

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'I' NEW DELHI]**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 8763/DEL/2019 (A.Y. 2012-13)

Turner & Townsend Pvt. Ltd. Unit 02/03, Ground Floor, B Wing, Art Guild Hosue, LBS Marg, Kurla West, Mumbai, Maharashtra PAN No. AADCT0324J (APPELLANT)	Vs.	ACIT Circle-2592) C. R. Building, I. P. Estate, New Delhi (RESPONDENT)
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Assessee by :	Shri Mr. Bhaumik Goda, CA
Department by:	Shri Mrinal Kumar, Sr. D. R.;

Date of Hearing	31.05.2023
Date of Pronouncement	28.06.2023

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order dated 28.06.2019 passed by the Id. Commissioner of Income Tax (Appeals) (hereinafter referred to CIT (Appeals)Delhi-44, for assessment year 2012-13.

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

“Based on the facts and circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Commissioner of Income-tax (Appeals) - 9, New Delhi [hereinafter referred to as 'Learned CIT(A)], under Section 143(3) r.w.s. 144C of the Income-tax Act, 1961 (Act') on the following grounds.

1. The Ld. CIT(A) erred both on facts and in law in partially confirming the Ld. AO/ Transfer Pricing Officer's action of making an addition to the income of the Appellant by holding that the international transactions undertaken by the Appellant do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ('Act').

2. The Ld. CIT(A) erred both on facts and in law in confirming the Ld. AO/ Transfer Pricing Officer's action of considering APITCO Ltd as comparable company to that of Appellant without appreciating following:

2.1. APITCO is not functionally comparable with that of Appellant as APITCO is engaged activities which are not remotely near to activities performed by Appellant. Thus, functional, asset and risk profile of APITCO is not comparable with Appellant

2.2. APITCO was incorporated as M/s Andhra Pradesh Industrial and Technical Consul Organization Limited and is held by Government Corporations, Financial Institution Government Banks and works in areas which are predominantly government initial like skill development,

tourism development, cluster development, environment management etc.

3. *Without prejudice to above, APITCO should be rejected as said company is engaged number of government activities like skill development, tourism development, cluster development, environment management, which are core government activities and segmental information of alleged comparable activity is not available.*

4. *Without prejudice to above, Ld. CIT(A) erred both on facts and in law in rejecting segmental Profit & Loss Account between AE and Non AE sales as provided by Appellant before the learned TPO during transfer pricing proceedings as well as during Appellant proceedings before Ld. CIT(A) by not appreciating the following:*

4.1. All facts were on record and duly submitted by Appellant as part of paper book.

4.2. Not providing opportunity to the Appellant if further data was required to adjudicate this ground.”

3. Brief facts of the case as per the order of the CIT(A) are as under:-

The Turner and Townsend Private Limited (hereinafter referred to as "the Appellant"), is a company incorporated on 19th September 2008, as a subsidiary of Turner & Townsend International Limited. The Company is a part of the wide global network of Turner & Townsend Plc and is engaged in the business of providing construction project management, cost management

and management consultancy services. In the Assessment Year under consideration i.e. AY 2012-13, the Appellant filed its Return of Income u/s 139(1) of the Income Tax Act, 1961 declaring total income of Rs.74,16,650 as per the normal provisions of the Act and claiming tax deducted at source amounting to Rs. 1,74,90,886. Subsequently, the Return of Income was selected for scrutiny assessment under section 143(2) of the Act and assessment was framed vide an order dated 27.05.2016 (received on 01.06.2016) under section 143(3) read with section 144C of the Act by the Learned Assistant Commissioner of Income Tax, Circle 25(2), New Delhi (hereinafter referred to as the 'Ld. AO'). Consequently, the returned income of the Appellant was assessed at Rs. NIL (i.e. Rs. 1,55,51,154 Less brought forward business losses Rs. 1,55,51,154) after making impugned addition(s)/disallowance(s) to the tune of Rs. 81,34,504.

The details in respect of the addition(s)/disallowance(s) made by the Ld. AO is tabulated as under:

S. No.		Amount (in Rs.)
1.	Addition on account of Transfer Pricing Adjustment	38,94,442
2.	Disallowance on account of non-deposition of employee's contribution towards PF u/s 36(l)(va) within the time allowed as per the relevant statute.	42,40,062
	Total	81,34,504

3.1. The facts, in brief, regarding the impugned addition(s) made by the Ld. AO/ TPO are outlined herein below:

A. As regards the addition made on account of transfer pricing adjustment under section 92CA read with section 92C of the Act to the tune of Rs. 38,94/442

(i) During the Financial Year ended on March 31, 2012, the Appellant has entered into international Transactions as tabulated below:-

5. NO.	Nature of international Transactions	Method used	Value in INR
1	Professional services from AE	TNMM	1,45,60,590
2	Professional services to AE		3,69,92,624
3	Reimbursement of expenses to AE in connection with services performed		3,11,747
4	Receipt of Share Application Money	No benchmarking required	2,20,00,000
5	Reimbursement of expenses to AE		1,04,71,698

Abbreviation used: TNMM - Transactional Net Margin Method

(ii) In order to justify that the above said transactions are at arm's length, the Appellant considered Transactional Net Margin Method (TNMM) as the most appropriate method with Operating profit/ Operating Cost as the Profit Level Indicator (PLI) at the time of Transfer Pricing Documentation. The same remains undisputed by the Ld. TPO.

(iii) That in the absence of contemporaneous data available for the year under appeal at the time of preparation of Transfer Pricing documentation, the aforesaid PU was calculated considering the financial results of the selected comparables in the three years preceding the year under consideration.

(iv) That the Appellant, had earned a margin [operating profit on operating cost) of 3.05% as per the Transfer Pricing documentation and revised margin computed at 7.51% based on safe harbour rules, whereas the comparable companies earned a corresponding three year average margin of 5.47% thus satisfying the arm's length principle.

(v) Pursuant to the aforesaid reference being made by the Ld. AO, the Ld. TPO initiated the transfer pricing assessment proceedings by issuing notice dated 06.01.2016 under section 92CA(2) and 92D(3) of the Act, to the Appellant.

(vi) Based on the documents / information furnished by the Appellant, the Ld. TPO examined the economic analysis undertaken, and accepted the international transactions involving receipt of share application money and reimbursement of expenses to Associated Enterprise "AE" to be at arm's length.

(vii) However, with respect to the international transaction involving professional Services to/from AE and Reimbursement of expenses in connection to the services performed, the Ld. TPO had, in the show cause notice dated January 05, 2016 to the Appellant, alleged the following:

- Non-reliance on the Transfer Pricing Documentation of the Appellant without concluding the same to be incorrect as well as not reliable in pursuance of the provisions of Section 92C (3) (c) of the Act.
- Proceeded to determine the arm's length price ["ALP"] of the relevant international transaction by using the current year (contemporaneous) data only in view of proviso to rule 109(4) versus T&T's use of three year average.
- Discussed the filters applied and not applied by the Appellant for the purpose of identification of comparable companies.
- Non-reliance on the Transfer Pricing documentation and performance of a fresh benchmarking search to identify new comparable companies.
- Proceeded to determine the arm's length price ["ALP"] of the relevant international transaction by taking the average margin of 15.22% of comparable companies.
- Plainly disregarded the functional profile of the Appellant while identifying new comparable companies, and identified such comparables, which are functionally dissimilar to the Appellant.
- Proceeded to determine the proposed adjustment on the total transaction rather than considering only the international transaction.
- Non-cognizance with the consideration of notional interest (on ad-hoc basis) on outstanding receivables proposed by Ld. TPO for the purpose of benchmarking of outstanding receivables.

(viii) In response to the show cause notice issued by the Ld. TPO, the Appellant submitted detailed submission on 19 January 2016 in order to put forth the fact that no adjustment was warranted to the international transactions pertaining to professional Services to/from AE and Reimbursement of expenses in connection to the services performed as being proposed by the Ld. TPO. The arguments placed upon by the appellant in the submission are given below:

- Details of financial data required by the Ld. TPO (along with the relevant extracts of Profit & loss account and relevant schedules)
- Chart giving the brief description of the functions of comparables identified by the Ld. TPO suggesting their functional dissimilarity with the Appellant, along with the chart exhibiting other reasons for rejecting such alleged companies as comparables.
- Working in respect of related party transaction done in respect of the alleged comparables in order to justify that the said comparables need to be rejected.
- Working capital adjustment of the alleged comparables taking into account the impact of outstanding receivables on the profitability.

(ix) The Ld. TPO, without considering the factual and legal submissions made by the Appellant and without giving any cogent

reasons concluded thereby considering six companies as comparables with the Appellant and imputed an arm's length value.

(x) The Ld. TPO proceeded by comparing their average operating margin to cost ratio with that of the Appellant and thereby made a transfer pricing adjustment amounting to Rs.38,94,442.

B. As regards the disallowance made on account of non-deposition of employee's contribution to PF within the time allowed as per the relevant statute under section 36(1) val of the Act to the tune of Rs. 42,40,062/-.

(i) During the year under consideration, the total employee's contribution payable towards provident fund amounted to Rs. 43,52,705. Out of which, amount of Rs. 1,12,643 was duly paid within the time limit allowed as per the relevant statute and the balance amount of Rs. 42,40,062 was duly paid by the Appellant before the due date of filling of return of income i.e. 30.11.2012.

(ii) Subsequently, while computing the taxable income for the said year, no disallowance was made by the Appellant insofar the provisions of section 36(1)(va) of the Act are concerned based on the following premises:

(a) Amount of Rs. 1,12,643 was duly paid within the time allowed as per the relevant statute.

(b) Balance amount of Rs. 42,40,062 was duly paid before the due date of filing of return of income i.e. 30.11.2012 and hence, was allowable in full in view of the provisions of section 36(1)(va) read with section 438 of the Act. Also, reliance was placed on various judicial pronouncements in this regard.

(iii) Thereafter, during the course of assessment proceedings, the Ld. AD asked the Appellant to justify its claim for the allowance of employee's contribution to the tune of Rs. 42,40,062 which remained unpaid within the time allowed as per the relevant statute.

(iv) In response to the above, the Appellant duly filed a detailed submission before the Ld. AO vide letter(s) dated 14.01.2015, 19.02.2016 and 02.03.2016 wherein the Ld. AO was duly apprised of the factual matrix and the applicable law in respect of the instant case as mentioned in Point No. (ii) herein above.

(v) However, the Ld. AO disregarded the submissions made by the Appellant and placing reliance upon the CBDT's Circular 22 of 2015 dated 17.12.2015, thereby proceeded with the impugned disallowance to the tune of Rs. 42,40,062 under section 36(1)(va) of the Act.

4. Aggrieved by the aforesaid addition made by the A.O. /TPO in the assessment order, the assessee filed an appeal before the CIT(A) and the ld. CIT(A) vide order dated 28/06/2019 rejected the comparables added by the TPO except APITCO. Aggrieved by the acceptance APITCO as comparable by the CIT(A), the assessee preferred the present appeal on the grounds mentioned above.

5. The Ground No. 1 is general in nature which requires no adjudication. Ground No. 2 & 3 are regarding considering the APITCO as comparable Company. The Ld. Counsel for the Assessee submitted that the said company does not satisfy the functional comparability criterion adopted by Ld. TPO, further submitted that APITCO is held by public share holder and the assessee is held by Private Limited Company. The service description suggests that APITCO works predominately on government initiative project, therefore, the same is not comparable. The assessee relied on several judicial precedents.

6. On the other hand, the Ld. Departmental Representative relied on the order of the CIT(A) and submitted that the appeal of the assessee deserves to be dismissed.

7. We have heard both the parties and perused the material available on record. The assessee is primarily engaged in the business of providing integrated range of Project Management, Cost Management and Management

Consultancy Services to any entity engaged in the field of construction projects. The Ld. TPO included APITCO Ltd. as comparable for bench marking the international transaction. The Ld. Assessee's Representative made a detailed submission stating that the said company does not satisfy functional comparability criterion adopted by the TPO and should be excluded from the list of final comparables.

8. On going through the records and also the submissions made by the assessee it is found that the APITCO provides numerous services which are not provided by the assessee, the assessee is not involved in to skill development entrepreneurship development and training, research studies, asset reconstruction and management Services, Energy Related Service, Tourism Infrastructure Development and Environmental Management. Further, by going through the financial statement of the company for the Financial Year 2011-12, it is found that the APITCO is held by public share holder whereas the assessee is held by Private Limited Company. Services description suggests that APITCO works predominantly on government initiative project. Thus, the ratio laid down in the following judgments suggests that the APITCO cannot be a good comparable.

- *Terex Equipment (P.) Ltd. v. ACIT [2019] 104 taxmann.com 323 (Delhi - Trib.);*
- *DCIT v. Terex India (P.) Ltd. [2019] 104 taxmann.com 281 (Delhi*
- *Philip Morris Services India S.A v. DCIT [2018] 95 taxmann.com 156 (Delhi - Trib.);*
- *Virginia Transformer India (P.) Ltd. v. ITO [2017] 84 taxmann.com 245 (Delhi - Trib.);*
- *International SOS Services India (P.) Ltd. v. DCIT [2016] 67 taxmann.com 73 (Delhi - Trib.);*
- *CIT v. Principal Global Services (P.) Ltd [2018] 95 taxmann.com 315 (Bombay);*

9. Further, it is found that more than 75% of the Revenue earned by the APITCO in the Financial Year 2011-12 was from the activities like Skill Development, Cluster Development, Research Studies, Micro Enterprises Development, Environmental Management etc. But the assessee is only engaged in providing Project Management, Cost Management and Management Consultancy Services. Thus, functionally APITCO is not a comparable company to the assessee.

10. For the above said reasons, we are of the opinion that APITCO is functionally different and the same should be excluded from the list of comparables selected by the TPO. Accordingly the APITCO is ordered to be excluded as comparables for bench marking international transactions for assessee company. Accordingly, the Ground No. 2 & 3 of the assessee are allowed.

11. In the result, Appeal of the assessee is allowed.

Order pronounced in the open court on : **28/06/2023**.

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated : 28/06/2023

R.N, Sr. PS

Copy forwarded to :-

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

ASSISTANT REGISTRAR
ITAT NEW DELHI