

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member**

**Sh. Yogesh Kumar US, Judicial Member**

**ITA No. 1967/Del/2017: Asstt. Year: 2011-12**

ACIT, Circle-41(1), New Delhi	Vs	Karl Storz Endoscopy India Pvt. Ltd., D-181, Okhla Industries Area, Phase-1, New Delhi-110020
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAACK4816D</b>		

**ITA No. 2281/Del/2017: Asstt. Year: 2011-12**

Karl Storz Endoscopy India Pvt. Ltd., 11 <sup>th</sup> Floor, 28, Barakhamba Road, New Delhi-110001	Vs.	DCIT, Circle-14(1), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAACK4816D</b>		

**Assessee by : Sh. V. K. Sabharwal, Adv.**

**Sh. Ravi Kapoor, CA**

**Revenue by : Sh. Bhagwati Charan, Sr. DR**

<b>Date of Hearing: 24.11.2022</b>	<b>Date of Pronouncement: 24.01.2023</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeals have been filed by the Revenue and the assessee against the orders of the Id. CIT(A)-19, New Delhi dated 31.01.2017.

2. In ITA No. 1967/Del/2017, the revenue has raised the following grounds:

"(1) *"In the facts and circumstances of the case, the order of Ld. CIT(A) is perverse in directing the TPO to exclude comparables i.e. Quippo Valuers and Auctioneers Private Limited , Global Procurement Consultants Limited, Power System Operation Corporation Limited, MMTV Limited, Info Edge(India) Limited, Crystal hues Limited, on the basis of comparables being functionally different without*

*considering the fact that the comparables are pioneer in providing marketing services, advertisement services, internet based promotion of product etc which are the whole and soul of Market support service i.e. is the key service provided by the assessee."*

- (2) *" In the facts and circumstances of the case, the order of Ld. CIT(A) is perverse in directing the TPO to delete the following comparables i.e. Apitco Limited, DFHL Property Service Limited on the ground of absence of segmental data without considering the fact a mere mention of a segment in the service provided by the comparable company (which may or may not be there)does not indicate presence of segmental data. Further not considering the fact that application of TNMM does not call for rejection of a functionally similar comparable just on the fact that it does not have separate segmental data available."*
- (3) *"In the facts and circumstances of the case, the order of Ld. CIT(A) is perverse in deleting the Commission expense from the AMP expense without considering the fact that the expenses made toward the commission has a direct impact toward penetration of the market, brand promotion, creation and development of marketing intangibles which belongs to the AE."*
- (4) *"In the facts and circumstances of the case, the order of Ld. CIT(A) is perverse in deleting the adjustment made by the TPO regarding the AMP issue by putting his reliance on verdict of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile without appreciating the fact that SLP has been filed in the supreme Court in the said matter against the verdict of the Hon'ble High Court."*
- (5) *"That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law."*

3. In ITA No. 2281/Del/2017, the assessee has raised the following grounds:

- "1. *That on facts and in law, the Learned Commission of Income Tax(Appeals) has erred in selecting comparable ICC International Limited and Priya International Limited, which were rejected by the TPO and no appeal was preferred by the assessee company for their inclusion in the final list of the comparable, yet these were directed to be included in the final list of comparable by the Learned CIT(Appeals).*
2. *That on facts and in law, the Learned Commission of Income Tax(Appeals) has erred in rejecting comparable Concept Communication Ltd. and Crystal Hues Ltd., which*

were accepted by the TPO and no appeal was preferred by the assessee company for their exclusion in the final list of the comparable, yet these were directed to be included in the final list of comparable by the Learned CIT(Appeals).

3. *That on facts and in law, the Learned Assessing Officer, Transfer Pricing Officer and Commission of Income Tax(Appeals) has erred in exclusion of IDC Limited, which was clearly mentioned as selected in the TPO order, yet were excluded from the final list of the comparable for unknown reasons.*
4. *That on facts and in law, the Commission of Income Tax(Appeals) has erred in exclusion of Indus Technical & Financial Consultant Ltd, India Tourism Development Corporation Ltd., EDCIL (India) Ltd.'& In House Production Ltd. on the basis of the comparability.*
5. *That on facts and in law, the Learned Assessing Officer and Transfer Pricing Officer has erred in making the assessment under Section 143(3) of the Income Tax Act,1961, by adding Rs.2,16,33,306 on account of market support segment to taxable income.*
6. *The appellant submits that each of the above grounds/sub-grounds are independent and without prejudice to one another.*
7. *The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeals according to law."*

4. Karl Storz Endoscopy India Private Limited (Assessee) is a 100% subsidiary of Karl Storz GmbH & Co. KG. Germany ("Karl Storz Germany"). The Company is engaged in the import and trading of endoscopic instruments and providing after sales services to customers.

5. Assessee also provides marketing and service support to the existing dealer network of Karl Storz Germany in India. The marketing support provided by the Assesses primary encompasses sponsorship of seminars and conferences of prominent associations of the medical community and advertisement campaigns in the print media while service support pertains to warranty repair and

exchange of damaged equipment sold by Karl Storz Germany's dealers in India. In return for the services rendered and significant expenses incurred by the Company on marketing, Karl Storz Germany pays commission to Assessee on sales made by existing dealer network of AE in India. The Company also provides post warranty repair and maintenance service on chargeable basis.

6. Return declaring loss of Rs. 34,36,011/- was e-filed on 30.11.2011. During the year under consideration, the assessee has undertaken international transactions with associated enterprises. Under the provisions for Section 92CA of the Income Tax Act, the international transactions entered into by the Assessee with the AE was referred to the TPO for determining the ALP.

7. The assessee has benchmarked its international transactions under two segments Trading segment and provision of marketing support services. The assessee has benchmarked the trading segment by applying Resale Sale method (RPM) and Provision for marketing support services by applying TNMM.

8. The Id. TPO issued his order dated 28.01.2015 u/s 92CA (3) of the IT Act, 1961 and total adjustment of Rs.14,01,01,219/- was made as under:

SN	Description	Amount (Rs.)
1	On Account of Market Support Segment	2,16,33,306/-
2	On Account of AMP expenditure	11,84,67,913/-

## **ADDITION ON ACCOUNT OF MARKETING & SUPPORT SERVICES SEGMENT**

9. The assessee company is providing Provision of Marketing support services to the AEs. The marketing support provided by the company, primary encompasses sponsorship of seminars and conferences of prominent associations of the medical community and advertisement campaigns in the print media while service support pertains to warranty repair and exchange of damaged equipment sold by Karl Storz Germany's dealers in India. In return for the services rendered. In return of the significant expenses incurred by the Company on marketing, Karl Storz Germany pays a commission to Karl Storz India on sales made by its distributors in India.

10. The assessee has selected itself as the tested party and TNMM has been used as MAM and PLI is OP/OC. The assessee has selected 13 companies as comparable on the basis of the search conducted in the public database Prowess and Capita Line Plus. The PLI of the Company is arrived at 14.21% on cost whereas the average PLI of the 13 comparable companies is arrived at 7.14% on multiple year basis as per the analysis in the TP document.

Sr.	Name of the company	Operating profits on operating costs (%)
1	ICRA Management Consulting Services Ltd.	15.90%
2	ID C (India) Ltd.	10.33%
3	ICC International Agencies Ltd (Segmental)	36.45%
4	Indus Technical & Financial Consultants Ltd.	12.05%
5	Inhouse Productions Ltd (Segmental)	-0.88%
6	Inmacs Management	50.35%

	Services Ltd	
7	Priya International Ltd (Segmental)	4.32%
8	India Tourism Development Corporation Ltd.	-13.78%
9	EDCIL (India) Ltd.	2.34%
	Arithmetic mean	13.01%

11. The TPO has rejected all comparables selected by the Assessee except I C R A Management Consulting Services Ltd. and IDC (India) Limited vide its order dated 28/01/2015. TPO conducted a fresh search on revised filters. As a result, TPO proposed a final set of 14 comparable with an average margin of 22.91%. However, TPO has left out IDC (India) Limited, which was accepted by the TPO as comparable.

12. The comparables selected by the TPO is as under:

Sl. No.	Company Name	OP/OC
1	Concept communication Ltd.	4.73%
2	Crystal Hues Ltd.	11.69%
3	Apar Chematek Lubricants Ltd.	42.31%
4	Cyber Media Research Ltd.	10.60%
5	DH L Property Services Ltd.	14.86%
6	ICRA Management Consulting Services Ltd.	16.14%
7	Info Edge (India) Ltd.	45.53%
8	MMTV Ltd.	32.94%
9	Power System Operation Corporation Ltd.	22.52%
10	Quadrant Communications Ltd.	14.58%
11	Apitco Ltd.	25.17%
12	Global Procurement Consultants Ltd.	30.86%
13	TSR Darshaw Limited	41.60%
14	Quippo Valuers & Auctioneers Pvt. Ltd.	7.23%
	Average	22.91%

Computation of Arm's Length Price:

Particulars	Amount
Actual Cost of Assessee (A)	24,86,24,256
Arm's Length Revenue (B=A* 122.91%)	30,55,84,073
Revenue shown by Assessee	28,39,50,767
Adjustment u/s 92CA	2,16,33,305

13. On appeal, CIT (Appeals)-19 directed,

**To exclude** from final set of comparable pertaining the adjustment on account of MSS

M/s Indus Technical & Financial Consultant Ltd.

M/s Inmacs Management Services

M/s India tourism Development Corporation Ltd.

M/s EDCIL (India) Ltd.

M/s In House Production Ltd.

M/s Crystal Hues Ltd.

M/s Apar Chemate K lubricants Ltd.

M/s DHFL Property Services Ltd.

M/s Info Edge (India) Ltd.

M/s MMTV Ltd.

M/s Media Research User Council

M/s Power System Operation Corporation Ltd.

M/s Apitco Ltd.

M/s Global Procurement Consultants Ltd.

M/s TSR Darashaw Ltd.

M/s Quippo Valuers and Auctioneers Pvt. Ltd.

M/s Concept Communication Ltd.

**14. To include** in the final set of comparable pertaining the adjustment on account of MSS.

M/s ICC International Agencies Ltd.

M/s Priya International Ltd.

M/s ICRA Management Consulting Services Ltd.

M/s Cyber Media Research Ltd.

M/s Quadrant Communications Ltd.

15. As per the direction of the Ld. CIT(A) final set of comparables turn out to be follows:

Sl. No.	Particulars	Margin
1.	ICC International Agencies Ltd	36.45%
2.	Priya International Ltd	4.32%
3.	ICRA Management Consulting Services	15.90%
4.	Cyber Media Research Ltd	10.60%
5.	Quadrant Communications Ltd	14.58%
	Average	16.37%

16. The average margin of the comparable companies is 16.37% and that of the assessee company is 14.21% which is under the 5% range of relaxation under second proviso of Section 92C. The adjustment proposed in segment of MSS gets reduced to Nil following the direction of Ld. CIT.

17. Aggrieved, the revenue filed appeal against the decision of the Id. CIT(A) directing the TPO to exclude the following comparables. The decision of the Id. CIT(A) and acceptance and rejection thereof by the Tribunal is tabulated as under alongwith the reasons:

1.	<p><b>Global Procurement Consultants Ltd.</b></p> <p>This company is promoted by Export-Import Bank of India in association with leading Indian Public Sector and Private Sector consultancy organization on the basis of public private partnership model that offers collective Indian experience and expertise through the provision of a range of advisory services with particular focus on Procurement.</p> <p>The company provides technical assistance in enhancing equality, transparency, efficiency and effectiveness of procurement and implementation service to help attain desired institutional and corporate objective. The expertise of this company is available to various sectors including power, water resources, transportation, industries etc.</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>
2.	<p><b>Power System Operation CL</b></p> <p>The function of a grid maintenance company are completely different from a marketing company. The company is also not in to marketing of power. Even otherwise the</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>

	marketing of power is an entirely different ball game as compared to marketing of other goods and services. The company is not comparable and should be excluded.	
3.	<p><b>MMTV Ltd.</b></p> <p>The company derived income from broadcasting and advertisements. This it is media for markets and is not engaged in marketing activities itself. Broadcasting advertisement and having such consultants for promotion is entirely different. The company is not correct comparable.</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>
4.	<p><b>Info Edge (India) Ltd.</b></p> <p>The company owns several websites that serve as online search portal company to the needs of the customers.</p> <p>A perusal of the several websites which are owned by the company indicates that it is primarily in business of internet related business.</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>
5.	<p><b>Crystal Hues Ltd.</b></p> <p>The assessee has no objection to consider this as a comparable.</p>	<p>Hence, the decision of the Id. CIT(A) is not accepted.</p>

6.	<p><b>Quippo Valuers and Auctioneers Pvt. Ltd.</b></p> <p>The company which is in activities of auctions and valuations is functionally different from the appellant. The functions involved in auctions are totally different from promotion. Further no segmental arte available to quantify the extent and profitability of valuation activities which are of a completely different nature.</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>
7.	<p><b>Concept Communications Ltd.</b></p> <p>On the facts of the instant case, the corrected OP/OC may be taken.</p>	<p>Hence, the decision of the Id. CIT(A) is not accepted.</p>
8.	<p><b>DHFL Property Services Ltd.</b></p> <p>The company has two activities namely technical consultancy and project advisory, but the segmental results are not available, therefore, it cannot be selected and should be excluded.</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>
10.	<p><b>Apitco Ltd.</b></p> <p>The Apitco Ltd. deciphers that this company is providing services in nature of project report preparation, technical and economic studies, feasibility studies, micro enterprises</p>	<p>FAR not comparable.</p> <p>Hence, the decision of the Id. CIT(A) is accepted.</p>

	<p>management, skill developments, project management consulting, market and social research and asset reconstruction management services. No segment wise profitability data of these services is available. The TPO has considered this company as comparable at entity level. This is a tiny resemblance of some of the function performed by this company with the overall activities undertaken by the assessee. However, in absence of any segmental data, the company cannot be taken as comparable on an entity level.</p>	
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**ADDITION ON ACCOUNT OF AMP EXPENSES**

18. The TPO bifurcated Advertizing & Market Promotion (AMP) expenses into routine and non-routine following the Bright Line Test (BLT) and held that the appellant was providing service to its AEs because its AMP expenses were excessive. The TPO applied a markup of 15% on the non-routine expenditure of the appellant based on the PLR of the SBI. Thus, the TPO made an addition of account marketing intangibles developed by the appellant as a result of marketing expenditure on the basis of Bright Line Test (BLT) vide order under section 92CA(3).

19. Accordingly, the arm's length price in respect of the international transaction relating to AMP services is calculated as below:

Arm's length AMP i.e. the bright line	3.21%
Sales of the assessee company	45,34,45,893
Arm's length amount of AMP	1,45,55,613
Amount spent by the assessee company on AMP	11,75,71,190
Amount in excess of the arm's length amount of the AMP	10,30,15,577
Mark up @ 15%	1,54,52,337
Adjustment on account of AMP	11,84,67,913

20. The TPO rectified his order u/s 92CA(3) passed on 28.01.2015 vide order u/s 92CA(5) r.w. sec 154 dated 12.03.2015 and reduced the addition on account of AMP Expenses from Rs.11,84,67,913/- to Rs.2,80,11,203/-. Thereafter, on appeal, CIT Appeals-19 vide its order 31.01.2017 has deleted the entire addition of Rs.2,80,11,203/- on account of AMP.

21. The Revenue came into appeal before ITAT on the grounds that the Id. CIT(A) ought not to have relied on the verdict of Hon'ble High Court of Delhi in the case of Sony Ericsson as the department has filed SLP before the Hon'ble Supreme Court. At this juncture, it would suffice to hold that the judicial discipline mandates to follow the ratio of the Hon'ble Jurisdictional High Court and hence the appeal of the revenue on this ground is liable to be dismissed.

22. In the result, the appeal of the assessee is partly allowed and that of the revenue is dismissed.

Order Pronounced in the Open Court on 24/01/2023.

Sd/-

**(Yogesh Kumar US)**  
**Judicial Member**

**Dated: 24/01/2023**

**\*Subodh Kumar/AK, Sr. PS\***

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**