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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
And
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.5525/Del./2018
(ASSESSMENT YEAR : 2014-15)

ACIT, Circle 6, New Delhi.	vs.	M/s. CH2M Hill (India) Pvt. Ltd., 2nd Floor, R-27, Pratap Nagar, Jangpura B, New Delhi – 110 014.
		(PAN : AAECA3097N)
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Ajit Jain, CA
Shri Siddesh Chaughle, Advocate
REVENUE BY : Shri Mrinal Kumar Das, Senior DR

Date of Hearing : 01.11.2021
Date of Order : 21.01.2022

O R D E R

PER AMIT SHUKLA, JM :

The aforesaid appeal has been filed by the Revenue against the impugned order dated 31.05.2018, passed by the ld. Commissioner of Income-tax (Appeals)-44, New Delhi for the quantum of assessment order passed under section 143(3)/144C of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2014-15.

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 INR 23,87,25,233/-. The assessee company had also entered into international transaction for which the 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.

3. The international transactions 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 under:

S. No.	Nature of Transactions	Value (in INR)	Method Applied
1	Rendering of Technical Consultancy Services	15,40,69,765	Transactional Net Margin Method with OP/OC as the PLI
2	Availing of Technical Consultancy Services	9,32,05,201	Other Method
3	Reimbursement of Expenses	5,51,01,620	Other Method
4	Recovery of Expenses	1,66,05,576	Other Method

4. In order to benchmark the international transaction of receipt of technical consultancy services, the assessee had adopted TNMM as the most appropriate method. The assessee had taken a set of 8 companies with an average margin of 12.14% and had used multiple years data. The assessee's own margin was worked at 22.32% using segmental data and, therefore, it was assessee's contention that its international transaction was at Arm's Length.

5. During the transfer pricing assessment proceedings, the TPO rejected

the segmental results of the assessee and recomputed the margin of assessee company at (-)18.30%. Further, the TPO rejected all the 8 companies selected by the assessee. Then after his own search analysis, the TPO selected 8 new companies and thereafter proposed a set of 8 companies having mean margin of 19.36%. The list of 8 companies has been mentioned at page number 6 of the order of the TPO. The TPO proposed an adjustment of INR 5.12 Crores in his show cause notice on the transaction of rendering of technical consultancy.

6. During the transfer pricing assessment proceedings, the assessee submitted its objections on various companies proposed to be used by the TPO as comparable. After considering the objections of the assessee the TPO finally used a set of 8 companies as listed on page number 22 of his order as given below:

S.No.	**Comparable**	**OP/OC%**
1	Autoline Design Software Limited	-7.78%
2	HSCC (India) Limited	61.61%
3	IIDC Limited	12.31%
4	Kicons Limited	22.25%
5	Korus Engineering Solution Pvt. Ltd.	21.24%
6	Kratos Energy& Infrastructure Ltd.	3.77%
7	Mitcon Consultancy & Engg. Services Ltd.	24.98%
8	Tata Consulting Engineers Ltd	16.47%
Average		**19.36%**

7. The TPO applied the mean margin of 19.36% as against the loss of the assessee company as determined by him at (-) 18.30%. He computed the difference between the arm's length price and the price charged by the assessee at Rs. 19,99,20,203/-. However, the TPO adjusted the difference in the ratio of international transactions to the total transaction and proposed an adjustment of Rs. 5,12,47,767/- being upward adjustment to the ALP of the international transaction.

8. Aggrieved, the assessee approached the Ld. CIT (A), challenging the adjustment, who partly allowed the appeal. A brief summary of order of CIT (A) as per the order giving effect to the order of the CIT (A) dated 07/02/2019, can be highlighted in the following manner:

S.No.	**Comparable**	**OP/OC% as per the TPO's order**	**OP/OC% as per the directions of the CIT(A)**
1	Autoline Design Software Limited	-7.78%	-7.78%
2	HSCC (India) Limited	61.61%	Excluded
3	IIDC Limited	12.31%	8.64%
4	Kicons Limited	22.25%	Excluded
5	Korus Engineering Solution Pvt. Ltd.	21.24%	Excluded
6	Kratos Energy& Infrastructure Ltd.	3.77%	3.77%
7	Mitcon Consultancy & Engg. Services Ltd.	24.98%	Excluded
8	Tata Consulting Engineers Ltd	16.47%	15.86%
9	Development Consultants P. Ltd.	Not in TP Order	15.25%
10	Mahindra Consulting Engineering Ltd	Not in TP Order	2.30%
11	Acropetal Technologies Limited	Not in TP Order	-5.86%
Average		**19.36%**	**4.60%**

9. Thus, the adjustment of Rs. 5,12,47,767/- made on this account was reduced to Rs. 3,11,56,174/-. Thereafter, both the assessee and the Department filed their appeals before this Tribunal against the adjustment made by Ld. AO/ Ld. TPO and relief granted by CIT (A) to the assessee, respectively. With respect to the assessee's appeal, the assessee subsequently filed an application under the "The Direct Tax Vivad se Vishwas Act, 2020" in order to buy peace and settle the dispute.

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

> **"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is legally justified in excluding the following comparable from the comparables chosen by TPO in determining Arm's Length Price in relation to International Transactions:-**
>
> **(i) Mitcon Consultancy & Engg. Services Ltd**
> **(ii) Kicons Limited**
> **(iii) Korus Engineering Solution Pvt. Ltd."**

11. In relation to the above grounds the Ld. Departmental Representative ('DR') submitted that the Revenue is aggrieved with erroneous exclusion of above mentioned three companies. 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. The DR referring to page number 18-20 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. Learned DR relied heavily on para number 11 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 referring to the synopsis filed by the assessee on October 29, 2021 through email, submitted as under: -

a. Kicons Limited: -

This company was selected by the TPO as a comparable and the assessee had objected to the inclusion of this company on the ground of functional comparability. While dealing with the objections of the assessee the TPO on Page number 19 of his order has mentioned that this company is involved in Legal, accounting, book-keeping and auditing activities; tax consultancy; market research and public opinion polling; business and management consultancy. The TPO further mentioned that the company is not engaged in solar power projects and other civil activities; hence it is a suitable comparable. Ld. CIT(A) agreed with the assessee's contentions that this company is functionally dissimilar as it is engaged in execution contracts pertaining to solar power projects and other civil activities, the revenue of which is accounted as per the percentage completion basis given in accounting standard - 7. Accordingly, Ld. AO/TPO was directed to exclude it from the final set of comparables.

Before us, the Ld. AR submitted that this company is engaged in execution of contracts relating to solar power projects and other civil activities. It is further submitted that these services are absolutely different from what the assessee is engaged into. Further, referring to Page number 607 of the paper book being the Annual Report of the said company, Ld. AR pointed out that the business/ service nature of the comparable company is to engage in providing engineering design services and construction services for solar power and other civil activities. Without prejudice, it was argued by the Ld. AR that the Ld. TPO himself has mentioned that this company is involved in Legal, accounting, book-keeping and auditing activities; tax consultancy; market research and public opinion polling services, while the assessee is 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. Ld. AR argued that by no stretch of imagination the services provided by Kicons Limited are comparable to the assessee company.

b. Korus Engineering Solutions Limited: -

This company was selected by the TPO as a comparable and the assessee had objected to the inclusion of this company on the ground of functional comparability and for the reason that the annual report of this company is not available in public domain. Rejecting the objections of the assessee, Ld. TPO stated that it is involved in Technical Consultancy and Project Engineering, hence it is a suitable comparable. On the contrary the Ld. CIT(A) agreed with assessee's contention that this company is functionally dissimilar as it is engaged in development of steel industry and that annual report was not available in public domain. It also showed wide variation in profit margin. Accordingly, Ld. CIT (A) directed the Ld. AO/TPO to exclude it from the final set.

Before us, the Ld. AR for the assessee referring to Page number 713 of the paper book, which is an extract from the website of this company, submitted that this company is engaged in development of the steel industry and that these services are different from the services in which the Assessee is engaged into. Further referring to Page number 614 of the paper book, the Ld. AR submitted that only the financial statements of the company were available, but management discussion, auditor's report, director's report, etc. were not available and thus, it was not possible to analyze the detailed functional profile of the company.

c. Mitcon Consultancy & Engg. Services Limited:-

This company was selected by the TPO as a comparable and the assessee had objected to the inclusion of this company on the ground of functional comparability and for the reason that segmental accounts are not available. Rejecting the arguments of the assessee Ld. TPO mentioned that this company is engaged in providing technical & engineering consultancy services to its clients and accordingly, considered the same in final set of comparables. On the contrary the Ld. CIT(A) agreed with the assessee's contention that this company is engaged in a number of fields like Textiles, Banking and Financial Services, Energy and Carbon Consultancy Services and that the segmental accounts are not available. Accordingly, Ld. CIT(A) directed Ld. AO/TPO to exclude this company from the final set of comparables.

Before us, the Ld.AR of the assessee referring to page number 639 of the paper book pointed out that the annual report of this company shows that it is engaged in providing multiple services such as banking & financial solution services, securitization and financial restructuring services, MITCO e-SCHOOL, and others services which are textiles, market research, infra consulting, wind power generation, decentralized power generation projects, energy and carbon consultancy service, etc. Having read the above, the Ld. AR referred to page number 698 of the paper book to demonstrate that the company is deriving revenue from (i) Consultancy fees (ii) vocational training (iii) IT Courses and (iv) income from laboratories. The AR mentioned that even if the consultancy services are considered comparable to the assessee there are no segmental accounts available. For this purpose the AR referred to page number 711 of the paper book which shows that as per the Note 41 (Segment Reporting) of financial statement, the company operates in two segments – Consultancy & Training and

Wind Power Generation. Neither wind power generation segment and nor the consultancy and training segment which encapsulates income from consultancy fee, vocational training, etc. can be considered as comparable to the services provided by the Assessee.

13. Thus the Ld. AR, relying on the order of the Ld. CIT(A) vehemently argued that the three companies discussed above are not functionally comparable to the assessee company and are therefore liable to be rejected.

14. We have carefully considered the submissions and gone through the impugned order as well as material placed on record. The international transactions which are subject matter of the dispute are with regard to availing of technical consultancy services and rendering of technical consultancy services from the AE. The FAR analysis carried out by the assessee for both rendering as well as availing of services was provided as under :-

"*Functions Performed*

a. *Project Execution*

Appellant rendering of technical consultancy services to overseas AEs – Overseas AEs contract with independent customers for their respective projects and the Appellant only provides technical consultancy services to its overseas AEs based on their demand and need. Thus, the Appellant is not responsible for project execution.

Appellant availing of technical consultancy services from overseas AEs – The Appellant contracts with independent customers for its projects and the overseas AEs only provide technical consultancy services to the Appellant based on its demand and need. Thus, the overseas A £s are not responsible for project execution.

b. *Quality Control*

Appellant rendering of technical consultancy services to overseas AEs - The responsibility of ensuring the quality to independent customers lies with the contracting party (i.e. overseas AEs in this

case). Thus, the Appellant is not responsible for ensuring quality to end customer as it lies with the overseas AEs.

Appellant availing of technical consultancy services from overseas AEs - The responsibility of ensuring the quality to independent customers lies with the contracting party (i.e. Appellant in this case). Thus, the overseas AEs are not responsible for ensuring quality to end customer as it lies with the Appellant.

c. Marketing Strategy and development

Appellant rendering of technical consultancy services to overseas AEs - Overseas AEs prepare their own marketing strategy for their projects with independent customers and the Appellant only provides technical consultancy services to its overseas AEs based on their demand and need. Thus, the Appellant is not responsible for preparing marketing strategy & development.

Appellant availing of technical consultancy services from overseas AEs - The Appellant prepares its own marketing strategy for its projects with independent customers and the overseas AEs only provides technical consultancy services to the Appellant based on its demand and need. Thus, the overseas AEs are not responsible for preparing marketing strategy & development.

d. Pricing

Appellant rendering of technical consultancy services to overseas AEs - The pricing related decisions for contracts entered between the overseas AEs and independent customers are taken by the respective overseas AEs. The Appellant has no role to play in such decisions; and is only engaged in providing technical consultancy services to its overseas AEs based on their demand and need.

Appellant availing of technical consultancy services from overseas AEs - The pricing related decisions for contracts entered between the Appellant and independent customers are taken by the Appellant. The overseas AEs do not pay any role in such decisions; and is only engaged in providing technical consultancy services to the Appellant based on its demand and need.

Assets utilized by the Appellant

The Appellant employs routine tangible assets required in rendering the above-mentioned technical consultancy services. The Appellant does not own or develop any significant non-routine intangible assets. Any significant intangible assets used by the

Appellant in its operations in India are owned by its overseas parent company.

Risk profile of the Appellant

The Appellant is engaged in providing technical consultancy services to its overseas AEs, who in turn are the contracting entities for their respective contracts with the independent customers : the Appellant does not bear Market Risk (occurs when a company is subjected to adverse sales conditions), Credit Risk (occurs when a client is unable to fulfil its obligation to pay for its purchases or services under the terms of its contract), Service Liability Risk (associated with service failures, including non-compliance with generally accepted or regulatory standards). However, the Appellant bears Manpower Risk (since it is responsible for retaining skilled workforce to carry out its activities) and Foreign Exchange Risk (as it gets payment for its invoices from overseas A £s in foreign currency and bears risk of any fluctuation of exchange rates between foreign currency and Indian Rupee)."

15. In the TP study report, the assessee had stated that, *firstly*, it operates as low risk bearing technical consultancy service provider by providing technical services to its overseas AEs; and *secondly*, the overseas AEs operate as low risk bearing technical consultancy service providers by providing technical services to the assessee. In order to benchmark, the said international transaction of receipt of technical consultancy services, the assessee adopted TNMM as the MAM and after taking a set of 8 comparables, average margin of 12.14% was worked out and the assessee had shown PLI of 22.32% using segmental data and accordingly, it was reported that international transactions are at arm's length. Now, the only dispute before us is with regard to three comparables, namely, (i) Kicons Limited; (ii) Korus Engineering Solutions Limited; and (iii) Mitcon Consultancy & Engg. Services Limited. All the aforesaid three companies were selected by the TPO for which the assessee had objected for inclusion of said companies. The ld. CIT (A) after considering the functional

comparability and going through the details have directed the TPO/AO to exclude the said three companies from the final set of comparables.

16. Insofar as **Kicons Limited** is concerned, the TPO had included the said comparable on the ground that this company is functionally comparable. From the perusal of the TPO's order itself, it is seen that this company is involved in legal, accounting, book-keeping &auditing activities, tax consultancy, market research & public opinion polling, business and management consultancy. Apart from that, this company is engaged in execution of contracts for solar power projects and other civil activities, the revenue of which has been accounted as per the percentage completion method in accordance with AS-7. This fact has been appreciated by the ld. CIT (A) that it is not a good comparable and directed the TPO to exclude it. Once it is an admitted fact that this company is engaged in executing contracts relating to solar power projects and other civil activities which are entirely different from the activities and functions carried out by the assessee company. Apart from that, this company is also involved in various other activities like legal, accounting, book-keeping & auditing activities, tax consultancy, market research and public opinion polling services, whereas the assessee company is engaged in business of providing various management and technological solutions in the sector of water & waste management, infrastructure development, oil & gas, transportation, energy, chemicals, master planning and environment services. Thus, on functional dissimilarity, this company cannot be held to be comparable for the purpose of benchmarking the PLI of the assessee, hence we hold that the ld. CIT (A) has rightly excluded the said company from the final set of comparables.

17. As regards **Korus Engineering Solutions Limited**, the ld. TPO held that it is involved in technical consultancy and project engineering. Whereas, as noted by the ld. CIT (A), this company is engaged in development of steel industry and its annual report is not available in the

public domain. What has been referred to is the extract from the website of this company that the company is engaged in the development of steel industry. In absence of any annual report, these services cannot be held to be similar to the services in which assessee has been engaged into. What is available only the functional statement but nowhere management discussion, director's report, etc. were available, hence it is difficult to analyse the FAR of the said company. On this ground alone, this company has rightly been excluded by the ld. CIT (A).

18. Lastly, in the case of **Mitcon Consultancy & Engg. Services Ltd**., the TPO has included this comparable observing that this company is engaged in providing technical and engineering consultancy services to its clients. Whereas ld. CIT (A) has held that this company is engaged in a number of fields like textiles, banking & financial services, energy & carbon consultancy services and that the segmental accounts are not available. From the perusal of the annual report of this company, it is seen that it is engaged in providing multiple services, such as, banking & financial solution services, securitisation & financial restructuring services, MITCO e-School and other services which are in the field of textiles, market research, infra consulting, wind power generation, decentralised power generation, projects, energy and carbon consultancy service etc.. This company is deriving revenue from (i) consultancy fees; (ii) vocational training; (iii) IT courses; and (iv) income from laboratories. No doubt, the consultancy fees can considered to be similar to the services rendered by the assessee but in absence of any segmental details, it is difficult to see the profit margin under various streams of revenue. As per Note 41 of the segmental report of the company given in the financial statement, it has two segments viz., consultancy & training and wind power generation. Neither wind power generation nor training segment can be said to be comparable to the services provided by the assessee. Accordingly, we are of the opinion that ld. CIT (A) has rightly excluded this company as comparable from the

final set of comparables. Accordingly, grounds raised by the Revenue are dismissed.

19. In the result, the appeal filed by the Revenue is dismissed.

Order was pronounced in open court on 21st day of January, 2022.

Sd/-	**sd/-**
(DR. B.R.R. KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21.01.2022
TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.