

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No.:- 6816/Del /2015
Assessment Year: 2011-12

Emerson Process Management Power & Water Solutions India Pvt. Ltd., 204-206, Tolstoy House, 15, Tolstoy Marg, New Delhi – 110 001. PAN AAACW2693N	Vs.	ACIT Circle-8(1) New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Rohit Tiwari, CA Shri Anubhav Rastogi, CA
Department by:	Shri Piyush Jain, CIT(DR)
Date of Hearing	06/06/2016
Date of pronouncement	13 /06/2016

ORDER

PER N.K. SAINI, ACCOUNTANT MEMBER

This is an appeal filed by the assessee against the order dated 30th October , 2015 passed by the Ld. CIT(A) u/s 143(3)/144C of the Income Tax Act 1961 (hereinafter referred to 'the Act'). The following grounds have been raised in this appeal :-

1. *The assessment order passed by the Learned Assessing Officer (Ld. AO') is bad in law.*
2. *The Learned Transfer Pricing Officer ('Ld. TPO') / Ld. AO/ Hon'ble Dispute Resolution Panel ('DRP') erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case.*

3. *The Ld. AO/ Ld. TPO/ Hon'ble DRP have erred on facts and in law in enhancing the income of the Assessee by INR 13,147,114.*
 - 3.1. *The Ld. AO/ Ld. TPO/ Hon'ble DRP erred on the facts and in the circumstances of the case and in law in framing the order u/s 92CA of the Income Tax Act, 1961 ('the Act') on findings which are erroneous in law, contrary to the facts and based on mere conjectures and surmises.*
 - 3.2. *The Ld. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate the submissions made/ contentions raised by the Assessee and further erred in making observations, assertions and inferences in the order, which were both factually incorrect as well as legally untenable.*
4. *The Ld. AO/ Ld. TPO/ Hon'ble DRP erred in enhancing the income of the Assessee by INR 13,147,114 holding that the international transactions of the Assessee pertaining to provision of application engineered software development and related services do not satisfy the arm's length principle envisaged under the Act and in doing so, have grossly erred in:*
 - 4.1. *disregarding the Arm's Length Price ('ALP') as determined by the Assessee in the Transfer Pricing ('TP') documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules') as well as fresh search; and in particular modifying/ rejecting the filters applied by the Assessee;*
 - 4.2. *disregarding multiple year/ prior years' data as used by the Assessee in the TP documentation and holding that current year (i.e. Financial Year ('FY') 2010-11) data for comparable companies should be used;*
 - 4.3. *rejecting comparability analysis undertaken by the Assessee in the TP documentation and conducting a fresh comparability analysis based on application of additional/revised filters, or disregarding Assessee's filters in determining the ALP for the international transactions;*
 - 4.4. *including companies having high turnover in the final comparables' set for benchmarking a low risk captive unit such as the Assessee;*
 - 4.5. *including companies having volatile operating profit margins in the final comparables' set for benchmarking a low risk captive unit such as the Assessee;*

- 4.6 *including certain companies in the final set of comparables that are not comparable to the Assessee in terms of functions performed, assets employed and risks assumed; and excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Assessee in terms of functions performed, assets employed and risks assumed;*
 - 4.7. *by committing a number of factual/computational errors in selection/ rejection of proposed comparables and/ or in the operating profit mark-ups of the comparables; and*
 - 4.8. *ignoring the business/ commercial reality that the Assessee undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Assessee on account of this fact;*
 - 4.9. *disregarding judicial pronouncements in India in undertaking the TP adjustment.*
5. *The Ld. AO has erred in initiating penalty proceedings u/s 271(1)(c) of the Act mechanically and without recording any adequate satisfaction for such initiation.*
 6. *The Ld. AO has grossly erred on facts and in law by proposing to compute interest u/s 234D of the Act and withdraw interest u/s 244A of the Act mechanically and without recording any satisfactory reasons for the same."*
2. Ground No. 1 and 2 are general in nature
 3. Ground No. 3 to 3.2 were not pressed and ground No. 5 is prematurely raised. So these grounds do not require any comments on our part.
 4. At the first instance Ld. Counsel for the assessee argued ground No. 4.6 which relates to the addition of Rs. 1,31,47,140/- on account of arm's length price adjustment by including certain companies in the final set of comparables and excluding certain companies claimed to be comparable to the assessee.

5. Facts of the case in brief are that the assessee was engaged in providing application engineering, software development and related services for automation control systems as a part of the work and filed the revised return of income declaring an income of Rs. 2,83,86,373/- on 26.3.2013. Assessee entered into international transactions for which reference was made to the transfer pricing officer (TPO) to determine the arms length price on such transactions u/s 92CA(3) of the Income Tax Act 1961 (hereinafter referred 'the Act'). The assessee had taken the operating profit to total cost (OP/TC) ratio as the profit level indicator (PLI) by applying Transactional Net Margin Method (TNMN) and arrived at the PLI of 14.09% whereas the average PLI of the comparables was arrived at 15.56% as per the analysis in the TP document. It was claimed by the assessee that the price charged in the international transactions was within + / - 5% limit. Therefore the price charged in the international transactions was to be treated as arm's length. However, the TPO selected following comparables to be used to determine the arms length price of the international transactions :-

Sl. No.	International Transaction	Amount (In Rs.)
1.	HSCC (India) Ltd.	21.04%
2.	Acropetal Technologies Ltd (Engg. Design segment)	14.36%
3.	Mahindra Consulting Engineers Ltd.	30.92%
4.	Mitcon Consultancy & Engg. Services Ltd.	40.19%
5.	TCE Consulting Engineers Ltd.	29.29%
	Mean	27.16%

The TPO proposed the adjustment u/s 92CA of the Act as under :-

Operating Cost	209,951,858
Arm's Length Price at a Margin of 27.16%	266,974,783
Price Received	233,204,014
105% of International Transaction	244,864,215
Proposed Adjustment u/s 92CA	33,770,769

The TPO accordingly proposed an adjustment of Rs. 3,37,70,769/-.

6. Thereafter in accordance with the conformity to the recommendation of the TPO the AO framed draft assessment u/s 144(c)(i) of the Act and proposed to assess the total income of the assessee at Rs. 4,63,77,930/- as against returned income of Rs. 28,38,63,73/-.

7. Aggrieved with the draft assessment order the assessee filed the objection before the Ld. Dispute Resolution Panel (DRP) who issued the directions to the TPO to allow the benefit of working capital adjustment and also directed to re-compute service revenue filter of the comparable M/s. Mitcon Consultancy & Engg. Services Limited. The TPO provided the working capital adjustment. Accordingly arm's length margin was arrived at 20.52% as against earlier worked out at 22.89%, in the following manner :-

Sr. No.	Name of comparable	WC Adjusted OP/TC%
1.	HSCC India Ltd.	9.34
2.	Acropetal Technologies Ltd. (Seg.)	14.36
3.	Mahindra consulting Engineers Ltd.	28.44
4.	Mitcon Consultancy and Engg. Services Ltd.	40.14
5.	TCE Consulting Engineers Ltd.	28.31
6.	Cades Digitech Ltd.	2.53%
	Average	20.52%

The TPO proposed an adjustment of Rs. 1,31,47,114/- as under :-

Operating Revenue	204,406,844
Arm's Length Value of purchases at a margin of 20.52%	246,351,128
Purchase Price shown	233,204,014
105% of purchase price	244,864,215
Proposed Adjustment u/s 92CA	1,31,47,114

8. The AO passed the draft assessment order by making the above addition proposed by the TPO. Thereafter, the assessee filed objections before the Ld. DRP who did not find merit in the objections of the assessee except that the working capital adjustment is to be done and the TPO to recheck whether the comparable M/s. Mitcon Consultancy & Engg. Services Ltd clears the service income filter. On the directions of the Ld. DRP the AO passed the assessment order.

9. Being aggrieved the assessee is in appeal. Ld. Counsel for the assessee submitted that M/s. Mohindra Consulting Engineers Ltd. selected by the TPO as comparable was discarded and directed to be removed by this bench of the ITAT in ITA No. 5343/Del/2012 for assessment year 2008-09 vide order dated 13th April, 2016 in assessee's own case. Copy of the said order was furnished which is placed on record. It was further submitted that M/s. Mitcon Consultancy and Engg. Services Ltd. is functionally dissimilar as it was engaged in undertaking diversified services and derived revenue from the

following sources :-

- Consultancy Assignments
- Training programmes
- Bio Technology Incubation Centre
- Wind energy generation
- Other income

10. It was further submitted that there was no segmental information available in the annual report of the said company. Therefore it was not comparable to the assessee who provided contracts of their software development services to its AE. It was also contended that M/s. Tata Consulting Engineers Ltd. was also functionally different as it had different lines of services which included construction management consultancy, advance technology and simulation, solution overview and project management consultancy and services which made it functionally different from the assessee. Moreover its turnover was Rs. 416.02 crores while that of the assessee was merely Rs. 23.32 crores, so it also deserved to be removed. It was stated that if the aforesaid comparables are removed then OP/TC of the comparable companies for benchmarking the international transactions would be worked out within the +/- 5 % range to the OP/TC margin of the assessee and no adjustment was warranted on account of arm's length price. Ld. Counsel for the assessee referred to page No. 20 of the DRP's order and drew our attention towards the observation of the Ld. Dispute Resolution Panel that M/s. Mitcon Consultancy and Engg. Services Ltd. failed on service

filter and directed the TPO to recheck whether it clears the service income filter. It was stated that the aforesaid direction of the Ld. DRP was not followed by the TPO. Therefore M/s. Mitcon Consultancy and Engineering Service Ltd. should not have been included in the list of the comparables by the TPO.

11. In his rival submissions the Ld. CIT(DR) supported the orders of the authorities below and further submitted that the objections raised by the assessee were considered by the Ld. DRP and thereafter the directions were issued to the AO who framed the assessment by making the adjustment on account of arm's length price which may not be disturbed.

12. We have considered the submissions of both the parties and gone through the material available on record. In the present case it is noticed that the TPO while working out the average adjusted OP/TC margin of the comparable companies for the international transactions included M/s. Mahindra Consulting Engineers Ltd. which has been directed to be excluded by the ITAT vide order dated 13th April, 2016 in ITA No. 5343/Del/2012 in assessee's own case and the relevant findings have been given in para 20 to 24 of the said order which read as under :-

" 20. The Id. AR for the assessee contended that this comparable company is functionally dissimilar, having significant related party transactions and relied upon order passed by Delhi Tribunal in case cited as Bechtel India (P.) Ltd. Vs. Addl.CIT - 146 ITD 733 (Delhi - Trib.).

21. The TPO, while selecting the Mahindra as a comparable company, has returned the following findings :-:

"The assessee has objected to the use of this company as a comparable on account of being functionally different and submitted that consultancy services provided by this comparable

company in multidisciplinary areas. In contrast, the services provided by the Assessee are in of an entirely different nature.

Further, the Assessee has provided arguments on application of related party transaction filter to reject companies having controlled transactions in excess of 15% of revenue, the Assessee has submitted that during the FY 2007-08, Mahindra had transactions with its related parties to the extent of 15.51 % of the total revenue.

Here again the objection of the assessee is mainly on verticals of the company. It has already been discussed earlier in this order. Therefore, this company can also be used as a comparable having regard to assessee's functional profile.

Further the taxpayer has objected this company on the basis of its own contention of RPT filter. This has already been discussed in the relevant para in this order and accordingly the company has less than 25% of RPT. Hence it is retained."

22. A perusal of the profile of the aforesaid company lying at page 2 of Compendium of Annual Report shows that this company is into infrastructure sector by providing consultancy services in the areas of Special Economic Zones, Water Supply & Sewerage, Solid Waste Management, Urban Infrastructure, Agri Infrastructure, Social Infrastructure, Ports & Harbour & Offshore Terminal, Industrial Infrastructure, etc. The company has also worked on innovative projects like Centre of excellence for Horticulture, Dedicated Offshore terminal for Coal Handling and is augmenting its efforts to consolidate its position as a front runner in innovative projects.

23. Similarly, perusal of page 24 of Compendium of Annual Report goes to prove that the comparable company is having related party transactions to the extent of 15.51 % of the total value whereas, on the other hand, the assessee company is into providing application "Engineered Software Development and Related Services" to its group company which is diametrically dissimilar to the functional profile of the comparable company.

24. The TPO has disposed off both the objections to the inclusion of this comparable company as to the functional dissimilarity as well as a related party transaction to the extent of 15.51 % by returning cryptic finding that, "the comparable companies is also operating in the area of consultancy only and the company having less than 25 % related party transactions and has taken as comparable". However, when admittedly, the comparable company is engaged in infrastructure in the area of special economic zone, water sewerage, solid waste management, urban infrastructure, agri-infrastructure, social infrastructure, ports and harbor & offshore terminal, horticulture, coal

handling, etc., the same cannot be compared with the assessee company which is into application "Engineered Software Development and Related Services". This comparable has been rejected by the coordinate Bench of the Tribunal in case cited as Bechtel India (P.) Ltd. (supra) and restored the file back to the TPO. Ld. DR for the revenue has not controverted the proposition mooted out by the assessee as to the aforesaid decision of the coordinate Bench in Bechtel India (P.) Ltd. (supra)."

13. We, therefore, by respectfully following the aforesaid order direct the TPO not include M/s. Mohindra Consulting India Ltd. while working out the Arm's length price adjustment. As regard M/s. Mitcon Consultancy and Engg. Services Ltd. it appears that the Ld. DRP directed the TPO to recheck as to whether the said company cleared the service income filter. The relevant observations of the Ld. DRP are as under :-

"The above extract from the AR of the Company and the ones done by the TPO shows that the assessee contention in respect of lack of functional comparability is wrong. However as regards the assessee claim that the company has failed the service income filter as revenue from service income of Rs. 287,017,235 forms 60.02% of the total revenue of Rs. 478,196,289 the panel directs the TPO to re-check whether it clears the service income filter."

14. In the present case, it appears that the said direction was not properly followed, we therefore direct the TPO to adjudicate the issue as to whether M/s. Mitcon Consultancy and Engg. Services Ltd. is to be included or not after giving a due and proper opportunity of being heard to the assessee. The TPO is also directed to consider the claim of the assessee that this company was functionally different and it failed the service revenue filter.

15. The claim of the assessee with regard to M/s. Tata Consulting Engineers was that it was having different lines of services and having very high turnover

filter in comparison to the lower turnover filter of the assessee. This fact should also be examined by the TPO. Accordingly this issue is set aside to the file of the TPO to be adjudicated as directed above.

16. Another issue raised by the assessee vide ground No. 6 is relating to charging of interest u/s 234D and withdrawing interest u/s 244A. The Ld. Counsel for the assessee stated that proper opportunity of being heard was not given by the AO. Therefore this issue should be decided by the AO after giving an opportunity of being heard to the assessee, in accordance with law.

17. In the result appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 13/06/2016.

SD/-

**(KULDIP SINGH)
JUDICIAL MEMBER**

SD/-

**(N.K. SAINI)
ACCOUNTANT MEMBER**

Dated: 13 /06/2016

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi