

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.2304/Del/2015
Assessment Year : 2010-11

Technicolor India Pvt. Ltd., (earlier known as Thomson Holding India Pvt. Ltd.,) 306 – 308, 3 rd Floor, Bestech Chambers, Block B, Sushant Lok -1, Gurgaon, Haryana. PAN : AABAR4851 Q	Vs.	The Dy. Commissioner of Income- tax, Circle-25(1), New Delhi.
APPELLANT		RESPONDENT

Assessee by	:	Shri Mukesh Butani, Advocate
Revenue by	:	Shri Sreenivas T Bidari, CIT (DR)

Date of hearing	:	22.11.2022
Date of Pronouncement	:	15.02.2023

ORDER

This is an appeal filed by the assessee against the order passed by the AO u/s 143(3) r.w.s 144(13) dated 02.01.2015 on the Appeal under section 253(1) of the Income Tax Act, 1961 (the Act") against the order dated January 02, 2015 (received on February 17, 2015) passed under section 143(3) read with section 144C(13) of the Act passed by the Deputy Commissioner of Income Tax, Circle 25(1) and

25(2), New Delhi (AD") for the assessment year ('AY") 2010-11 with the following grounds of appeal:-

"1. That on the facts and circumstances of the case and in law, the AO has erred in completing the assessment of the Appellant at loss of INR 12,34,57,840 as against the returned loss of INR 12,83,66,843 by the Appellant. The Dispute Resolution Panel (DRP"), further, erred in upholding the said action of the AO.

2. That on the facts and circumstances of the case and in law, the assessment order passed by the AO is invalid and bad in law.

Grounds in relation to market support services:

3. That on the facts and circumstances of the case and in law, the AO / DRP / Transfer Pricing Officer ("TPO") erred in making a transfer pricing adjustment of 1NR42,76,899 on account of provision of market support services, alleging the same to be not at arm's length in terms of the provisions of section 920 of the Act read with Rule 10 of the Income-tax Rules, 1962 ("the Rules").

4. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in not appreciating the fact that the Assessee is a support service provider, carrying out limited functions and assuming limited risks.

5. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in arbitrarily rejecting the comparable companies and modifying the comparable set selected by the Appellant in relation to market support services, alleging the same to be functionally incomparable.

5.1 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in arbitrarily rejecting modifying the search process and the filters for the purpose of benchmarking the international transaction pertaining to rendition market support services.

6. That on the facts and circumstances of the case and in law, the AO/ DRP / TPO erred in arbitrarily selecting companies which were functionally not comparable in relation to market support services.

Grounds in relation to warranty support services:

7 That on the facts and circumstances of the case and in law. the AO / DRP / TPO erred in making a transfer pricing adjustment of

INR 6,32,101 in respect of the international transaction pertaining to warranty support, alleging the same to be not at arm's length in terms of the provisions of section 920 of the Act read with Rule 100 of the Rules.

8. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in arbitrarily rejecting the comparable companies and modifying the comparable set selected by the Appellant in relation to warranty support services, alleging the same to be functionally incomparable.

8.1 That on the facts and circumstances of the case and in law, the AO/ DRP / TPO erred in arbitrarily rejecting/ modifying the search process and the filters for the purpose of benchmarking the international transaction pertaining to warranty support services.

9. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in selecting companies which were functionally not comparable in relation to warranty support services.

Other Grounds:

10. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred by ignoring the provisions of Rule 10B(4) of the Rules and judicial pronouncements, which advocates the usage of multiple year data of comparable companies for the purpose of determination of the arm's length price as defined under section 92F of the Act.

11. That on the facts and the circumstances of the case and in law, the AO/ DRP / TPO have erred in not considering foreign exchange fluctuation gain I loss while computing the operating margins.

12. That on the facts and the circumstances of the case and in law, the AO/DRP/ TPO have erred in not providing any comparability and economic adjustments as required under Rule 10B(1)(e)(iii) of the Rules.

That on the facts and circumstances of the case and in law, the AO I DRP I TPO erred in not providing the Appellant the benefit of (+1-) 5% range as provided by the proviso to section 920(2) of the Act.

That on the facts and circumstances of the case and in law, the AO has erred in directing and I or arising interest under sections 234A, 234B, 2340 and 234 0 of the Act.

Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for 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.”

2. The brief facts of the case are that the assessee filed return of income declaring total loss of Rs.12.84 crores on 27/09/2010. The case was selected for scrutiny and statutory notices were issued to the assessee. The assessee company was engaged in the business of trading in broadband equipments (set top boxes) and related equipments. The company is also engaged in providing marketing/warranty support services to customers in India on behalf of group companies. It has also set up a research & development units in banglore in the previous year to provide services to group companies. The assessee provides services, technologies, systems and equipments to companies operating in the media and entertainment industry. Thomson Group's customers are media and entertainment content creators (movie studios, broadcasters, game developers, and advertisers), content distributors (broadcasters, network operators, internet service providers, retailers) and high-end users of video technology. Headquartered in France, Thomson Group operates in around 30 countries and is active in growing markets in North America, Europe

and Asia. The Group's business is organized in three strategic business units; services, systems and technology.

3. The international transactions involves provision of marketing support services and warranty support services. Since the assessee was involving in international transactions with its AEs accordingly the AO considers it necessary and expedient to refer the case to the TPO to determine the arms length price (ALP) of the international transactions. The AO after obtaining approval from the competent authority, matter was referred to the TPO.

4. During the year the following international transactions were undertaken which is as under:-

Nature of International Transaction	Method	Amount (In INR)
Purchase of finished goods for resale	TNMM	29,244,183
Sale/Return of defective goods	-	11,875,321
Purchase of fixed assets	CUP	2,693,547
Sale of fixed assets-Del Laptop, Server rack mount power, voice network management system	TNMM	4,004,006
Market, Warranty & Business support services	TNMM	53,219,486
Cost allocation for IT infrastructure support services, Cost allocation for SAP local user support services, cost allocation for HR support services	TNMM	5,854,844
Reimbursement of expenses, Reimbursement of expenses in relation to engineering/repair services	-	3,258,824
Issue of Share Capital	-	148,560,000

5. From the TP study report it was observed by the TPO that the assessee was engaged in market support services to its AEs for the purpose of sale of equipments in India and net profit margin of

11.52% on cost for market support services were calculated and for the benchmarking of these transactions the search process for the comparable companies, the assessee adopted prowess and capital line data base and selected 18 companies as comparables and the average margin was calculated at 5.63% by using multiple year data. As per the submission dated 11/09/2013, the margin for current year for the comparable companies was calculated at 7.49% after removing 3 companies. Further in respect of warranty support services as per the TP study report, the margin was calculated at 12.71% and benchmarked for 3 comparable companies was at 11.73% thereafter as per letter dated 11/9/2013 the margin was calculated at 11.49%.

6. From the TP study report and submissions, the comparables selected by the assessee and margin calculation the TPO was not satisfied and he applied for fresh selection of comparables for calculation of margins by applying certain new filters. The assessee also filed objections. The TPO for warranty support services scheme after considering the objections of the assessee selected 11 companies and calculated average margin at 27.70%, which is as under:-

S. No.	Company Name	OP/OC (%)
1	Cades Digitech Pvt. Ltd.	9.02
2	Dalkia Energy Services Ltd.	20.81
3	Engineers India	62.94
4	HSCC (India)	18.32
5	IBI Chematur	52.66
6	I-Design Engg.	11.88
7	Kirloskar Consultants Ltd.	15.64
8	Kitco Ltd.	14.01
9	Mahindra Consulting Engineers Ltd.	23.50
10	Rites Ltd.	50.05
11	T C E Consulting Engineers Ltd.	25.88
Average		27.70

Operating Cost Disclosed	Rs. 41,16,511
Arm's length Margin -27.70%	Rs. 11,40,273
Arm's length Price	Rs. 52,56,784
Price Disclosed in AE segment	Rs. 46,24,683
Difference	Rs. 6,32,101
Adjustment	Rs. 6,32,101

6.1. Accordingly, the TPO calculated the arms length price for warranty support services scheme for adjustment of Rs.6,32,101/-.

7. The provision for market support services, the TNMM method was applied and the following companies were selected by the TPO after considering the objections filed by the assessee.

S. No.	Company Name	OP/OC (%)
1	Apitco Ltd.	40.09
2	Cameo Corp.Serv.	8.26
3	Crystal Hues Limited	9.10
4	Cyber Media Research Ltd. (IDC India)	14.85
5	Global Procurement Consultants Ltd.	37.19
6	H C C A Business Services Pvt. Ltd.	20.05
7	Quadrant Communications Ltd.	13.11
8	Quippo Valuers	25.49
9	T S R Darashaw Ltd.	41.15
10	Karvy Data Mgmt. Services Ltd.	6.47
Average		21.57

Operating Cost	Rs.4,25,52,893
Arm's length Margin 21.57%	Rs.91,78,659
Arm's length Price	Rs.5,17,31,552
Price Disclosed in AE segment	Rs.4,74,54,653
Difference	Rs.42,76,899
Adjustment	Rs.42,76,899

7.1. The TPO suggested for adjustment for marketing support services of Rs.42,76,899/-

8. After receipt of the TPO's order passed u/s 92CA(3), the AO passed draft order on 13/03/2014 u/s 144C of the Act and assessed a total loss after making adjustment of Rs.49,09,000/- (Rs. 6,32,101+ Rs. 42,76,899). The return loss was reduced to Rs.12,34,57,840/-.

9. Aggrieved from the above order, the assessee filed objections before DRP. The DRP after considering the objections filed by the assessee rejected the objections of the assessee and passed order on

01/12/2014. Accordingly the AO passed final assessment order confirming to the adjustment suggested by the TPO and determined the same income/loss as passed in the draft assessment order.

10. Aggrieved from the above order, the assessee filed appeal before the ITAT.

11. The Id.AR reiterated the submissions made before the lower authorities & further submitted that the assessee was engaged in market support services and warranty support services. The AO/TPO/DRP did not accept the objections raised before him. He submitted that the functions performed by the assessee company is different from the comparables selected by the TPO. He submitted that the assessee was engaged in providing the warranty support services to the third party on behalf of its AEs (group companies). For providing support services during the warranty period, Thomson India engaged a sub contractor also who in turn provided the said services to the third party customers on behalf of the assessee and recharged the service fees and service tax from Thomson India with regard to such services. The assessee is only providing warranty services for the goods directly sold by AEs in India which were within the warranty period of 17 to 36 months and primarily covered the manufacturing defects. He further submitted that the companies Engineers India Ltd., IBI Chematur, Rites Ltd., and TCE Consulting Eng. Ltd., are not comparable

companies because the functions performed by these companies are quite different from the assessee company. He has submitted a chart showing the functions performed by them as well as their financial reports. He strongly objected that the comparables selected by the Id. TPO are functionally different and can not be compared with the assessee company. He further submitted that the following three companies turnover are more than 200 crores. As per the various decisions of the Hon'ble High Courts, the companies whose turnover is more than 200 crore should not be considered as comparables. The turnover of the companies is as under:-

1. Engineers India Ltd., - 1,993.8 crores
2. IBI Chematur - 586.54 croes
3. TCE Consulting Eng. Ltd., - 383.47 crores

11.1. These above 3 companies should be excluded on the basis of high turnover and he further submitted that Hon'ble Punjab and Haryana High in ITA No.551 of 2017 vide order dated 05/02/2020 in the case of PCIT Vs. M/s Comverse Net Works Systems India Pvt. Ltd. placed at P.B. Page No. 130 to 141, has directed to the revenue department for exclusion of four companies challenged by the assessee on the basis of functional profiles.

12. The assessee relied on the following judgments:-

- 1) Boeing International Corporation India Pvt. Ltd., in ITA No.1127/Del/2015

- 2) Terex India Pvt. Ltd., in ITA No.4791/Del/2015
- 3) AT & T Communication Services India Pvt. Ltd., in ITA No.1016/Del/2015
- 4) Lummus Technology Heat Transfer BV in ITA No.1817/Del/2015

13. In support of market services, he challenged the following three companies.

- 1) TSR Darashaw
- 2) Aptico
- 3) Global Procurement

13.1. The ld.AR of the assessee submitted in respect of TSR Darsahaw Ltd. that it is engaged in BPO services & he referred to the business profile from the Director's report and submitted that companies are engaged in provision of payroll outsourcing. Payroll process outsourcing continues to be promising even in the current challenging environment and in line with the growth of the business, TSRDL has emerged stronger and has been able to retain its market share. TSRDL has now selected a new Global Payroll E1P application called RAMCO for its fast growing Payroll business, which is on par with similar applications in the business. This will enable TSRDL to be able to cater to various complexities of the payroll requirements of the clients. IT continues to be the key focus wherein the company has installed state of the art infrastructure over the last 12 months

and has changed over to new and latest applications for its traditional business in Registry and Share Transfer business. Accordingly he submitted that the TSRDL is functionally different.

13.2. The Id.AR submitted in respect of Aptico Ltd., it is not functionally comparable. From the annual report of the company the Aptico Ltd., is executing project in various filed under the gamut of technical consultancy. The functional study is as under:-

	Rs.	Rs.
SCHEDULE - 11		
INCOME FROM OPERATIONS		
Micro Enterprises Development		
Skill Development	5,283,039	11,782,673
Entrepreneurship Development	27,575,000	32,259,550
Tourism & Research Studies	10,873,397	3,078,030
Project related Services, Infrastructure Planning & Developmen	14,835,450	20,743,985
Environment Management	32,600,996	18,805,321
Energy related Services	3,998,796	1,000,000
Cluster Development	4,835,206	5,086,749
Asset Reconstruction & Management Services	47,986,516	9,714,128
Emerging Areas	5,503,141	7,802,982
	683,732	-
	<u>154,175,273</u>	<u>110,273,418</u>

13.3 From the above table, it was noticed that the company is engaged in high yield technical consultancy services which include complete project management and is end to end solution and the Aptico employed high skilled employees for the respective technical field and work force and it is also government company which cannot be considered as a comparables.

13.4 Further, the Id.AR submitted that in respect of global procurement Consultant Ltd., the companies engaged in provision of procurement services that vary for various industries and with its

strategic partnerships with various internationally recognized bodies. He also submitted from the Director's report the company has contracts from world bank and other renowned international agency which range in variety of different services and completely different from the operational profile of the assessee. He relied on the judgment of Hon'ble High Court in the case of Philip Morris Services India SA reported in [2019] 109 taxmann.com 376 (Del), in which he submitted that all these 3 companies had been excluded by the Hon'ble High Court of Delhi on the functional profile. He also relied on the following judgments:-

- 1) H & M Mauritz India Pvt. Ltd., in ITA No.490/Bang/2015
- 2) Hyundai Rotem Company in ITA No.1722/Del/2016
- 3) CECAS Services India Pvt. Ltd., in CO No.217/Del/2015

14. The ld.DR relied on the order of the lower authorities. He filed the written synopsis which placed on the paper book pages 1 to 4 filed on 16/12/2020.

15. After hearing rival contentions, the main grievances of the assessee is that proposed adjustment made by the TPO and not accepting the objections filed by the assessee before the ld. DRP in regard to 2 segments viz., market support services is Rs.42,79,899 and warranty support services is Rs.6,32,101/-. Before us the ld.AR

requested that in respect of market support services wanted to exclude the following companies:-

- 1) TSR Darashaw Ltd.
- 2) Aptico Ltd.
- 3) Global Procurement Consultant Ltd.

16. These companies were included by the TPO and confirmed by the DRP while calculation the ALP.

17. After going into the facts of the case and functional profile, we noted from the objections filed before the Id. DRP at appeal set page No. No.30, the companies providing services to AEs for sale of equipments in India and were limited provision of limited risk support and for providing these services, the assessee charges cost plus mark up basis to its AEs. The following functions are performed:-

- 1) Customer identification support -

The assessee undertakes support services pertaining to creating awareness about different products being directly sold by its AEs to its potential customers. The said activities is limited only to creating awareness and company does not contractually sell the products.

- 2) Provision of justified activities

Thomson India acts in a limited capacity as a communication channel between its AEs and the customers for ensuring that the customer understands the products and its functionality. Thomson India undertakes the subject activity through presentation and meeting with the client and as stated does not contractually binds the customers. The Assessee further provides Support services for coordination with the customers and assessee reports on monthly basis of its performance to its AEs.

18. Going through the comparables contested by the Id.AR the functions are not similar with the assessee. The Id.AR relied on the judgment of Hon'ble Delhi High Court in the case of CIT vs Philip Morris Services India SA reported in [2019] 102 taxmann.com376 Delhi (cited supra) support the case of the assessee. The relevant portion of the judgment is as under:-

“2. Revenue is aggrieved by the direction given by the Tribunal to exclude M/s Aptico Ltd., Cameo Crop Ltd., Global Procurement Consultants, Killik Agencies Marketing Ltd. and TSR Darashaw Ltd. from the list of comparables.

3. The respondent-assessee had an Indian Branch office, which had provided various services to associated enterprises of the group. It was engaged in the business of import and distribution of Marlboro brand of cigarettes, export of tobacco leaves and provision of market support services to its associated enterprises.

4. The Tribunal in the impugned order has gone into great depth and details to record findings as to why the five above mentioned companies should be excluded. For the sake of convenience and completeness, we

would reproduce relevant portion of the reasoning given by the Tribunal, which reads:-

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Apitco Ltd., XXXXX

13. As could be seen from the annual report of this company, is company is one of the 18 TCOs was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise Apitco Ltd., was established to provide technical services to other government companies and body corporate. Further this company is engaged in providing services such as asset reconstruction and management, clustered allotment for mega footmarks, and environment services, energy- related services, infrastructure planning and development, energy audit etc. and undoubtedly this company is a high-end consultancy service provider. The annual report further reveals that this company is engaged in providing high-end technical services also.

14. Ld. AR brought to our notice that they Apitco Ltd., was rejected by a catena of decisions rendered by different Benches of this Tribunal including a coordinate Bench of this Tribunal in Ciena India (P) Ltd vs. DCIT in ITA No. 2948 and 3224/del/2013 following which in Avaya India private limited versus DCIT in ITA No. 146/del/2013. He also placed reliance on the nation reported in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/del/2016. In International SOS services India private limited versus DCIT ITA No. 1631/del/2014 this company was excluded on account of being hundred percent government organisation and the appeal against this decision of the tribunal was dismissed by the Hon'ble jurisdictional High Court.. Further it could be seen in Vestegaard Asia private limited verses DCIT in ITA No. 6670/del/2015 and H & M Mouritz India private limited verses DCIT in ITA 282/bankg/2015 it is held that the Aptico Pvt Ltd., is not a good comparable with any company rendering business support services on the ground that this company is a public sector undertaking and its operations are mainly based the on the policy requirements of the government.

15. Further reliance is placed by the counsel on the decision of the Mumbai bench of this tribunal in TysokKrupp industries India private limited verses ACIT in ITA No. 6460/mum/2012 wherein it was held that this company being a government enterprises is not comparable with a private business service provider because in case of government enterprises profit motive is not irrelevant consideration, and government companies work for other public sector undertakings and in that sense the related party transactions are much more than the filter of 25%. This decision of the tribunal was upheld by the Hon'ble Bombay High Court in ITA number 20/02/2018 of 2013.

16. *The reasons recorded by the Tribunal in all the decisions referred to above hold good for the assessee also inasmuch as the assessee is a private company in the field of providing business support services. We, therefore, while respectfully following the ratio laid down in the above decisions hold that Apitco Ltd., is not a good comparable with the assessee and is accordingly liable to be excluded. We, therefore, directly Ld. TPO to exclude this company from the finalist of comparables to benchmark the international transaction relating to the market support services provided by the assessee to its AEs.*

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Global Procurement Consultants Ltd.,

26. *We have gone through the material provided in the paper book in respect of Global Procurement Consultants Ltd. and find that Global Procurement Consultants Ltd., is primarily engaged in preparing and reviewing technical specifications, estimation of costs, selection of vendors, inspection and a expediting and quality control and time management. It is also clear that the company renders the procurement related services in exclusively in CIS countries, Eastern Europe and emerging economies in the African continent, by Kettering relates in the areas like Health, Education, Urban and Rural Development, agriculture, mining, transportation, communication, energy, water resources and other key factors. We also further find from the record that Global Procurement Consultants Ltd., conducts procurement pushed revenue for World Bank financed projects, renders financial advisory services with a high volatile margins.*

27. *This profile what we have observed from the record certainly makes this company to stand apart from the market support service providers. Further it is submitted by the Ld. AR that this company rejected by Ld. DRP, Delhi in the case of travel security services(India) private Ltd. For assessment year 2011-12 by holding that this company is functionality similar and should be deleted from the set of comparable companies rendering business support services. Further a coordinate Bench of this Tribunal in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/de1/2016 excluded this company as comparable to the marketing support services. So also in Adidas technical services [Ltd vs. DCIT](#) in ITA No. 862/de1/2016 and ITA No. 1233/de1/2015 a coordinate Bench of this Tribunal excluded this Global Procurement Consultants Ltd., as a good comparable to the marketing support service providers on the ground of functionality similarity.*

28. *The profile of this Global Procurement Consultants Ltd., as narrated by the Ld. TPO himself speaks in unequivocal terms that this Global Procurement Consultants Ltd., is a company established by the government to serve the purpose of professional procurement and management services*

needs and also to provide combines management services required by the government departments or their project execution agencies to carry out the procurement in a time bound and efficient manner within the framework of government regulations and guidelines of international institutions, which is not such a characteristic of the business of the assessee. The business model itself is different, let alone the disproportion is of the financials. We have no hesitation, in the face of the profile of Global Procurement Consultants Ltd., that it is not a good comparable at all to the assessee and for that matter to any private marketing support service provider, as such we direct the Ld. TPO to exclude this company from the list of comparables to benchmark the international transaction of the assessee in providing the market support services to its AEs.

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TSR Darashaw Ltd.

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39. On a perusal of record and the Annual Report of TSR Darashaw Ltd. we find that TSR Darashaw Ltd. is mainly into the payroll process outsourcing with a new global payroll ERP application called RAMCO for its payroll business. Further the order of Ld. TPO itself reads that TSR Darashaw Ltd. undertakes the registrar and transfer agent activity functions for equity and preference shares, venture instruments and bonds, commercial paper and private placements. Moreover this company, under this segment also undertakes transfer processing customer/query handling and correspondence split/ consolidation/renewal of certificates, processing and distribution of interest to slash dividend warrants, payments by physical warrants/through ECS/director credited. In the segment of Records Management activity, TSR Darashaw Ltd. undertakes storage, retention and tribal of physical and/or electronic records. In the segment of payroll and trust fund activity, TSR Darshaw Ltd. handles the activities normally handled by "Payroll and Retirement Funds" section in any organisation including interface with the regulatory authorities. These functions are not at all comparable with the functions performed by the assessee. At the same time no segmental information is available as to the revenues.

40. Further the coordinate benches of this tribunal in Microsoft Corporation India Private Limited vs. DCIT in ITA No. 5766/de1/2011, [Eli Lilly and Co \(India\) Private Ltd vs. ACIT](#) in ITA No. 788/de1/2015 and [Kobelco Cranes India Private Limited vs. ITO](#) in ITA No. 802/del/2016, [Adobe Systems India Private Limited vs. JCIT](#) in ITA No. 1163/de1/2014, and [Adidas technology Services Private Limited vs. DCIT](#) in ITA No. 862/del/2016 held that TSR Darashaw Ltd. is not a good comparable to the companies rendering market support services.

41. In this factual and legal position, where of the considered opinion that TSR Darashaw Ltd. is not at all a good comparable to the assessee who is rendering only market support services in no way comparable to the

functions performed by the TSR Darashaw Ltd. We, therefore, direct the Ld. TPO to delete this company from the finalist of comparables.

42. For the reasons recorded in the preceding paragraphs, we find that the 5 companies, namely, Apitco Ltd., Cameo Corporate Services, Global Procurement Consultants Ltd, Kilik Agencies and Marketing Ltd. and TSR Drawshaw Ltd. opposed by the assessee before the authorities below are not good comparables to the assessee and they are liable to be deleted. We therefore direct the Ld. TPO to delete all these companies can define a list of comparables for benchmarking the international transaction of Market Support Services rendered by the assessee to AEs., and to recompute the Arm's Length Price of the international transaction of Market Support Services."

5. The aforesaid reasoning is factual and discloses the functional and other reasons to elucidate, dissimilarities between the five entities and the respondent-assessee. Keeping in view the aforesaid factual background, which is not doubted and debated nor challenged on the ground of perversity, we do not find any substantial question of law for consideration in this appeal."

19. Respectfully following the above judgments, we also direct the AO/TPO for excluding the TSR Darashaw Ltd., Aptico Ltd. & Global Procurement Consultant Ltd. companies from the list of companies because of functionally not comparables with the assessee company.

Warranty Support Services :- Ground No. 7 to 9

20. From the facts noted above, it is clear that the companies providing warranty support services on behalf of its AEs and assessee engaged sub contractor also who in turn provided the said services through the third party customers on behalf of the assessee and recharged service fees and service tax from Thomson India with regard to such services for the warranty period of 18 to 36 months

for the manufacturing defects. Before us, the Id.AR of the assessee contested four companies for exclusion from the comparables selected by the TPO:-

- 1) Engineers India Ltd.,
- 2) Rites
- 3) TCE Consulting
- 4) IBI Chemtur

21. From the financial statement available before us, we noted that turnover of Sl. No. 1 to 3 above mentioned companies are more than Rs. 200.00/- crores. Therefore as per the decision of the various Hon'ble High Courts these companies cannot be considered as good comparables and in the case of IBI Chemtur, the company is engaged in providing planning and engineering services for the chemical manufacturing industries, therefore this company is functionally not comparable.

22. The Id.AR of the assessee relied on the judgment of Hon'ble Punjab and Haryana High Court in the case of Pr. CIT Gurgaon vs. Converse Net Works Systems Pvt. Ltd., (cited supra) the four companies have also been excluded on the basis of functionally not comparables. The relevant part of the judgment is as under:-

SALES AND POST SALES SUPPORT SEGMENT

Engineers India Limited

16. The TPO selected the said comparable as being functionally comparable to the profile of the assessee. The said finding was confirmed by the DRP. Before the ITAT, the assessee contended that Engineers India Limited ('EIL') was functionally dissimilar to the profile of the assessee owing to the fact that the said company provided complete range of project services ranging from conceptualization, planning, designing, engineering and construction activities to meet specific requirements of its clients in various fields like petroleum 7 of 12 refining, petrochemicals, pipeline, offshore oil and gas, onshore oil and gas, terminals and storages, mining and metallurgy and infrastructure. Hence, it was submitted by the assessee that the said company was an end to end engineering service provider and that the said company spent significant amount on research and development. The ITAT while directing its exclusion has observed as under:

"77. We have considered arguments of the rival submissions advanced by both sides. It is observed that assessee provides support services to its AE in respect of sale of software by AE. Bug fixing is also a part of post sales support services, which may be treated partly as function of technical nature, but the same cannot be compared with consultancy provided in the field of engineering infrastructure field. We see no similarity in the kinds of services rendered by assessee vis-à-vis this company. We accordingly direct for the exclusion of this company from the list of comparables."

17. The said finding of fact that the comparable is functionally dissimilar has not been shown to be perverse by the Revenue and thus, the ITAT has rightly concluded that the said comparable has to be excluded.

IBI Chamatur Engineering and Consultancy Ltd.

18. The said comparable was chosen by the TPO as being functionally comparable to the profile of the assessee which was confirmed by the DRP. Before the ITAT, it was submitted by the assessee that IBI Chematur was not functionally similar owing to the fact that it provided planning and engineering services for the chemical manufacturing industry. It was further submitted by the assessee that the said company provided a wide range of services, detailed engineering, intelligent 3D plant modelling, 2D conversion services, smart plant instrumentation inspection services, project planning and management supervision services. The ITAT while directing exclusion of IBI Chematur as not being functionally comparable to the profile of the assessee has held as 8 of 12 under:

"80. We have perused records in the light of submissions advanced by both the sides we agree with Ld. Counsel that this company is involved in huge engineering projects; which are turnkey in nature. Such activities cannot be compared with technical services like bug fixing or provisions of warranty services etc. rendered by assessee. From the financial report of company it is observed that this company is also responsible for setting up till performance of work undertaken for a particular client. Therefore, in our considered view services rendered by this company cannot be considered to be merely technical in nature."

19. The finding recorded by the ITAT have not been shown to be perverse and cogent reasons have been given showing the dissimilarity of the comparable to the assessee and thus, the exclusion of the above comparable cannot be faulted with.

RITES Limited

20. The TPO selected this comparable while stating that only the consultancy services segment has been considered which was similar to the technical services provided by the assessee. The said finding was confirmed by the DRP. Before the ITAT, it was submitted by the assessee that the said comparable was engaged in providing concept to commissioning consultancy, design, engineering and turnkey solutions in the field of transportation, infrastructure and related technologies of the highest professional standards and hence the same ought to be rejected. Additionally, it was submitted by the assessee that the said company had been recognized as a think tank for development of national policies, priorities and strategies in the field of transportation and infrastructure sector. The ITAT while directing its exclusion has observed as under:

"We have perused the submissions advanced by both the sides in the light of records placed before us. We find that only 9 of 12 'Consultancy service segment' of this company has been considered by the TPO leaving the other business segments aside. It is also observed that this company is imparting high-end technical services which cannot be compared with the low-end sale and post sale services rendered by assessee. We also find that this company is a Govt. of India Undertaking providing end to end solutions for turn-key project. In the following cases, the Tribunal has held that RITES Ltd. is engaged in providing engineering segments and to end to end solutions and therefore not functionally comparable with marketing support segments.

(a) Asstt. [CIT v. Chemtex Global Engineers \(P\) Ltd.](#), [2014] 147 ITD 488/[2013] 135 taxmann.com 351 (Mum.-Trib)

(b) [Dy. CIT v. MCI Com India \(P\) Ltd.](#) [2012] 53 SOT 290 (URO)/25 taxmann.com 520 (Delhi)

(c) [Yum Restaurants \(India\) \(P\) Ltd. v. ITO](#) [2014] 48 taxmann.com 384 (Delhi)

(d) [Nortel Networks India \(P\) Ltd. v. Addl. CJT](#) [2014] 44 taxmann.com 26 (Delhi-Trib.) Considering the facts discussed herein above in the light of the judicial decisions mentioned herein above, we direct for the exclusion of this company from the final list of comparables."

21. The said finding of fact that the comparable is functionally dissimilar has not been shown to be perverse by the Revenue and thus, the comparable rightly been excluded by the ITAT.

TCE Consulting Engineers Ltd.

22. The TPO has selected this comparable while stating that the said company is engaged in various project engineering services which are in the nature of technical services and hence comparable to the profile of the assessee. The said finding was

confirmed by the DRP. Before the ITAT, it was submitted by the assessee that the said company ought to be rejected owing to the fact that it was engaged in engineering consultancy services in the nature of design engineering, procurement assistances and inspection and expediting, construction and supervision and commissioning support. It was further 10 of 12 submitted by the assessee that the said company had a huge brand value and hence the same was liable to be rejected. The ITAT while directing its exclusion had observed as under:

"We have perused the submissions advanced by in the light of the records placed before us. The company is involved in activities beyond engineering design. It is engaged in activities that extend from concept to engineering. Whereas the assessee provides services as a captive unit to its overseas AEs. The diversified functions of this comparable company include pre-project activities, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision. Further, there is no segmental accounting in the annual report of the Company which provides profitability, for the engineering design segment. This, in view of our discussion and also following the precedence in the aforesaid cases, we hold that TCS Consulting cannot be held to be comparable company."

23. The counsel for the revenue relies upon the order passed by the TPO and argued that the ITAT failed to appreciate the findings and observations given by the TPO. The finding recorded by the ITAT have not been shown to be perverse and cogent reasons have been given showing the dissimilarity of the comparable to the assessee and thus, the exclusion of the above comparable cannot be faulted with in any manner.

24. The above findings of fact by the ITAT regarding exclusion of the comparables are thus upheld and the same do not merit any interference. The questions of law are answered against the revenue and in favour of the assessee. Similar views have been taken by this Hon'ble Court in the case of PCIT v Equant Solutions India Pvt. Ltd. (ITA No. 419/2016), the Bombay High Court in the case of [CIT vs. PTC Software](#) (395 ITR 176) and in the case of Principal Commissioner of Income Tax Vs. Barclays Technology Centre India Pvt. Ltd. (409 ITR 108) and by the Karnataka High Court in [Principal Commissioner of Income Tax vs. Softbrands India Pvt. Ltd.](#) (406 ITR 513)

23. The ld.AR also relied on the following judgments:

- 1) *Boeing International Corp. India Pvt. Ltd. v. DCIT*
(Delhi ITAT)
- 2) *Terex India Pvt. Ltd. v. DCIT* (Delhi ITAT)
- 3) *AT&T Communication Services India v. ACIT*

(Delhi ITAT)

4) Lummus Technology Heat Transfer BV v. DOT

(Delhi ITAT)

24. The ld. AR also submitted that the high turnover company can not be considered as comparable because the assessee's company turnover is less than Rs. 200/- crores.

25. The ld. DR relied on the order of the lower authorities.

26. After hearing both the sides and perusing the entire materials on record and order of the authorities below , we noticed that the functions performed by the assessee company are not similar to the comparable companies as selected by the Ld. TPO/DRP/AO. The assessee company is providing warranty support services to the third party on behalf of its AEs and has engaged a sub-contractor also who in turn provided the said services to the third parties customers on behalf of the assessee and recharged the service fee. Respectfully following the above judgment of Hon'ble High Court, we direct the AO/TPO for exclusion of these four companies on functional dissimilarity.

27. Ground No.1 and 2 are general in nature.

28. Ground No.10 to 13 not pressed, hence does not require any adjudication, accordingly these grounds are dismissed as not pressed.

29. Ground No.14 is consequential in nature.

30. In the result, appeal of the assessee is partly allowed.

Order pronounced in court on 15th day of February, 2023

Sd/-
(George George K)
Judicial Member

Sd/-
(Laxmi Prasad Sahu)
Accountant Member

Bangalore,
Dated : 15 .02.2023.
Vms

Copyto:

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.

1. Date of Dictation
2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
.....
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the
Sr. P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
.....
8. Date on which the file goes to the Bench Clerk
.....
9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
.....
11. The date on which the file goes to the Assistant
Registrar for signature on the order
.....
12. The date on which the file goes to dispatch
section for dispatch of the Tribunal Order
.....
13. Date of Despatch of Order.
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