raised by the Ld.AR for the assessee before us is that SBSL was rejected by the TPO on arbitrary basis even though the company is functionally comparable to the assessee. The assessee is also aggrieved by erroneous computation of margin in case of HSCC (India) Ltd. at 18.32%. We shall deal with the submissions of both authorized representatives while deciding the issue in paras below.

8. The Ld.AR for the assessee pointed out that Ground of appeal No.1 raised by the assessee is general. Ground of appeal Nos. 2, 6 & 7 are not pressed. However, Ground of appeal No.3, partly Ground of appeal No.4 & Ground of appeal No.5 need to be adjudicated in the case of the assessee.

9. We have heard the rival contentions and perused the record. The assessee before us is engaged in providing support services to its AE in the nature of marketing and other support services. The assessee is reimbursed on cost plus basis for rendering the said services to its AE i.e. Continent Hotels INC. The assessee had applied Transactional Net Margin Method for benchmarking its international transaction for Provision of Ancillary Management Support Services to its AE being the most appropriate method and had computed its margin at 10.28% by applying OP/OC as PLI. The assessee in the transfer pricing study report has selected six comparable companies as functionally comparable, whose mean margins worked to 9.84 % and had claimed the international transaction to be at arm's length. However,

the TPO applied filters selected by the assessee but also used additional filters and drew list of nine comparables as finally selected to benchmark the international transaction of Provision of Ancillary Management Support Services by the assessee to its AEs. The final list of nine comparables is as under:-

Sl.No.	Company Name	OP/OC (without Forex)
1.	Apitco Ltd.	40.09
2.	Cameo Corporate Services Ltd.	8.26%
3.	Global Procurement Consultant Ltd.	37.19
4.	Quadrant Communication ltd.	13.11
5.	TSR Darashaw Ltd.	41.15
6.	HCCA Business Services Pvt.Ltd.	20.05
7.	HSCC (India) Ltd.	18.32
8.	IDC now known as Cyber Media Research Ltd.	14.85
9.	ICRA management Consulting Services Ltd.	1.94
Average		21.66%

10. The assessee is aggrieved by the inclusion of Apitco Ltd., Global Procurement Consultants Ltd. and TSR Darashaw Ltd. and rejection of Spectrum Business Solution Ltd. The assessee is also aggrieved by the computation of margins in the case of HSCC (India) Ltd.

11. Coming to the concern Apitco Ltd. The assessee points out that it is Government Company set up by the Government for specific government purposes, where majority revenues were from government related entities;

hence functionally not comparable. Also it was engaged in diversified high-end technical services and no segmental information is available. The Ld.AR for the assessee pointed out that similarly GPCL is funded by the Government i.e. EXIM bank and World Bank and involved in rendering services only to Government companies and functionally not comparable as involved in procurement and varied non-comparable high end services. In respect of TSR Darashaw Ltd. the same is functionally not comparable as it acts as Depository and Share Registrar. The assessee before us is a BPO and functional profile of the assessee has been accepted by the TPO in his order.

12. The case of the assessee before us is that Government companies which are set up for specific purposes and were providing services to other Government owned companies and/or entities cannot be held to be functionally comparable to business entities in view of the ratio laid down by the Hon'ble Delhi High Court in Philip Morris in ITA No.1468 of 2018 judgement dated 18.12.2018. The Ld.AR for the assessee also pointed out that the Delhi Bench of Tribunal in assessee's own case relating to Assessment Year 2009-10 in ITA No.5479/Del/2014 vide order dated 27.07.2018 on similar grounds rejected the inclusion of Vapi Waste Effluent Co., a Government company as functionally not comparable. Our attention was drawn to the financial statement of the respective concerns i.e. Apitco Ltd. & GPCL Ltd. to establish its case that the said concerns were Government companies.

13. The Ld.DR for the Revenue on the other hand pointed out that there was no dispute to the filters applied but applying those filters and adopting reject/accept matrix the TPO selected concerns as functionally comparables. It was pointed out by the Ld.DR for the Revenue that the assessee manages own hotels and manages third party hotels and manages franchisee hotels and where the assessee is providing Ancillary Management Support Services then under TNMM analysis similarly placed concerns are considered. The Ld. DR for the Revenue also pointed out that though the Ld.AR for the assessee has relied on various case laws but he has not compared its own profile with the profile of those cases; hence reliance placed upon by the Ld.AR for the assessee is not correct.

14. The Ld.AR for the assessee pointed out that assessee was not owning any hotels nor was it holding any third party hotels. The said profile was the business model of the group entity, for whom the assessee was providing marketing and Ancillary Management Support Services. Our attention was drawn to para 5.2.2 at page 7 of the order of the TPO wherein the profile of the assessee is mentioned by the TPO.

15. We find merit in the plea of the assessee as far as its business profile is concerned. The assessee was not owning hotels nor third party hotels, but was providing Marketing and Ancillary Management Support Services to the AEs. The assessee in the final analysis is aggrieved by the inclusion of the two concerns i.e. Apitco Ltd. and GPCL on the ground that Government companies are not comparable to business concerns. We find that the issue stands settled

by the decision of the Hon'ble Delhi High Court in Philip Morris (supra) wherein vide paras 13 to 16 it was held as under:-

13. *“As could be seen from the annual report of this company, is company is one of the 18 TCOs was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise Apitco Ltd., was established to provide technical services to other government companies and body corporate. Further this company is engaged in providing services such as asset reconstruction and management, clustered allotment for mega footmarks, and environment services, energy- related services, infrastructure planning and development, energy audit etc. and undoubtedly this company is a high-end consultancy service provider. The annual report further reveals that this company is engaged in providing high-end technical services also.*

14. *Ld. AR brought to our notice that they Apitco Ltd., was rejected by a catena of decisions rendered by different Benches of this Tribunal including a coordinate Bench of this Tribunal in Ciena India (P) Ltd vs. DCIT in ITA No. 2948 and 3224/de1/2013 following which in Avaya India private limited versus DCIT in ITA No. 146/del/2013. He also placed reliance on the nation reported in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/del/2016. In International SOS services India private limited versus DCIT ITA No. 1631/de1/2014 this company was excluded on account of being hundred percent government organisation and the appeal against this decision of the tribunal was dismissed by the Hon'ble jurisdictional High Court.. Further it could be seen in Vestegaard Asia private limited verses DCIT in ITA No. 6670/del/2015 and H & M Mouritz India private limited verses DCIT in ITA 282/bankg/2015 it is held that the Aptico Pvt Ltd., is not a good comparable with any company rendering business support services on the ground that this company is a public sector undertaking and its operations are mainly based the on the policy requirements of the government.*

15. *Further reliance is placed by the counsel on the decision of the Mumbai bench of this tribunal in TysokKrupp industries India private limited verses ACIT in ITA No. 6460/mum/2012 wherein it was held that this company being a government enterprises is not comparable with a private business service provider because in case of government enterprises profit motive is not irrelevant consideration, and government companies work for other public sector undertakings and in that sense the related party transactions are much more than the filter of 25%. This decision of the tribunal was upheld by the Hon'ble Bombay High Court in ITA number 20/02/2018 of 2013.*

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

16. The Hon’ble High Court had directed that M/s. Apitco Ltd. was not good comparable of concerns providing business support services, on the ground that in case of Government enterprises, profit motive is not relevant consideration and the Government company worked for public undertakings.

17. Further, GPCL has been held to be not comparables by the Hon’ble Delhi High Court in Philips Morris (supra) itself on the ground that the company was established by the Government to provide Ancillary Management Support Services to Government Departments or their agencies. The relevant paras read as under:-

*26. “We have gone through the material provided in the paper book in respect of Global Procurement Consultants Ltd. and find that Global Procurement Consultants Ltd., is primarily engaged in preparing and reviewing technical specifications, estimation of castes, selection of vendors, inspection and a expediting and quality control and time management. It is also clear that the company renders the procurement related services in exclusively in CIS countries, Eastern Europe and emerging economies in the African continent, by Kettering relates in the areas like Health, Education, Urban and Rural Development, agriculture, mining, transportation, communication, energy, water resources and other key factors. We also further find from the record that Global Procurement Consultants Ltd., conducts procurement pushed revenue for World Bank financed projects, renders financial advisory services with a high volatile margins.*

27. This profile what we have observed from the record certainly makes this company to stand apart from the market support service providers. Further it is submitted by the Ld. AR that this company rejected by Ld. DRP, Delhi in the case of travel security services(India) private Ltd. For assessment year 2011-12 by holding that this company is functionality similar and should be deleted from the set of comparable companies rendering business support services. Further a coordinate Bench of this Tribunal in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/de1/2016 excluded this company as comparable to the marketing support services. So also in Adidas technical services Ltd vs. DCIT in ITA No. 862/de1/2016 and ITA No. 1233/de1/2015 a coordinate Bench of this Tribunal excluded this Global Procurement Consultants Ltd., as a good comparable to the marketing support service providers on the ground of functionality similarity.

28. The profile of this Global Procurement Consultants Ltd., as narrated by the Ld. TPO himself speaks in unequivocal terms that this Global Procurement Consultants Ltd., is a company established by the government to serve the purpose of professional procurement and management services needs and also to provide combines management services required by the government departments or their project execution agencies to carry out the procurement in a time bound and efficient manner within the framework of government regulations and guidelines of international institutions, which is not such a characteristic of the business of the assessee. The business model itself is different, let alone the disproportion is of the financials. We have no hesitation, in the face of the profile of Global Procurement Consultants Ltd., that it is not a good comparable at all to the assessee and for that matter to any private marketing support service provider, as such we direct the Ld. TPO to exclude this company from the list of comparables to benchmark the international transaction of the assessee in providing the market support services to its AEs.”

18. The assessee before us is also engaged in providing marketing and Ancillary Management Support Services to its AE; hence the concerns, Apitco Ltd. & GPCL being Government concerns are not comparable and the same needs to be excluded from the final list of comparables. In this regard, we find support from the ratio laid down by the Hon'ble Delhi High Court in Philips Morris (supra) and Tribunal in assessee's own case relating to Assessment Year

2009-10 wherein another Government concern i.e. Vapi Waste Effluent Co. was held to be not comparable to the assessee. Accordingly, we direct so.

19. The next concern which the Ld.AR for the assessee claims is not comparable is TSR Darashaw Ltd. on the ground that the same operates in three segments i.e. Registrar and Transfer Agent Activity, Record management and Payroll and Trust Fund Activity Payroll, which functions are not similar to the Marketing and Ancillary Management Support Services provided by assessee to its AE. The case of the assessee is the concern, which acts as depository and share registrar cannot be held to be functionally comparable to the assessee. Our attention was drawn to the Annual Report, wherein it is clearly mentioned that the TSR Darashaw Ltd. acts as Registrar and Share Transfer Agents, as against the functional profile of the selected concern is different from that of the assessee, which is engaged in providing Marketing and Ancillary Management Support Services to its AE. The said concern is to be excluded from final list of comparables. We also find support from the decision of Hon'ble Delhi High Court in Philips Morris (supra) to exclude it from the final list of comparables. The Hon'ble Delhi High Court in Philip Morris (supra) vide paras 39 & 40 directed the exclusion of TSR Darashaw Ltd. as no segmental information was available in respect of the different segments operated by the company. Accordingly, we hold that TSR Darashaw Ltd. is not to be included in final list of comparables.

20. Now coming to the computation of margins of HSCC (India) Ltd. The assessee claims that because of difference in provisions of doubtful debts, the

margins have been incorrectly computed at 18.32% whereas the correct margin is 8.96%. The assessee claims that the main reason of difference in the computation of margins of the said company by the assessee and the TPO is on account of treatment of provision of doubtful debts as an operating item by the assessee and as non-operating by the TPO.

21. The Ld.DR for the Revenue pointed out that the margins of the said concern need to be looked into by the TPO.

22. We accordingly direct the Assessing Officer/TPO to re-compute the margins of the said concern i.e. HSCC (India) Ltd. by including provision of doubtful debts as an operating item and re-compute the mean margin of assessee.

23. Another ground which is raised by the assessee is against the exclusion of Specturm Business Solution Ltd. The Ld.DR for the Revenue pointed out that the assessee has failed to file elaborate submissions before the CIT(A).

24. We find no merit in the stand of the Ld.DR for the Revenue. The assessee is engaged in providing Ancillary Management Support Services to its AE. The concern SBSL is also engaged in providing marketing and sales support services and admin support services etc. alongwith marketing research and marketing services. The same is clear from the functional profile of the said concern. The functional profile of the assessee is reported as under:-

*“Marketing and reservation services-marketing support, sales and reservation support, market communication/publicity, market research*

*and other sales and marketing program promotions, guest relations and operation and maintenance of reservation programs.”*

Because of the similarity of functions being performed by both the companies, we direct the inclusion of Specturm Business Solution Ltd. in the final list of comparables.

25. Accordingly transfer pricing issues raised by the assessee vide Ground of appeal No.3, part of Ground of appeal No.4 & 5 are allowed.

26. Ground of appeal No.1 raised by the assessee being general, does not require any adjudication. Ground of appeal Nos.2, 6 & 7 being not pressed, are dismissed. Ground of appeal No.8 raised by the assessee against charging of interest u/s 234B of the Act is consequential, hence dismissed. Ground of appeal No.9 raised by the assessee is pre-mature, hence dismissed.

27. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 14<sup>th</sup> October, 2020.

**Sd/-**

**(PRASHANT MAHARISHI)**  
**लेखासदस्य/ ACCOUNTANT MEMBER**

**Sd/-**

**(SUSHMA CHOWLA)**  
**उपाध्यक्ष / VICE PRESIDENT**

दिल्ली / दिनांक Dated : 14<sup>th</sup> October, 2020

*\*Amit Kumar\**

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति//True Copy//

सहायकरजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली  
**Assistant Registrar, ITAT, Delhi**