

**THE INCOME TAX APPELLATE TRIBUNAL  
DELHIBENCH 'I', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member  
Sh. Yogesh Kumar US, Judicial Member**

**ITA No. 5421/Del/2017: Asstt. Year: 2009-10**

UOP India Pvt. Ltd, 4 <sup>th</sup> Floor, Unitech Trade Centre, Sushant Lok, Phase-I, Block-C, Sector-43, Gurgaon-122002	Vs.	DCIT, Circle-18(1), New Delhi
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAACU2687E</b>		

**ITA No. 5724/Del/2017: Asstt. Year: 2009-10**

ACIT, Circle-27 (1), New Delhi	Vs.	UOP India Pvt. Ltd, 4 <sup>th</sup> Floor, Unitech Trade Centre, Sushant Lok, Phase-I, Block-C, Sector-43, Gurgaon-122002
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAACU2687E</b>		

**Assessee by : Sh. Ajit, Saksham Jain &  
Ms. Bhawna Gupta, CAs**

**Revenue by : Sh. Rajesh Kumar, CIT (DR)**

**Date of Hearing: 06.12.2022**

**Date of Pronouncement: 03.03.2023**

**ORDER**

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

The present appeal has been filed by the assessee and revenue against the order dated 18.05.2017 passed by the CIT(A)-38, New Delhi for Assessment Year 2009-10.

2. The assessee has raised the following grounds of appeal:-

**"Transfer Pricing Matter - Provision of Market Support Services"**

1. On facts and in law, the Learned Additional Director of Income Tax, Transfer Pricing Officer -II(4) ('Ld. TPO') and Learned Deputy Commissioner of Income Tax, Circle 18(1), New Delhi ('Ld. AO') have erred in adding, and the Learned Commissioner of Income Tax (Appeals)-38, New Delhi ('Ld. CIT(A)') erred in confirming the addition of a new company (i.e. HCCA Business Services Private Limited) as comparable to the Appellant, disregarding the fact that the Functions, Assets and Risk ('FAR') profile of this company is entirely different from that of Appellant's business, thereby violating the provisions of Rule 10B(2) of the Income Tax Rules, 1962 ('the Rules').

2. On facts and in law, the Ld. TPO and Ld. AO erred in adding, and the Ld. CIT(A) erred in confirming the addition of a new company (i.e. Killick Agencies & Marketing Limited) as comparable to the Appellant, disregarding the fact that the FAR profile of this company is entirely different from that of the Appellant's business, thereby violating the provisions of Rule 10B(2) of the Rules.

3. On facts and in law, the Ld. TPO and Ld. AO erred in rejecting, and Ld. CIT(A) erred in confirming the rejection of a company (i.e. Cyber Media India Online Limited) as comparable to the Appellant, disregarding the fact that the FAR profile of this company is same as that of the Appellant's business, thereby violating the provisions of Rule 10B(2) of the Rules.

4. On facts and in law, the Ld. TPO and Ld. AO erred in rejecting, and the Ld. CIT(A) erred in confirming the rejection of a company (i.e. Times Innovative Media Ltd.) as comparable to the Appellant, merely on the basis of the losses incurred by the said comparable company, thereby violating the provisions of Rule 10B(2) of the Rules.

5. On facts and in law the Ld. AO and Ld. TPO have erred in not granting and the Ld. CIT(A) has erred in confirming the action of Ld. AO and Ld. TPO, of not granting the benefit of the 5% variation as per the proviso to section 92C(2) of the Act to the Appellant.

6. On facts and in law, the Ld. AO and Ld. TPO have erred in disregarding and the Ld. CIT(A) has erred in confirming the action of Ld. AO and Ld. TPO, of disregarding prior years' data used by the Appellant to benchmark its international transactions, in its TP Documentation for the year and holding that current year (i.e. FY 2008-09) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of

*preparing its TP Documentation, and grossly misinterpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply current year data, thereby breaching the principles of natural justice and 'impossibility of performance'.*

*7. On the facts and in the circumstances of the case, the Ld. AO erred in initiating penalty proceedings u/s 271 (1)(c) of the Act.*

*8. On the facts and in the circumstances of the case, the Ld. AO erred in levying interest under section 234B of the Act."*

3. The revenue has raised the following grounds of appeal:-

*(i) Whether the CIT(A) was justified in rejecting high margin comparables contested by the taxpayer and allowing to retain other low margin comparable in the final set of the TPO not opposed by the taxpayer, which were discharging similar nature of functions even while ignoring the decision of the Hon'ble Supreme Court in the case of Mumbai International Airport (P) Ltd. Vs. Golden Chariot Airport with regard to the "Doctrine of Election" and the "Doctrine of Approbation and Reprobation", wherein it has been laid down that a litigant cannot change and choose its stand to suit its convenience.*

*(ii) Whether the CIT (A) as justified in laying down stringent standards of comparability and attempting to identify exact replica of the taxpayer for comparability analysis, whereas the Indian law and the international jurisprudence recognise the reality that there cannot be an exact comparable in a given situation without any differences without appreciating that such stringency will defeat the purpose of flexibility provided in comparability analysis for determination of ALP.*

*(iii) Whether the CIT (A) in the facts and circumstances of the case and in law, was justified in not considering the facts presented by the Ld. TPO in its original order*

***New Grounds of appeal [Additional Specific Grounds of Appeal***

*(i) The Ld. CIT(A) has erred in directing to exclude the comparable namely, M/s Mitcon Consultancy Services by holding that functional profile & economic activities of the assessee are very different from this comparable. The Id. CIT(A) has also erred in ignoring that fact that the assessee had admitted that this comparable is broadly engaged in the similar business of technical consultancy and engineering services deriving revenue worth 57% from the consultancy segment.*

*(ii) The Ld. CIT(A) has erred in concluding that the comparable namely. M/s L&T Ramboll Consulting Engineers Ltd. is*

*functionally different to the assessee's business ignoring the fact that the revenue of this comparable for F.Y. 2008-09 is from Engineering Services Consultancy only, as per the available financials and the annual report of this comparable.*

*(iii) The Ld. CIT(A) should have also removed the comparable namely M/s. Onward Technology Ltd as this comparable can also be considered to be functionally different since, it is predominantly in automobile engineering segment. If the assessee is allowed to remove M/s Mitcon Consultancy Services and M/s L&T Ramboll Consulting Engineers Ltd. on the grounds of functional dissimilarity, then, on the same analogy, M/s Onward Technologies Ltd. should also have been removed.*

*(iv) There is a one-time loss of Rs. 8 Crore due to past even, Hon'ble ITAT may kindly direct exclusion of this loss in calculation of OP/TC margin of Onward Technologies Ltd. as evident from annual report (Page no.66).*

*(v) The Ld. CIT(A) has erred in directing the AO/TPO to include the comparable namely, M/s Indiacom Ltd in the final list of comparables without appreciating the fact that it was excluded by the TPO as a comparable on the ground that it has a different financial year ending (ending on 31st December) and the quarterly audited financials for this comparable are not available in public domain and the assessee has also failed in providing the same. The Ld. CIT(A) has also erred in not appreciating the provision of Rule 10B(4) of I.T. Rules mandating to consider data only for relevant F.Y. Comparative analysis.*

*(vi) The Ld. CIT(A) has erred holding that the comparable namely, M/s GPCL should not be included as a comparable on the basis that M/s. GPCL has global presence, without appreciating the fact that this comparable passes all the filters applied by the TPO and its global presence does not affect its eligibility for determination of the Arm's Length Price."*

4. UOPIPL was incorporated in the year 1999 as a wholly owned subsidiary of a US based company namely, UOP LLC that operates in the refining, petrochemical and gas processing industry. During FY 2008-09, UOPIPL rendered technical services, market support services and facilities and administrative support services to Honeywell group entities. UOPIPL

also undertakes independent transactions with Indian customers for sale of equipment.

5. International Transactions which are undertaken by the Assessee during AY 2009-10:-

Sr. No.	Nature of Transactions	Value (in INR)	Method Applied	UOPIPL margin	Comparable companies Margin
1	Provision of technical services	412,089,091	Transactional Net Margin Method ('TNMM')	15.50%	15.93% (+/-5% range lies between 10.13% to 21.72%)
2	Availing of facility and administration services	476,171			
3	Availing of technical services	39,132,682			
4	Provision of market support services	199,943,991	TNMM	10.47%	9.66%

6. During AY 2009-10, the above transactions were examined by the Transfer Pricing Officer ('TPO') during the Transfer Pricing ('TP') assessment proceedings. The TPO, in his TP order, confirmed that the pricing of the Appellant's various international transactions meets the arm's length standard except for certain international transaction. The TPO made the following adjustment:

Nature of Transactions	TP adjustment (in INR)
Provision of engineering, technical & inspection ('ET&I') services	150,430,504
Provision of market support services	23,392,078
Total TP adjustment	173,822,582

7. Pursuant to the TP order and the AO order, the Assessee preferred an appeal before the CIT(A) against these adjustments and the CIT(A) allowed partial relief, on some of the arguments raised by the Assessee. Thereafter, both the Assessee and the Department filed their appeals before the Tribunal against the adjustment made by Ld. AO/ Ld. TPO and relief granted by CIT(A) to the Assessee, respectively.

## 8. Provision of ET&I Services

The services provided by the Appellant to its overseas AEs include, Engineering services mainly cover provision of engineering design specifications to the customers, Technical services include technical advisory services consisting of examining the physical fitness of the unit, witnessing the pressure testing and loading of absorbents & catalysts in the unit, advising the customers in the initial operations of the unit, inspection services for the equipment during fabrication & construction of the unit. The transactions pertaining to provision and availing ET&I services and availing of facility and administration services are aggregated for the purpose of benchmarking.

## 10. Objections by Department

Rejection of new companies introduced by the TPO by the CIT(A)

Sr. No.	Name of the companies	TPO's contentions	Ld. CIT(A)'s order	Respondent's contentions	Case laws
1	Mitcon Consultancy Services	This company is engaged in technical consultancy and engineering services. The entire income is from consultancy. This company can be used as a comparable. The Id. CIT(A) has also erred in ignoring that fact that the assessee had	After careful perusal of the TP order and the submissions of appellant, it is clear that the functional profile and economic activities of appellant are very different from that of Mitcon Consultancy Services. Hence, AO/TPO is directed to exclude Mitcon Consultancy Services from the list of comparables in the ET&I segment.	❖ Functionally dissimilarity ■ As per company's website ( <a href="http://www.mitconindia.com/">http://www.mitconindia.com/</a> ) and annual Report, this company is engaged in providing multiple services such as banking & financial services, textiles, market research, infra consulting, wind power generation, decentralized power generation projects, energy and carbon consultancy service, etc. Having read the above, the Appellant submits that these services are different from what the Appellant is engaged	- Delhi High Court judgment in case of WSP Consultants India Pvt Ltd (ITA 935/2017) held that Mitcon Consultancy & Engineering Services Ltd. is deriving less than 75% revenue from consultancy services- a reasonable

		admitted that this comparable is broadly engaged in the similar business of technical consultancy and engineering services deriving revenue worth 57% from the consultancy segment.		<p>into.</p> <ul style="list-style-type: none"> <li>■ Only 57% of the entire revenue of the company is earned from consultancy income is considered, while the Company earns approximately 43% of the revenues from income from vocational training programme, IT training, income from laboratories and other income.</li> <li>❖ Non-availability of Segmental accounts</li> </ul> <p>*The segmental accounts of this company are not available in public domain, which makes it difficult to analyse or select a particular segment of this company, if found comparable to the Appellant's business activities - as the company's entire operations cannot be considered comparable to that of the Appellant.</p>	basis for its exclusion.
<b>In view of the judgment of the Hon'ble Jurisdictional High Court the same is directed to the excluded</b>					
2.	L&T Ramboll Consulting Engineers Ltd	This is a leading multi-disciplinary Indian consultancy firm. The company is engaged in engineering consultancy. This can be used as a	Appellant has also argued that segmental information of the Company is not available in the public domain. Accordingly, Ld. AO/ Ld. TPO is directed to exclude this company from the final list of	<ul style="list-style-type: none"> <li>❖ Functionally dissimilarity</li> <li>❖ Company is engaged in providing a vast range of consultancy services covering the whole spectrum of infrastructure projects. The company is a diversified company which is engaged in</li> </ul>	

		comparable	comparables in the ET&I segment.	providing different types of services like Field Studies and Data Collection, Mathematical Modelling, Geotechnical Studies, Feasibility Studies, Privatization Studies/Advisory Services, Supervision and Quality Control etc.	
<b>Functionally dissimilar and hence, needs to be excluded</b>					

11. Acceptance of a company, previously selected by TPO himself in the TP Order, by the CIT(A)

Sr. No.	Name of the companies	Ld. TPO's contentions	Ld. CIT(A)'s order	Ld. CIT(A)'s order	Remark
1.	Onward Technologies Ltd	<p>The professional and consultancy segment can be used as comparable.</p> <p>The Ld. CIT(A) should have also removed the comparable namely M/s Onward Technology Ltd. as this comparable can also be considered to be functionally different since, it is predominantly in automobile engineering segment.</p> <p>There is a one-time loss of Rs. 8 crore due to past event.</p>	<p>Not discussed as no arguments were raised by the department before the CIT(A)'s against this company.</p>	<p>Department cannot build a new case in an appeal before ITAT</p> <p>❖ Technically, the department cannot argue on the comparable already accepted by the TPO. This company was selected by the TPO in its order and now department cannot change its position by arguing towards excluding the same.</p> <p>❖ Functionally similarity</p> <p>The annual</p>	<p><b>On examination of the functional we hold that this is not a right comparable owing to functional dissimilarity. The tribunal cannot ignore the functional dissimilarity and consider it as a right comparable.</b></p>

		<p>Hon'ble 1TAT may kindly direct exclusion of this loss in calculation of OP/TC margin of Onward Technologies Ltd. as evident from annual report (Page no.66)</p>		<p>report shows that the Onward EDS business is primarily engaged in applying physical laws and principal of engineering in the design, development, and utilization of machine, materials, instruments, structures, processes, and systems. EDS involved with mechanical engineering skills and the services offering extends from early stages of idea generation, through engineering design and analysis, virtual stimulation, documentation and conversion, prototyping and testing, knowledge-based engineering and PLM solutions.</p> <p>As per the annual report, the sales &amp; other income as shown in the profit and</p>	
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				<p>loss accounts includes the value of sales reversal of Rs.80,313,553 towards ongoing pilots conducted at the behest of one of Company's major offshore customer. Therefore, these sales reversals are arising in normal course of business and should not be considered as non-operating.</p>	
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## 12. Provision of Market Support Services

- The market support services provided by the Appellant to its overseas AE include the activities undertaken by the Appellant to promote the use of:
  - UOP equipment by petroleum refineries, petrochemical facilities;
  - UOP Processes; and
  - UOP ET&I Services.

### 3.2 Appellant's contention and objections

Acceptance of few new companies introduced by the TPO

- The Appellant has provided below a comparative chart of the companies selected by TPO and upheld by CIT(A) along with its objections/contentions on the same:

Sr. No.	Name of the Companies	Ld. TPO's contentions	Ld. CIT(A)'s order	Appellant's contentions	Case laws
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1	HCCA Business Services Pvt. Ltd.	The annual report of the company has been perused. The company is dealing in HR operations and administration. Therefore, this company can be used as a comparable.	Appellant has argued that HCCA is functionally different at it is a leading service provider in the entire gamut of HR operations and administration. It also offers specialised services for certified processes, data security policies, confidentiality, disaster management business continuity, etc. All these services are clearly in the nature of business services. Hence, Ld. AO/Ld. TPO is correct in including HCCA Business Services Private Limited as a comparable in the marketing support services segment.		
<b>Owing to the function dissimilarities such as HR functions, payroll processing, compensation structuring, level management and the allied activities, this comparable is directed to be excluded.</b>					
2	Killick Agencies & Mktg. Limited	Does not fulfill the			
<b>Does not fulfill the requirement of RPT filter of 25% whereas, the company had RPT 64 %</b>					
1	Cyber Media India Online Limited	As per the annual report, the company is into providing software support & services to its clients. So, it is not functionally	From the above snapshot it is crystal clear that the functional profile of Cyber Media India Online Ltd. is different from that of appellant. Hence, action of Ld. AO/Ld. TPO to treat it	<ul style="list-style-type: none"> <li>❖ Functionally similarity</li> <li>■ Further, the annual report shows that the Company operates in a single business segment of online Media</li> </ul>	<ul style="list-style-type: none"> <li>■ Delhi ITAT in case of Genzyme India Pvt Ltd [TS-339-ITAT-2018(DEL)-TP1 for AY 2009-10 \ held that the company is engaged ) in providing advertising and marketing services ( including event management, relationship</li> </ul>
		comparable to the taxpayer.  (Refer page 107 of paperbook for relevant extract of TPO order)	as not comparable is upheld.  (Refer page 41 & 42 of paperbook for relevant extract of CIT(A) order)	The annual report of the Company shows that the Company operates as an information technology information website. Also, the principal product/service lines of the	and fulfilment management) in various forms of media to its clients and thereby, also directly promotes the brand by incurring expenses. We accordingly direct the TPO to include this company in the list of comparables.

				Company are defined as relation & fulfilment income, management consulting and advertisement income.  {Refer pages 230 to 232 of paperbook for relevant extract of CIT (A) submission and 1356& 1360 for annual report)	
<b>This company is involved in advertising and marketing services, event management, relationship management, hence cannot be considered as right comparable in the instant case.</b>					
2	Times Innovative Media Limited	The company is making persistent losses. Therefore, it will not be a good comparable.  (Refer page 108 of paperbook for relevant extract of TPO order)	This company has been excluded by TPO on the ground that it is a company making persistent losses so, it is not functionally comparable to the taxpayer. This appears to be a valid reason for holding that it will not be a good comparable. Hence, the decision of TPO is upheld	Functionally similarity Unacceptable filtration criterion.  Nowhere in the OECD guidelines provided that revenue trend is a determinant of comparable.  Loss and competition are normal incidents of business  The company is earning operating profit in 1 out of 3 year	Bombay High Court in the case of CIT vs Goldman Sachs (India) Securities Pvt. Ltd.(Income Tax Appeal No. 2222 of 2013) held that only persistently loss making unit cannot be said as comparable. Mumbai ITAT ruling in case of AC1T vs. MOL Maritime (India) Pvt Ltd [TS-416-ITAT-2020(Mum)-TP] held that the company can be considered as a
			and ground of appeal 15 is partly allowed.	(.Refer pages 234 to 239 of paperbook for relevant extract of CIT	comparable if it has not suffered persistent losses.

			(Refer page 42 of paperbook for relevant extract of CIT(A) order)	(A) submission) Accented in AY 2008-09 The Company has been accepted by the Ld. TPO during the TP assessment proceedings of the earlier years i.e. AY 2008-09.	
<b>We have gone through the segmental information at page NO. 1384 of the Paper Book and find that the comparable is a persistently loss making company, hence, cannot be included.</b>					
1	Global Procurement Consultants Limited	The annual report also mentions that the Company is engaged in management services. This company is also found to be functionally similar.	It is seen that GPCL has a global presence across several continents and countries. The arguments of appellant have considerable force that GPCL should not be included as a comparable in market support services segment. Hence, Ld. AO/Ld. TPO is directed to exclude	Functionally dissimilarity Company deal exclusively with procurement related services - in CIS countries, Eastern Europe and emerging economies in the African continent. The company caters to areas as diverse as Health, Education, Agriculture, Transportation, Mining, Communication, Energy, Water Resources and other key sectors.  ■ Consulting activities such as financial advisory services, environmental audits, third party assessments/ inspections	<b>The Decision of the Id CIT(A) is affirmed</b>
1	Indiacom Limited	It's a December ending company. So, it will not be used as a	The TPO has excluded this comparable on the ground that it has a different financial year ending, i.e. its financial year ends on	Functionally similarity Broadly functional comparable company	Delhi High Court decision in case of CIT vs.

		comparable.  (Refer page 107 of paperbook for relevant extract of TPO order)	31st December. On all other counts this company is a suitable comparable and has been selected by the appellant in its own TP study. If quarterly accounts are available, Ld. AO/Ld. TPO is directed to take accounts for the 12th month period i.e. 01.04.2008 to 31.03.2009 for Indiacom Ltd. and include it in the final list of comparables.  (Refer page 42 of paper book for relevant extract of CIT(A) order)	<ul style="list-style-type: none"> <li>■ Unacceptable filtration criterion. (Refer pages 232 to 234 of paperbook for relevant extract of CIT (A) submission and 1425, 1431 &amp; 1433 for annual report)</li> </ul> <p>Accented in AY 2008-09</p> <p>The Company has been accepted by the Ld. TPO during the TP assessment proceedings of the earlier years i.e. AY 2008-09.</p>	Mckinsey Knowledge Centre India Pvt. Ltd. [TS- 672-HC- 2015(DEL)-TP] held that if the comparable is functionally same as that of tested party then same cannot be rejected merely on the ground that data for entire financial year is not available. If from the available data on record, the results in financial year can reasonably be extrapolated then the comparable cannot be excluded solely on the ground that the comparables have different financial year endings.
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**We have gone through the functional profile at page No. 581 of the paper book and compared it to the functional profile of the comparable, Indiacom Ltd. which provides printing, publishing, and advertising services. The Company offers printing services for telephone directories as well as offers advertising space within telephone**

**directories. Indiacom serves customers throughout India. Hence, we hold that it is not functionally comparable for the instant year.**

13. In a nutshell, we hold that the following comparables are directed to be excluded:-

- Mitcon Consultancy Services
- L&T Ramboll Consulting Engineers Ltd
- Onward Technologies Ltd
- HCCA Business Services Pvt. Ltd
- Killick Agencies & Mktg. Limited
- Cyber Media India Online Limited
- Times Innovative Media Limited
- Global Procurement Consultants Limited
- Indiacom Limited

14. In the result, the appeal of the assessee and revenue are partly allowed.

Order Pronounced in the Open Court on 03/03/2023.

Sd/-

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

Sd/-

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

**Dated: 03/03/2023**

\*Ajay Kumar Keot, Sr. PS\*

Copy forwarded to:

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

**ASSISTANT REGISTRAR**