

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.421/Bang/2016
Assessment Year : 2011-12

Lloyds Offshore Global Services Private Limited Unit2, Level-2 BagmaneTridib B- wing Bagmane Technology Park CV Raman Nagar Bengaluru 560 093 PAN NO : AAACL9321N	Vs.	Deputy Commissioner of Income-tax Circle-4(1)(1) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Chavali Narayan, A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	28.10.2021
Date of Pronouncement	:	28.10.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 17.12.2015 passed by the A.O. for assessment years 2011-12 u/s 143(3) r.w.s. 144C of the Act in pursuance of directions given by Ld. Dispute resolution Panel (DRP). The grounds of appeal urged by the assessee read as under:-

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1. *The learned AO/ Transfer Pricing Officer ("TPO") have erred, in law and in facts, by making an addition of Rs.85,85,786 to the total income of the Appellant on account of adjustment in the arm's length price of the international transactions entered by the Appellant with its associated enterprises. Accordingly, the learned AO has assessed the total income at Rs. 2,74,56,554 as against the returned income of Rs. 1,88,70,768 as computed by the Appellant;*
2. *The learned AO/ TPO and the learned DRP have erred, in law and in facts, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("Rules"), conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction, and holding that the Appellant's international transaction is not at arm's length;*
3. *The learned AO/ TPO have erred, in law and in facts, by not considering Impresario Event Management India Private Limited as a comparable company, disregarding the directions issued by the DRP;*
4. *The learned AO/ TPO and the learned DRP have erred, in law and in facts, by determining the arm's length margin/ price using data pertaining only to FY 2010-11 which was not available for almost of the comparable companies to the Appellant **at the time of** complying with the transfer pricing documentation requirement;*
5. *The learned AO/ TPO and the learned DRP have erred, in law and in facts, by accepting / rejecting companies based on unreasonable comparability criteria;*
6. *The learned AO/ TPO and the learned DRP have erred, in law and in facts, by not providing any adjustment for the differences in working capital level of the Appellant vis-a-vis that of the comparable companies;*
7. *The learned AO/ TPO has erred in considering the penalty of Rs. 68,82,700 paid under Employees Provident Fund and Miscellaneous Provisions Act, 1952, as operating in nature, and accordingly has computed the operating margin on operating cost at 7.21%;*
8. *The learned AO/ TPO and the learned DRP have erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies;*
9. *The learned AO/ TPO and the learned DRP have erred, in computing the arm's length price without considering the +/- 5 percent variation from the arm's length price as permitted to the Appellant under the provisions of section 920(2) of the Act;*

Grounds relating to corporate tax matters

10. *The learned AO has erred in granting short credit of advance tax of Rs 10,00,000 paid by the Appellant for FY 2010-11, which has resulted into higher tax demand;*

General Grounds

11. *The learned AO has erred, in law and in facts, by levying interest of Rs.24,27,374, and Rs.90,556 under section 234B and 234C of the Act respectively;*

12. *The learned AO has erred, in law and in facts, in initiating penalty proceedings u/s 271(1)(c) of the Act.*

2. The Ground No.5 and 7 have been modified as under by the assessee; vide its letter dated 2nd September, 2021.

“Ground 5 – The learned AO/TPO and the learned DRP have erred, in law and in facts, by accepting/rejecting companies based on unreasonable comparability criteria

The learned AO/TPO/DRP have erred, in law and in fact, by accepting the following as comparable companies:

a) ICC International Agencies Limited.

The learned AO/TPO/DRP have erred, in law and in fact, by rejecting the following as comparable companies:

a) EDCIL (India) Limited

b) ICRA Management Consulting Services Limited

c) Indus Technical & Financial Consultants Limited

Ground 7 – The learned AO/TPO has erred in considering the penalty of Rs.68,82,700 paid under Employees Provident Fund and Miscellaneous Provisions Act, 1952, as operating in nature, and in considering liabilities no longer required written back of INR 6,03,728 as non-operating in nature while computing the operating margin on operating cost of Lloyds India at 7.21%.”

3. The above grounds given rise to the following issues:-

a) TP adjustment made by the A.O.

b) Short credit of advance tax.

Other grounds are either general in nature or consequential.

4. The assessee was incorporated in October, 2003. It primarily, oversees its principal LTSBs Outsourcing Contracts in India and provided following support services to its A.E.

- Staff Welfare support
- Risk and compliance management
- Incident and crisis management coordination

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- Corporate Social Responsibility (CSR)
- Industry representation
- Provide support to business units in industry regulation and trends
- Provide support in seeking other opportunities
- Supplier Management Support
- Other services.

Hence the assessee is engaged in providing Business support services. The TPO selected companies engaged in “market support services”. The Ld A.R submitted that the assessee is not aggrieved by that, since business support services is akin to market support services.

5. The assessee received Rs.21.25 crores during the year under consideration from its A.E for providing business support services. The assessee has selected TNM method as most appropriate method and OP/OC has provided level indicator. The assessee selected 10 comparable companies in its transfer pricing study. The A.O. rejected the TP study of the assessee and selected following 3 companies.

Sl. No.	Name of the company	OP/Cost (%)
1	Asian Business Exhibition & Conferences Ltd.	19.51
2	Cyber Media Research Ltd.	10.59
3	I C C International Agencies Ltd.	24.66
Average		18.25%

Accordingly, the TPO made adjustment of Rs.85,85,786/-.

6. Before Ld. DRP, the assessee sought inclusion of 3 companies namely HT Music, ITDC and Impressario. The Ld. DRP rejected the 2 companies namely HT Music & ITDC and directed the AO/TPO to include Impressario Event Management India Pvt. Ltd., in final set of comparables. Following the directions issued by Ld DRP, the AO

passed the final assessment order. Aggrieved, the assessee has filed this appeal before us.

7. The first issue relates to the Transfer pricing adjustment made by the TPO and partially confirmed by Ld DRP. The assessee has raised various contentions on the Transfer pricing adjustment.

I.1 The first contention of Ld A.R was that the TPO/A.O, while passing the consequential order, did not include Impressario Event Management India Pvt. Ltd as comparable company as directed by Ld. DRP. Accordingly, he sought a suitable direction from the Tribunal.

I.2 We heard Ld. D.R. on this issue and perused the record. Since the Ld. DRP has already directed inclusion of Impressario Event Management India Pvt. Ltd., we direct the AO/TPO to include the same in the final set of comparables.

II.1 The next contention of the assessee is with regard to exclusion of two comparable companies. The Ld. A.R. submitted that the two comparable companies selected by TPO, viz., Asian Business Execution & Conferences Ltd. and ICC International Agencies Ltd. have been held to be not good comparables in the case of ALCON Laboratories India Pvt. Ltd. (IT(TP)A No.221/Bang/2016). Accordingly, he prayed for exclusion of the above set of two companies.

II.2 We heard Ld. D.R. and perused the record. We notice that the assessee has not raised any specific ground with regard to Asian Business Execution & Conferences Ltd. Accordingly, we decline to entertain the contentions with regard to the above said company. The Ld A.R submitted that M/s ICC International

Agencies Ltd has been held to be not good comparable company for an assessee providing market support services, by the coordinate bench in the case of ALCON Laboratories India Pvt. Ltd. (supra). The relevant observations made by the Tribunal in respect of this company are extracted below:

"21. The relevant ground of Revenue is Ground No.2 which is reproduced below:-

"2. The DRP erred in directing to exclude M/s. ICC International Agencies Ltd., holding it to be functionally dissimilar on the ground of non-availability of information regarding nature of services, when the primary activity of the comparable involves processing orders including for its principal concern also the DRP erred in imposing conditions beyond the scope of law and business reality by rejecting all close comparables on one or the other ground, without appreciating that no two companies can ever be the same."

22. As far as exclusion of ICC International Agencies Ltd. by the DRP is concerned, it was brought to our notice by the learned counsel for the assessee that in the case of AMD India Pvt. Ltd., Vs. ACIT in IT(TP)A No.1487 & 1496/Bang/2015 order dated 06.04.2017 ITAT Bangalore Bench for the very same segment for AY 2011-12 was pleased to hold that this company was not comparable with MS Services providing company. The relevant observations are as follows:-

"2. ICC International Agencies Ltd :

The assessee submitted before the DRP that this company is functionally not comparable since it is engaged in trading activity and thereby functionally different. The DRP rejected this company for the reason that this company is functionally dissimilar and for incorrect margin computation made by the TPO. The Revenue is on appeal . The assessee pleaded that this is functionally different and relies on this Tribunal decision in ITO v Interwoven Software Services(India) P Ltd [TS -723-ITAT - 2016 -Bang-TP ay 2010-11. The relevant portion of the order IT(TP)A.1487 & 1496/Bang/2015 Page - 36 from ITO v Interwoven Software Services (India) P Ltd [IT(TP)A.No.461/Bang/2015 dt 26.8.2016 for a y 2010-11 is extracted as under :

"28. For this segment, the assessee is seeking exclusion of two comparables i.e. M/s Acentia Technologies Ltd., and M/s ICC International Agencies Ltd., The claim of assessee regarding exclusion of M/s Acentia Technologies Ltd. is also covered in favour of the assessee by the same Tribunal order rendered in the case of

M/s Electronics for Imaging India (P)Ltd.,(Supra) and respectfully following the same Tribunal order, we direct the AO/TPO to exclude this company from the list of final comparable because the ld. DR of the revenue could not point out any difference in facts.

29. Regarding exclusion of second company, it was submitted by the learned AR of the assessee that i.e. M/s ICC International Agencies Ltd., (Supra) this is the claim of the assessee that annual report of this company available on page 1100 & 1104 of the paper book. As per the same, we find that this company is deriving income from trading activity and also maintaining inventories. Both these arguments are supported by annual report of this company available on page 1100 & 1104 of the paper book. Since the assessee is not engaged in trading activity, in our considered opinion, this company cannot be considered as good comparable in the present case and hence we direct the AO/TPO to exclude his company from the list of final comparable."

23. Following the said decision, we direct exclusion of the aforesaid company ICC International Agencies Ltd., from the list of comparable companies. The ld. DR submitted that ICC International Agencies Ltd., was accepted by assessee himself as comparable before the TPO. We find that before the DRP in the objections, the assessee has objected to inclusion of ICC International Agencies Ltd., as comparable company on several counts at page 05 of the written submission filed before the DRP on 04.12.2015. The Special Bench of the Hon'ble Tribunal in the case of [DCIT v. Quark Systems \(P\) Ltd.](#) ([2010] 38 SOT 307 (CHD.) (SB) has held that an assessee cannot be precluded from seeking exclusion of a company selected by it in its TP study, when the company is otherwise not comparable to the assessee. We therefore reject that argument of the learned DR in this regard."

Following the above said decision of coordinate bench, we direct exclusion of ICC International Agencies Ltd. from final set of comparable companies.

III.1 The next contention is on inclusion of three companies. In the modified grounds of appeal, the assessee has sought inclusion of three companies viz., M/s EDCIL (India) Ltd; M/s ICRA Management Consulting Services Ltd and M/s Indus Technical & Financial Consultants Ltd. At the time of hearing, the Ld A.R did not press inclusion of M/s Indus Technical & Financial Consultants Ltd.

III.2 With regard to the remaining two companies, viz. M/s EDCIL (India) Ltd and M/s ICRA Management Consulting Services Ltd, the Ld A.R submitted that these two companies have been held to be not good comparable companies in the assessee's own case in AY 2008-09 in ITA No.5928/Mum/2012. When the bench pointed out that the present appeal is related to AY 2011-12 and how the decision rendered for AY 2008-09 could be followed without analyzing the functions carried out by these two companies in the year relevant to AY 2011-12, the Ld A.R submitted that these two companies may be restored to the file of TPO/AO to examine these two companies afresh.

III.3 The Ld D.R did not object to the prayer of Ld A.R. Accordingly, we restore these two companies to the file of AO/TPO for examining the same afresh.

IV.1 The next contention on T.P adjustment relates to the issue of not considering "reversal of provision" as operating in nature. The Ld. A.R. submitted that the TPO has considered reversal of provision as non-operating in nature. He submitted that it should be treated as operating in nature.

IV.2 We heard Ld. D.R. on this issue and perused the record. With regard to the reversal of provision, we notice that the same represents writing off of liabilities no longer required. We find no reason for not taking it as operating income, since it is part and parcel of business activities carried on by the assessee. Accordingly, we direct the A.O. to include reversal of provision amounting to Rs.6,03,728/- as operating in nature.

V.1 The next contention of the assessee is that the penalty paid under PF Act should be considered as non-operating in nature. The

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Ld. A.R. submitted that the assessee has paid penalty of Rs.68.82 lakhs under Employee Provident Fund and Miscellaneous Provisions and the TPO has considered the same as operating in nature. The Ld. A.R. contended that the penalty paid should be considered as non-operating in nature, as it does not relate to day to day operations of the assessee company.

V.2 We heard Ld D.R and perused the record. With regard to the penalty payment of Rs.68.82 lakhs, we are unable to agree with the contention of the assessee that it is non-operating in nature. The above said payment has been made by the assessee under Employees Provident Fund and Miscellaneous Provisions Act and this payment is linked to salaries paid by the assessee. Hence it is connected to the business carried on by the assessee. Hence, the penalty paid under the above said Act, in our view, constitutes operating expenses in the hands of the assessee. Accordingly, we hold that the AO/TPO was right in considering the same as operating in nature.

VI.1 The next issue contested by the assessee relates to working capital adjustment. The Ld. DRP did not grant working capital adjustment for want of details. The Ld A.R submitted that the assessee shall furnish necessary details to the AO/TPO, if an opportunity is provided. Accordingly, we restore this issue to the file of the AO/TPO for examining the claim of the assessee, provided the assessee furnished relevant details in support of its claim to AO/TPO.

VII.1 The Ld. D.R. did not press the ground relating to granting of risk adjustment.

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VIII.1 The next issue relates to consideration of +/- 5% variation while computing the arm's length price. We restore this issue to the file of AO/TPO.

8. The last issue urged by the assessee relates to short credit of advance tax by Rs.10 lakhs. We restore this issue to the file of AO to examine the claim of the assessee.

9. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 28th Oct, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 28th Oct, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.