

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI PRASHANT MAHARSHI (ACCOUNTANT MEMBER) &
SMT. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1756/MUM/2017 (A.Y.2012-13)

NBC Fashion India Private Limited Splendor Forum, 4 th Floor, Units 401-412, Jasola District Centre, New Delhi-100 025 PAN : AADCN0495L	vs	Assistant Commissioner of Income- tax, Tax Circle 3(2)(2), Mumbai Aayakar Bhavan, M.K. Road, Mumbai-400 020
APPELLANT		RESPONDENT

Assessee represented by	Shri Madhur Agarwal
Department represented by	Shri Tejinder Pal Singh Anand Sr.AR

Date of hearing	26/05/2022
Date of pronouncement	23/08/2022

ORDER

Per Kavitha Rajagopal (JM):

This appeal has been filed by the assessee as against the order of the Assistant Commissioner of Income-tax, Circle 3(2)(2), Mumbai (Assessing Officer / Transfer Pricing Officer (TPO) passed under section 144(C) r.w.s. 92CA(3) of the Income-tax Act, 1961 pertaining to assessment year 2012-13.

2. Following are the grounds of appeal:-

"Ground No. 1: General Ground

1.1 On the facts and in the circumstances of the case and in law, the assessment order passed in pursuance to the directions issued by the Hon'ble Dispute Resolution Panel-1 ('DRP') is a vitiated order, as the Asst. Commissioner of Income-tax, Range 3(2)(2) ('Ld. AO')/DRP erred both on facts and in law in making/confirming the addition made to the Appellant's income.

Ground 2: Transfer Pricing adjustment in respect of procurement support service provided to Associated Enterprise ('AE')

2.1 On the facts and in the circumstances of the case and in law, in relation to the procurement support services provided to AE, the Ld.AO / Ld.TPO erred in passing the assessment order without giving cognizance to the directions issued by the Hon'ble DRP u/s 144C of the Act, with regard to one of the comparable company, viz. Marketing Consultants Agencies Limited, thereby making transfer pricing adjustment of INR 8,721,791 to the total income of the Appellant.

2.2 On the facts and in the circumstances of the case and in law, the Hon'ble DRP / Ld. AO/ Ld. TPO i erred in rejecting the fact that economic analysis undertaken by the Appellant in the Transfer Pricing ('TP') documentation was in accordance with the provisions of the Income-tax Act, 1961 read with the Income-tax Rules, 1962 ('Rules').

2.5 On the facts and in the circumstances of the case and in law, the Hon'ble DRP / Ld. AO/ Ld. TPO erred in cherry picking and adding two comparables namely BVG India Limited and Apitco Limited, which were not functionally comparable to the Appellant.

2.6 On the facts and in the circumstances of the case and in law, the Hon'ble DRP / Ld. AO/ Ld. TPO erred in considering the foreign exchange loss to the tune of INR 62,35,144 as operating cost while j computing the margin of the Appellant.

2.7 Without prejudice to the above grounds, on the facts and in the circumstances of the case and in law, the Hon'ble DRP / Ld.AO / Ld. TPO erred in rejecting the adjustments required to be made for appropriate comparison for difference in working capital levels and the difference in risks borne by the Appellant and the comparable companies

The Appellant therefore prays that the aforesaid adjustment of INR 8,721,791 proposed by the Ld. AO / Ld. TPO be deleted.

Ground No. 3: Penalty Proceedings

3.1 On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed any particulars of its income nor furnished any inaccurate particulars of the income.

That the Ld.AO be directed to re-calculate the interest levied under section 234A and 2346 after considering the relief granted by the Hon'ble Tribunal in respect of the grounds raised by the Appellant."

3. The brief facts are that the assessee is in the business of support services to its Associated Enterprises (AEs) being captive service provider engaged in the business of providing procurement, support services to facilitate procurement of portal / merchandise from the Indian subcontinent region by the TJX group (AEs). The assessee filed its return of income for the impugned assessment year on 23/05/2013 declaring total income of Rs.3,84,91,930/-. The assessee's case was then selected for scrutiny and was referred to the Transfer Pricing Officer (TPO) for determination of arm's length price (ALP) for the international transactions entered into by the assessee. The TPO passed an order under section 92CA(3) of the Act dated 19/01/2016 proposing an adjustment of Rs.3,30,21,116/- for the international transaction of the assessee with its AEs. Subsequent to this, the Assessing officer issued a draft assessment order dated 17/03/2016 under section 143(3) read with section 144C(1) of the Act proposing adjustment of Rs.3,30,21,116/- and thus determining the total income at Rs.7,15,13,046/-. Aggrieved by this, the assessee filed objection before the Dispute Resolution Panel (DRP). The DRP partly confirmed the proposed addition. Further aggrieved, the assessee is in appeal before us.

4. Having heard both the learned representatives and perused the materials on record, we find that ground 1 is a general ground. Therefore, we proceed to adjudicate the appeal on the other grounds.

5. **Ground 2.1** : This ground pertains to the rejection of comparables, viz. Marketing Consultants Agencies Ltd (MC & AL). It is pertinent to point out that the said comparable was suggested by the TPO to include as it is comparable for which the assessee has raised its objection before the DRP on the ground that the annual report of the said company was not available and also that the website of the said company was also unavailable. The assessee

has further objected on the ground that the reference website indicates that the said comparable company was engaged in providing advertising services which was different from that of the assessee company. The assessee further objected to the functional comparability of the said company with that of the assessee company. The Ld.DRP had then directed the TPO / AO to provide the financial data of the said company to the assessee wherein the assessee did not object to the comparability of the said company after perusing the financial working or the business profile of the said comparable.

6. During the appellate proceedings, the Ld.AR for the assessee contended that the TPO / AO had excluded the said comparable, viz. Marketing Consultants & Agencies Ltd on the ground that it was a government company. The Ld.AR further stated that the Ld.TPO / AO has rejected the said comparable inspite of the direction of the Ld.DRP, though the assessee has not objected to the inclusion of the said comparable company. The Ld.DR relied on the order of the Ld.TPO / AO and stated that the said comparable was rightly rejected by the AO / TPO.

7. Upon perusal of the orders of the lower authorities, we are of the considered opinion that the AO / TPO has not substantiated the deduction by the AO / TPO in rejecting comparable recommended by the Ld.DRP. It is evident that the TPO has added three new comparables, viz. (1) Apitco Ltd; (2) BVG India Ltd; and 3) Marketing Consultants & Agencies Ltd, out of which, the TPO / AO has accepted Apitco Ltd and BVG India Ltd as comparable case. On the contrary, the Ld.AO / TPO has failed to specify on what grounds the impugned comparable company was rejected except for the reason that it is fully owned subsidiary of Government of Karnataka Company and that 100% of equity shares are held up by Government Companies. The assessee further

submitted that the Ld.TPO / AO has included another Government Company (Aptico Ltd) as one of the comparable company.

8. We have also considered the written submission of the assessee, wherein it has stated that as per section 144C(10) and 144C(13) of the I.T. Act, 1961, the Assessing Officer shall in conformity with the directions, complete the assessment and that the directions of the assessment and that the directions of the DRP are binding on the Ld.AO / TPO. The relevant provisions of section 144C(10) and 144C(13) are reproduced, as below:-

"(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer."

"(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete notwithstanding anything to the contrary contained in section 153 [or section 153^], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received."

It is also pertinent to point out that if Marketing Consultants & Agencies Ltd was included as a comparable company, then the value of international transaction of the assessee would be at arm's length wherein the margin of comparable cases would be calculated as under:-

S.No.	Name of comparable company	OP / TC
1.	Priya International Limited – Indenting Segment	12.89%
2.	Marketing Consultants & Agencies Ltd	10.32%
3.	BVG India Ltd	24.21%
4.	Apitco Limited	24.45%
Mean		17.97%

In view of the above, we are of the view that rejection of Marketing Consultants & Agencies Ltd as comparable company inspite of the directions of Ld.DRP is unsustainable and contrary to the provisions of section 144C(10) and 144C(13) of the Act.

8. On the above observation, we direct the TPO / AO to include Marketing Consultants & Agencies Ltd as a comparable company and benchmark the international transaction of the assessee accordingly.

9. As the ground raised by the assessee is allowed, the other grounds need not be adjudicated at this juncture since they are academic in nature.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 23rd August, 2022.

Sd/-

sd/-

(PRASHANT MAHARSHI)	(KAVITHA RAJAGOPAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 23/08/2022

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Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar), **ITAT, Mumbai**

