

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.4240/Del./2017
(Assessment Year : 2011-12)**

M/s. Intercontinental Hotels Group (India) vs. DCIT, Circle 2,
Private Limited, Gurgaon.
11th Floor, Building 10 Tower C,
DLF Cyber City, DLF Phase – II,
Gurgaon – 122 002 (Haryana).

(PAN : AAGCS7613G)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Atul Jain, Advocate
REVENUE BY : Shri Dhiraj Jain, Senior DR

Date of Hearing : 18.02.2021
Date of Order : 03.03.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Intercontinental Hotels Group (India) Private Limited (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 24.04.2017 passed by the Commissioner of Income-tax (Appeals)-1, Gurgaon in an appeal challenging the orders passed by the Id. TPO/AO qua the assessment year 2011-12 on the grounds inter alia that :-

“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 an addition to the extent of INR 1,09,13,894 made by the Learned Deputy Commissioner of Income Tax, Circle-2, Gurgaon ("Ld. AO")/ Learned Additional Commissioner of Income Tax, Transfer Pricing Officer - 1(3), New Delhi ("Ld. TPO") on account of adjustment to the Arm's Length Price ("ALP") of the Appellant's international transaction of provision of ancillary management support services to its Associated Enterprises ("AEs").

2. On facts and in law, the Hon'ble CIT(A) has erred in disposing off the order while dealing with com parables summarily based on conjectures and surmises, thereby contravening the provisions of the Rule 10B(2) of the Income Tax Rules, 1962 ("Rules"). In doing so, the CIT(A) erred in:

2.1. Solely relying on the companies selected by the TPO in AY 2010-11 and ignoring the detailed reasons for accepting / rejecting disputed comparables submitted by the Appellant before the CIT(A), thereby disregarding the methodological benchmarking search undertaken by the Appellant in its TP documentation;

2.2. Not appreciating that the comparables selected in the TP documentation have already been accepted by the Ld. TPO as broadly similar to the Appellant.

3. On facts and in law, the Hon'ble CIT(A) erred in not allowing 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.

4. 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 10D(4) of the Rules.

5. 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, 234C and 234D of the Act on the assessed income.

6. 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."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Intercontinental Hotels Group (India) Pvt. Ltd. (IHG India), the taxpayer was incorporated as H.I. Crowe Plaza (I) Pvt. Ltd. on August 23, 1996 as subsidiary of Bass International Holdings N.V. Netherlands (now known as Six Continents International Holding B.V.) for managing and offering services mainly to Indian Hotels. IHG India provides ancillary management support services to Six Continents Hotels Inc. and to Inter Continental Group (Asia Pacific) Pte. Ltd. (IHGAP). During the year under consideration, the taxpayer entered into international transactions with its Associated Enterprises (AE) as under :-

Sl. No.	Nature of Transactions	Value Rs.	Method Applied	Arm's Length Result	Result of Assessee
1	Provision of Ancillary management and operational assistance services	120,925,638	TNMM	10%	9.94%
2	Recovery of expenses	2,095,671	No Benchmarking required	N.A.	N.A.
3	Reimbursement of expenses	17,630,431			

3. The taxpayer in its transfer pricing analysis to benchmark its international transactions applied Transactional Net Margin Method (TNMM) with Operating Profit/Operating Cost (OP/OC) as Profit Level Indicator (PLI) as the Most Appropriate Method (MAM). The taxpayer computed its margin (OP/OC) at 9.94%,

chosen 7 external comparables and found its international transactions at arm's length.

4. However, Id. TPO rejected the TP analysis undertaken by the taxpayer and proceeded to compare the AE segment of taxpayer with its non-AE segment and compared the net margin that have been earned by the taxpayer in its AE and non-AE segment. Accordingly, TPO in order to benchmark the international transactions treated the taxpayer's net margin earned from its non-AE transactions and treated the margin of 22.17% as the arm's length margin and proposed the ALP of international transactions qua the support services as under :-

Total Cost	Rs.109,948,739
ALP at a margin of 22.17%	Rs.134,324,374
Price received	Rs.120,925,638
Adjustment u/s 92CA	Rs. 13,987,736

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

6. 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.

7. At the very outset, it is pointed out by the ld. AR for the taxpayer that ld. CIT (A) has erred in adopting the internal comparables finally selected by the TPO and accepted by the ld. CIT(A) in taxpayer's own case for AY 2010-11, for this year i.e. AY 2011-12 and thereby computed the ALP to the extent of Rs.1,09,13,894/-. However, ld. DR for the Revenue has failed to controvert the factual argument addressed by the ld. AR for the taxpayer rather relied upon the order passed by the Revenue authorities below.

8. Perusal of the impugned order passed by the ld. CIT (A) goes to prove that ld. CIT (A) instead of examining the legality of TP analysis made by the TPO as well as the taxpayer to benchmark the international transactions straightaway jumped to adopt the TP analysis made by the TPO and accepted by ld. CIT (A) in taxpayer's own case for AY 2010-11 to determine the ALP of international transactions qua provisions of support services by returning following findings :-

“3.9 I have carefully considered the appellant's submissions. I have also perused the TPO order in the appellant's case for AY 2010-11 and the order of the CIT(A) in appellant's case for AY 2010-11. Following issues need to be considered in this case:-

I. Whether the use of internal comparables as done by the TPO, is correct.

II. The quantum of adjustment required to be made in this case.

Each of the aforesaid issues is being discussed as under:-

I. Whether the use of internal comparables as done by the TPO, is correct.

A. As seen from the submissions made by the appellant, it is evident that the services rendered by the appellant to the AEs are very different from the services being rendered to the other parties. The services rendered to unrelated parties include pre-commencement services and hotel management services whereas the services rendered to AEs are in the nature of system fund support, brand support and regional office services, The basis of charging of services fee is also different in the case of unrelated parties and in the case of AEs. Whereas the pre-commencement services in the case of unrelated parties are being charged on a fixed basis and the hotel management services in the case of unrelated parties are being charged on the basis of fixed percentage of gross turnover, the services in the case of AEs are being charged on the basis of cost incurred plus 10% mark-up. It is therefore evident that the nature of services and the basis of charging are completely different in the case of AEs and in the case of unrelated parties. It is also relevant to mention here that in the similar facts and circumstances in appellant's own case for AY 2010-11, the TPO had adopted external comparables for the purpose of arriving at Arm's length margin and this approach of TPO had also been confirmed by the CIT(A).

B. Keeping in view all the facts discussed above and in view of the rule of consistency, it may be considered view that the TPO was not justified in adopting internal comparables for the purpose of computation of Arm's Length Margin.

II. The quantum of adjustment requires to be made in this case.

A. The appellant has computed the Arm's Length Margin by adopting external comparables at 10%. As mentioned above similar issue was considered in appellant's own case for AY 2010-11. The comparables used by the appellant were discussed at length both by the TPO and by the CIT(A) in their orders for AY 2010-11. Some comparables used by the appellant were rejected whereas certain other new comparable were used by the TPO. The final list of comparables used by the TPO in AY 2010-11 for computation of Arm's Length Margin is as under:-

S. No.	Companies selected by Ld. TPO in AY 2010-11 and affirmed by Hon'ble CIT (A)	NCP FY 2010-11 (%)
1	Apitco Limited	25.07
2	Cameo Corporate Services Limited	11.03
3	Global Procurement Consultants Limited	30.86
4	Quadrant Communication Limited	14.58
5	TSR Darashaw Limited	41.32
6	H C C A Business Services Private Limited	13.99
7	HSCC (India) Limited	16.01
8	IDC (India) Limited	10.60
9	ICRA Management Consulting Services Limited	15.71
	Arithmetic Mean	19.91

B. The comparables used by the TPO were upheld by the CIT(A) in his order dated 29/03/2016. The appellant has not given any explanation or justification against the comparables adopted by the TPO in appellant's own case for AY 2010-11.

C. Keeping in view the aforesaid facts and in view of the detailed reasons recorded by the TPO and CIT(A) in appellant's own case for AY 2010-11, it is held that the same comparables may be adopted for arriving at Arm's Length Margin. Further, in view of the detailed reasons given by TPO in his order dated 12/12/2014, the use of only the current year data in respect of the comparables is upheld. The Arm's Length Margin is accordingly computed as under:-

S. No.	Companies selected by Ld. TPO in AY 2010-11 and affirmed by Hon'ble CIT (A)	NCP FY 2010-11 (%)
1	Apitco Limited	25.07
2	Cameo Corporate Services Limited	11.03
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	Arithmetic Mean	19.91

D. The TPO had computed the total cost at Rs.10,99,48,739/-. The appellant had not raised any ground of appeal against this computation of total cost. The adjustment u/s 92CA is accordingly computed as under:-

Total Cost	Rs.10,99,48,739
ALP at a margin of 19.9%	Rs.13,18,39,532
Price received	Rs.12,09,25,638
Proposed Adjustment u/s 92CA	Rs. 1,09,13,894

E. The adjustment made by the AO is accordingly confirmed to the extent of Rs.1,09,13,894/-.

3.10 These grounds of appeal are partly allowed.”

9. Aforesaid findings returned by the Id. CIT (A) go to show that Id. CIT (A) under the garb of “rule of consistency” adopted the TP analysis made by the TPO and accepted by the Id. CIT (A) in taxpayer’s own case for AY 2010-11 without examining the legality of the TP study conducted by the taxpayer finding its international transactions at arm’s length and TP analysis of the TPO vide which he has adopted the internal comparables and proposed an adjustment of Rs.1,39,87,736/-.

10. This method of TP analysis is unheard of as every assessment year is required to be examined independently to reach the logical conclusion to determine the ALP of international transactions. Merely because of the fact that during the year under consideration, there is no change in the business model of the taxpayer and the services rendered are identical, there is no

statutory mandate to adopt the TP analysis made by the Revenue Department in the earlier years in order to make the adjustment in the subsequent years. In these circumstances, we are of the considered view that passing such an order on the basis of conjectures and surmises is in contravention of the provisions contained in Rule 10B (2) of the Income-tax Rules, 1962. Consequently, impugned order passed by the Id. CIT (A) is set aside and file is remitted back to the Id. CIT(A) to decide afresh after providing an opportunity of being heard to the taxpayer. The appeal filed by the taxpayer is hereby allowed for statistical purposes.

Order pronounced in open court on this 3rd day of March, 2021.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

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

**Dated the 3rd day of March, 2021.
TS**

Copy forwarded to:

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

**AR, ITAT
NEW DELHI.**