

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

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.2598/DEL/2018
Assessment Year: 2012-2013

DCIT, Circle-6(1), New Delhi	vs.	CH2M Hill (India) Pvt. Ltd., 604, Shakuntala Building 59, Nehru Place, New Delhi.
TAN/PAN: AAECA3097N (Appellant)		(Respondent)

Appellant by:	Shri Shri Dheeraj Jain, Sr.D.R.		
Respondent by:	Shri Ajit Kr. Jain, CA		
Date of hearing:	11	03	2021
Date of pronouncement:	07	06	2021

ORDER

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the Revenue against impugned order dated 31.01.2018, passed by Id. CIT (A)-XLIV, New Delhi for the quantum of assessment passed u/s.143(3) r.w.s. 144C for the Assessment Year 2012-13.

2. The facts in brief are that the Assessee, i.e., CH2M HILL (India) Private Limited is a subsidiary of CH2M HILL International Limited, USA. The assessee-company is primarily engaged in the business of providing various management and technological solutions in sectors like Water and Waste management, Infrastructure development, Oil & Gas, Transportation, Energy, Chemicals, Master Planning and

Environmental Services. It is engaged in the business of providing engineering services to related as well as unrelated parties. The return of income was filed declaring a total loss of Rs. 22,38,13,628/-. The same was processed u/s. 143(1) of the Act. Subsequently, the case was selected for scrutiny, wherein Assessing Officer examining the Form 3 CEB report that the Assessee-company had also entered into international transaction with its AE, a reference was made to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price of such transaction u/s. 92CA(3) of the Act. The international transaction undertaken by the Assessee during the year under consideration were essentially for rendering of technical consultancy services and availing of technical consultancy services. Details of international transaction as per Form No. 3CEB of the Assessee-company were as follows:

S. No.	Nature of Transactions	Value (in INR)	Method Applied
1	Rendering of Technical Consultancy Services	131,738,873	Transactional Net Margin Method ('TNMM')
2	Availing of Technical Consultancy Services	174,803,353	Other Method
3	Reimbursement of Expenses	34,946,182	Other Method
4	Recovery of Expenses	15,576,983	Other Method

3. In order to benchmark the international transaction of receipt of technical consultancy services, the Assessee had

adopted TNMM as the most appropriate method. As mentioned by the Learned Transfer Pricing Officer (TPO) at page number 3-4 of his order, the Assessee had taken a set of 8 comparable companies with an average margin of 14.65% and had used multiple year data. The Assessee's own margin was worked at 41.31% using segmental data and, therefore, it was Assessee's contention that its international transaction was at Arm's Length.

4. During the transfer pricing assessment proceedings, the TPO rejected the segmental results of the assessee and recomputed the margin of assessee company at (-) 18.23%. Further, the TPO rejected 5 companies out of 8 companies selected by the assessee. Thus, the TPO accepted only 3 companies selected by the assessee. Further the TPO selected 5 new companies and thereafter proposed a set of 8 comparable companies having mean margin of 20.64%. The list of 8 companies is available on page number 7 of the order of the TPO. Accordingly, the TPO proposed an adjustment of INR 25.18 Crores in the show cause notice.

5. During the transfer pricing assessment proceedings, the assessee submitted its detail objections on various companies proposed to be used by the TPO as comparables. After considering the objections of the assessee the TPO finally arrived at set of 5 comparable companies as listed at page number 24 of his order as given below:

S. No.	Comparable	OP/OC%
1	Cades Digitech Pvt. Ltd. (Merged)	2.92%
2	Holtec Consulting Pvt. Ltd.	59%
3	Onward Technologies Ltd.	17.04%
4	Acropetal Technologies Ltd. (Seg)	9.21%
5	TCE Consulting Engineers Ltd.	21.15%
Average		22.72%

6. The TPO applied the mean margin of 22.72% as against the loss of the assessee company as determined by him at (-) 18.23%. The TPO computed the difference between the arm's length price and the price charged by the assessee at Rs. 25,97,46,129/-. However, the TPO adjusted the difference in the ratio of international transactions to the total transaction and proposed an adjustment of Rs. 6,76,11,918/- being upward adjustment to the ALP of the international transaction.

7. Aggrieved, the Assessee approached the Ld. CIT (A), challenging the adjustment, who partly allowed the Assessee's appeal. A brief summary of order of CIT (A) as per the order giving effect to the order of the CIT (A) dated 23/08/2019, filed by the assessee in paper book on page number 17, is as under:

S. No.	Comparable	OP/OC% as per the TPO's order	OP/OC% as per the directions of the CIT(A)

1	Cades Digitech Pvt. Ltd. (Merged)	2.92%	1.26%
2	Holtec Consulting Pvt. Ltd.	59%	Excluded
3	Acropetal Technologies Ltd. (Seg)	9.21%	9.21%
4	TCE Consulting Engineers Ltd.	21.15%	21.15%
5	Onward Technologies Ltd.	17.04%	14.89%
6	Development Consultants P. Ltd.	Not in TP order	18.09%
Average		22.72%	12.92%

8. Thus, the adjustment of Rs. 6,76,11,918/- made on this account was reduced to Rs. 5,25,28,068/-. Thereafter, both the Appellant and the Department have filed their respective appeals before this Tribunal against the adjustment made by Ld. AO/ Ld. TPO and relief granted by CIT (A) to the Appellant, respectively. With respect to the Assessee's appeal, the Appellant assessee subsequently filed an application under the "The Direct Tax Vivad se Vishwas Act, 2020" in order to buy peace and settle the dispute. Relevant intimation in this regard have been placed in the paper book at page number 7.

9. Now, the Department's appeal is before the Tribunal challenging order of the CIT (A) by raising the following grounds of appeal:-

"1. On the facts and circumstances of the case, the Ld. CIT(A) erred in exclusion of comparable i.e. Holtec Consulting Pvt. Ltd. By ignoring the TP proceedings wherein it was established that the company is

primarily engaged in the business of rendering engineering consultancy services.

2. On the facts and circumstances of the case, the Ld. CIT (Appeal) erred by ignoring the fact that an entity can be excluded from the list of comparables only on the ground of incompatibility taking into account comparability factors as is stipulated u/s 92C(1) of the Income Tax Act, 1961 and Rule 10B(2) & (3) of the Income Tax Rules 1962 and not on the basis of higher or lower profit rate.

10. In relation to the above grounds, the Ld. Departmental Representative ('DR') submitted that the Revenue is aggrieved with erroneous exclusion of Holtec Consulting Pvt. Ltd. The DR referred to the order of the TPO and mentioned that the assessee company is primarily engaged in providing planning, consulting, engineering, operations and technical consultancy services in the field of water and waste management, infrastructure development, oil and gas, transportation, energy, chemicals, master planning and environmental services. Ld. DR referring to page number 19 of the TPO's order mentioned that the comparables selected by the TPO broadly perform functions similar to the assessee and are part of the same industry segment. He pointed out that the services provided by the company are in the nature of technical services which may not be exactly same, but the services are technical services, provided by the engineers. Hence both the assessee company and the comparable perform the services which are comparable.

11. Referring to the order of the Ld. CIT (A) on the exclusion

of Holtec Consulting Pvt. Ltd. LD. DR pointed out that the CIT(A) on page number 85 of her order while granting relief has followed her order for the AY 2013-14. On being enquired the AR for the assessee pointed out that the appeal for AY 2013-14 is still pending before this ITAT. He further submitted that the year under appeal i.e. AY 2012-13 being the first year in which the Holtec Consulting Pvt. Ltd. was added as a comparable by the TPO may be decided on the facts of this year. Learned DR relied heavily on para number 14 of the TPO wherein the TPO has mentioned the reasons for inclusion of this company as a good comparable.

12. On the contrary the Learned AR for the assessee referred to the annual report of Holtec Consulting Pvt. Ltd. as placed in the paper book at page number 605 and also the extract of the website of this company available on page number 651 of the paper book. Referring to the extracts of the website the AR pointed out that Holtec Consulting Pvt. Ltd. is not only into Engineering Support and Detailing but also into Cement, Power and Highways & Bridges. It provides a wide range of services from concept to commissioning of green field modernization/conversion/expansion of cement as well as captive power plants/waste heat recovery-based power plant projects. In addition, this company also operates in other related areas such as Highways and Bridges engineering support and detailing, building material handling, alternate fuel and raw material etc. Thus, the AR argued that the functional profile of this company cannot be compared with

that of the assessee company.

13. Ld. AR also referred to page number 642 of the paper book to demonstrate that there are no segmental accounts available which can be used for the purpose of comparability with the assessee company presuming some of the activities are comparable. The AR then relied upon the findings of the Ld. CIT (A) wherein it is held that functional profile of the assessee company is not similar to that of the company under reference at the entity level and the segmental accounts are not available.

14. We have considered the aforesaid submissions and also perused the relevant findings given in the impugned order as well as material referred to before us. The only comparable which has been challenged before is, Holtec Consulting Pvt. Ltd. This was the comparable chosen by the TPO. The assessee has challenged the inclusion of the said comparable on account of functional dissimilarity as this company was having diversified operations and services including geology and mining project and construction management, environment management, performance enhancement, logistics etc. Further, it has no segmental account for various schemes of income. However, the ld. TPO held that since the assessee is engaged in providing various management and technological solutions services in the field of water and waste management, infrastructure development, etc. which can be broadly compared to the functions performed by this

company which is also in the nature of technical services. Before us, the ld. counsel as pointed out from the annual reports of the said company that Holtec Consulting Pvt. Ltd. is not only to be engineering support and detailing but also into cement power, highways and bridges. It provides wide range of services from concept of commissioning of green field modernization/conversion/ expansion of cement as well as captive power plants recovery based power plant projects. In addition to this, company also operates in highways and bridges, engineering supports and dealing, building materials, material handling, alternate fuel and raw materials etc. For carrying of such activities and revenues earned from such diversified activities, no segmental accounts are available. This fact has been duly noted by the ld. CIT (A) at pages 84 and 85 of the appellate order. Once it is an admitted fact that there is no segmental account to various activities and diversified services, ostensibly it would be difficult to benchmark the margin of the said company with the assessee company. Precisely, on this ground alone, the ld. CIT (A) is directed to exclude the said company. The relevant portion of the ld. CIT (A) dealing with this comparable reads as under:

NOTES TO FINANCIAL STATEMENTS FOR THE YEAR ENDED MARCH 31, 2013

NOTE-15

Revenue from operations

<i>Particulars</i>	<i>March 31, 2013</i> <i>(Rs.)</i>	<i>March 31, 2012</i> <i>(Rs.)</i>
<i>Income from consultancy services</i>	<i>750,576,267</i>	<i>785,049,917</i>

32 Segment Reporting

The company is primarily engaged in the business of rendering engineering consultancy services to its clients located in India & abroad. As the office of the company is situated at one place in India accounts are being maintained centrally, the management is of the view that the accounting standard “Segment Reporting (As- 17) issued by the institute of Chartered Accountants of India is not applicable to the company. However, the management is examining the applicability of the same and will determine the manner of accounting to retrieve the data required as per the reporting requirement of AS-17 if found applicable.

It can be seen from the above, above services provided by this company in the nature of technical services. Hence, though services provided by it may not be exactly same, but they are technical services provided by engineers. Hence, as per the discussion in the ‘General Discussion’ section, it is a comparable.

Further, the Annual Report is available in the public domain and assessee can obtain it from the website of the MCA or this office. ”

(b)The appellant has furnished the following information from the website of the company (Source:<http://www.holtecnet.com/index.php?id=2>—) and stated that the company is functional dissimilar

ABOUT HOLTEC

Incorporated in 1967, Holtec Consulting Private Limited is an ISO-certified consulting company, primarily positioned to service the entire gamut of needs of the global cement industry. It also offers comprehensive services in the areas of Power, Highways, Bridges and Engineering Support Services for Bulk Material Handling & Structural Steel Detailing its portfolio of services spans all disciplines

of Engineering, Business Consulting, Geology & Mining, Project & Construction Management, Environment Management, Performance Enhancement, Logistics Etc. In addition Holtec operates and maintains cement plants globally for its clients and also provides solutions encompassing the integrated delivery of services and products through its domestic and international group entities.

Since its inception, Holtec has delivered significant value to its 800+clients comprising of cement producers, equipment and service providers EPC and construction firms, infrastructure developers investing and funding bodies and all other relevant stakeholders through 3,900 + consulting assignments in 90+countries executed by its 300+multi disciplinary staff with an experience inventory of 600+ person-years.

Our Services

Holtec offers a wide range of services from concept to commissioning for green-field modernization/conversion/expansion of cement as well as captive power plant/Waste heat recovery based power plant projects. In addition, we also operate in other related areas such as Highways and Bridges, Engineering Support and Detailing, building Materials, Material Handling, Alternate Fuel and Raw Materials (AFR) etc.

Because it is engaged in various sector of the economy and primarily caters to the global cement industry. It has a diversified portfolio of services that spans around engineering, geology & mining, business consulting, project & construction Management, environment management, performance enhancement, logistics, etc. It has also been stated that the company also offers wide range of services from concept to commissioning for green-field, modernization/ conversion/expansion of cement as well as captive power plants recovery based power plant projects.

(c) The appellant has further stated that the segmental accounts of this company are not available in public domain, which makes it difficult to analyze or select a particular segment of this company, if found comparable to the Appellant's business activities - as the company's entire operations cannot be considered comparable to that of the Appellant.

(d) It is further stated that the profit is 72.45%, which is abnormally high. It has been observed both in the OECD Guidelines as well as the decision of the Delhi Tribunal in the case of Mentor Graphics (supra) that very high profit and high loss making companies ought not to be considered for the purpose of benchmarking as it would skew the profit margin of the comparable set of companies.

(e) In view of the above discussion it is observed that the functional profile of the appellant is not similar to that of the company under reference at the entity level. It is also noted that segmental data is not available and that the company has showed abnormal profits during the year. In view of the same, the AO/TPO is directed to exclude Holtec Consulting Pvt. Ltd. from the final list of comparables.”

(b) In the year under reference it is seen that the material facts of the case are similar. The appellant has stated that the above-mentioned comparable should not be included in the final set due to non-availability of segmental accounts; abnormal profit margins and significantly higher asset base. A perusal of the annual report placed in the paper book shows that segmental accounts are not available for the year under reference and that the company has a much higher asset base. Accordingly, this ground of appeal is decided in favour of the appellant.

15. In view of the aforesaid facts on record and as discussed above, we do not find any reason to deviate from the finding of the ld. CIT (A) for exclusion of this comparable. Same is

accordingly confirmed. Accordingly, the TPO is directed to exclude the said company from the list of the comparables and; secondly, the Revenue's appeal is dismissed.

16. In the result, the appeal of Revenue is dismissed.

Order pronounced in the Open Court on 7th June, 2021

Sd/-

**[PRASHANT MAHARISHI]
[ACCOUNTANT MEMBER]**

DATED: 07/06/2021

PKK:

Sd/-

**[AMIT SHUKLA]
JUDICIAL MEMBER**