

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 3701 & 3723/DEL/2017
[Assessment Years: 2004-05 & 2005-06]**

M/s Microsoft Corporation (India) Pvt Ltd
F-40, NDSE, Part - 1
New Delhi

Vs.

Dy. C.I.T
Circle - 6(1)
New Delhi

PAN: AAACM 5586 C

[Appellant]

[Respondent]

Date of Hearing : 05.08.2020

Date of Pronouncement : 07.08.2020

Assessee by : Shri Nageshwar Rao, Adv

Revenue by : Shri Surendra Pal, CIT. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

These two appeals by the assessee are preferred against the order of the CIT(A) - 44, New Delhi dated 14.02.2016 pertaining to assessment years 2004-05 and 2005-06. Since in both these appeals,

common grounds are involved, both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. The grievance of the assessee is two fold - firstly, the assessee is aggrieved by the Transfer Pricing adjustment made in the marketing support service segment and secondly, the assessee is aggrieved by allowing of depreciation @ 10% instead of 15% as claimed by the assessee.

3. The assessee is a wholly owned subsidiary of Microsoft Corporation, US. The assessee creates awareness of Microsoft products in India in general through seminars, conferences, advertisement in public media, promotional campaigns. For such services, the assessee is remunerated by its AEs on a cost plus basis.

4. International transactions of the assessee with its AEs reported in form 3CEB are as under:

Assessment Year 2004-05

S.N	International Transaction	Method	Value (in Rs.)
1	Provision of marketing support services	TNMM	164,86,44,780
2	Service Fee received for software consulting services	TNMM	8,78,47,564
3	Assignment of personnel	TNMM	5,94,17,211

2005-06

S.N	International Transaction	Method	Value (in Rs.)
1	Provision of marketing support services	TNMM	2,190,042,292/-
2	Provision of Microsoft Consulting solutions ("MCS")	TNMM	60,922,198/-
3	Provision of product support services ("PSS")	TNMM	15,480,268/-
4-	Provision of regional guest employee ("RGE") services	TNMM	4,35,767,529
5*	Assignment of personnel	TNMM	1,01,512,302

5. There are three segments as under:-

- i) Microsoft services [MCS]
- ii) Product support services [PCS]
- iii) Service fee constituted of market support services and R&D services.

6. In the TP study, MCS and PCS segments have been clubbed with marketing support services and bench marked. R & D services were shown as separate segment and separately bench marked. Since MCS and PCS segments have no RPT, it was not bench marked at all. In the R & D segment, since the assessee was at arms length, no such adjustment was made. In the marketing support services, adjustments have been made.

7. The final list of comparable companies selected by the TPO is as under:

1. Besant Raj International Ltd.(fBR Inti)
2. Engineers India Limited.(EIL)
3. Mahindra Acres Consulting Engineers
4. Priya International Limited (Priya)
5. RITES Ltd.
6. TCE Consulting Engineers Ltd.(TCE)
7. Ujjwal Limited (Ujwal)
8. Water & Power Consultancy Services Ltd.
9. *CRISIL*
10. VIMTA LABS
11. KITCO
12. ICRA

8. The assessee has objected for inclusion of six comparable companies, namely,

- i) WAPCO Ltd
- ii) CRISIL Ltd
- iii) ICRA Ltd
- iv) RITES Ltd
- v) VIMTA Lab
- vi) Engineers India Ltd

9. The contention of the assessee is that these six comparable companies are functionally dissimilar. It has been strongly argued that these companies have been excluded by the Tribunal in assessee's own case in earlier and subsequent Assessment Years i.e. Assessment Years 2003-04, 2006-07 and 2007-08.

10. Before us, the ld. DR has strongly supported the findings of the ld. CIT(A) and the ld. counsel for the assessee has placed orders of the Tribunal for Assessment Years 2003-04, 2006-07 and 2007-08.

11. We have given thoughtful consideration to the orders of the authorities below. We have also gone through the orders of the co-ordinate bench. We find force in the contention of the ld. counsel for the assessee. The Tribunal in assessee's own case in ITA No. 5980/DEL/2016 has considered the aforementioned six comparable companies and has excluded the same. The relevant findings of the co-ordinate bench read as under:

"20. Coordinate Bench of the Tribunal in taxpayer's own case for AY 2002-03 excluded Crisil from the final set of comparables by returning following findings :-

"23. It is brought to our notice by the ld. AR for the taxpayer in tabulated form that continuously in AYS 2007-08 to 2009-10, CRISIL (Advisory and information segment) has been rejected by the DRP as a valid comparable vis-à-vis the taxpayer on the ground that, "CRISIL is engaged in providing niche advisory services of financial markets and as such financially different."

24. When the taxpayer is proved to have provided similar marketing support services to its AE as it has provided in AYS 2007- 08 to 2009-10, no cogent reason has been brought on record by the TPO/CIT (A) to depart from the consistent view taken in the succeeding years. Moreover, the company

providing advisory services cannot be compared with the taxpayer who is into providing routine marketing support services to its AEs.

25. Moreover, audited financial of CRISIL, available at page 426 of the paper book (Annual Report), shows that 74% of its income is from rating services. Rating services have been explained in the annual report, available at page 411 of the paper book, as under :-

"Some landmarks achieved by the Ratings division in 2001-02 are highlighted below :

- Grading of healthcare institutions launched with the announcement of grades assigned to three hospitals • Introduction of a new rating symbol (with "r" subscript) to indicate non-credit risk • First rated debt transaction for an acquisition • Two new State Government ratings • Government of India guaranteed debt ratings • First rated take-out cum guarantee facility by an infrastructure development finance institution.

Corporate Sector Rating Services (CSRS) Revenue growth in corporate sector ratings was mainly driven by refinancing of debt due to the continuous drop in interest rates. New offerings such as the Advance Rating Services and structured ratings have grown significantly and account for 30% of the CSRS billings. The 42 new companies rated during 2001-02 constituted 30% of CSRS initial rating fees. The CSRS has

also made significant progress in generating business from standard and Poor's. Although this is still a small component of its revenues, there is a significant order book as on date and CSRS expects to double its international revenues in the current year. Government's disinvestment programme and a further round of refinancing by stronger corporate, are expected to drive CSRS revenues in the coming year."

26. Furthermore, from the financial conditions explained at page 423 of the annual report, it has come on record that huge intangibles have been employed by CRISIL in order to achieve its targets, which make it incomparable vis-à-vis the taxpayer. Consequently, we order to exclude CRISIL from the final set of comparables."

21. In view of what has been discussed above and following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case (supra) in the similar facts and circumstances wherein there is no change in the business model and taxpayer is providing services under the same master service agreement, Crisil being owner of huge intangibles having been employed in order to achieve its target and that it is a high risk profile entity cannot be a suitable comparable vis-à-vis the taxpayer who is a non-risk bearing routine marketing service provider to its AE working on cost plus mark up basis, hence ordered to be excluded.

ICRA LIMITED (ICRA)

22. The taxpayer sought to exclude ICRA on the grounds inter alia that it is providing rating services, advisory services and information services; that ICRA is into providing premium advisory services segment; and that ICRA has been excluded by the coordinate Bench of the Tribunal in taxpayer's own case in AY 2002-03 (supra) on ground of functional dissimilarity.

23. Perusal of the annual report available under the head Director's Report at pages 918, 923 & 924 shows that ICRA is into rating services, advisory services and information services. Furthermore, perusal of the TP order itself shows that TPO himself acknowledged in para 7.9 that ICRA is into providing premium financial advisory services as the rate of its employee cost is extremely high indicating that its personnel are key drivers of these businesses. Moreover, coordinate Bench of the Tribunal in taxpayer's own case for AYs 2002-03 and 2007-08 (supra) has excluded ICRA from the final set of comparables. The relevant findings returned in AY 2002-03 (supra) is reproduced for ready perusal as under :-

"ICRA LIMITED (ICRA)

27.Undisputedly, ICRA has been rejected as a valid comparable by the Revenue on the objection of functional dissimilarity raised by the taxpayer in AYs 2006-07 to 2009-

10, as per compilation given by the taxpayer during the course of arguments available on record.

28. Moreover, perusal of the annual report, available at pages 547, 553 & 557 of the paper book, shows that there is no segmental information available and keeping in view the diversified function performed by ICRA, it cannot be taken at entity level. Moreover, under TNMM, the TPO has a wide discretion of choosing comparables as there is wide range of such comparables available for benchmarking the international transactions.

29. Furthermore, ICRA has been held to be incomparable vis-à-vis the taxpayer by the coordinate Bench of the Tribunal in the taxpayer's own case for AY 2007-08 (supra) by holding that since ICRA has been providing advisory services, it can be a no match to the company providing actual marketing support services. Since there is no change in the profile of the taxpayer during the year under assessment as it has been providing similar marketing support services to its AE, ICRA is not a valid comparable vis-à-vis taxpayer, hence ordered to be excluded."

24. In view of what has been discussed above and following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case for AYs 2002-03 and 2007-08 (supra), we are of the considered view that ICRA is not a suitable comparable vis-à-vis the taxpayer on ground of functional

dissimilarity but being into providing advisory services which is no match to the company providing actual marketing support services, hence ordered to exclude ICRA from the final set of comparables. WATER AND POWER CONSULTANCY SERVICES (INDIA) LTD. (WAPCOS)

25. The taxpayer sought exclusion of WAPCOS on the grounds inter alia that WAPCOS is functionally dissimilar being into non-comparable companies; that it is a 100% Government owned entity and that it has been ordered to be excluded by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2002-03, 2007-08 and 2008-09 (supra).

26. Perusal of annual report at pages 628 to 640 of the paper book, shows that WAPCOS is into distinct activities viz. commercial and informatics centre for providing services in publishing of publicity material, technical bulletins, status report, providing consultancy services in the major field of irrigation, drainage, watershed management, etc., it is also providing services in the field of hydro-power, thermal power, transmission and distribution etc. and is into conducting environmental studies for mega projects in hydropower, water resources, ports and harbours, mining, industrial sector etc., ports and harbours division is involved in carrying out techno-economic feasibility studies, preparation of project reports, detailed engineering project implementation and monitoring, it

is into providing planning and designing of rural and urban water supply schemes, sewage treatment and disposal schemes, laboratory testing, inspection etc.

27. Coordinate Bench of the Tribunal excluded WAPCOS from the final set of comparables in taxpayer's own case for AY 2006- 07 by returning following findings :-

"18.2. We find that this company operates in two segments, namely, Consultancy & engineering projects and Lumpsum turnkey projects. This company provides consultancy services, such as, pre-feasibility report of hydroelectric projects, field investigation drilling of tube wells, etc. From the above description of the nature of activities performed by this company, it can be seen that the same is engaged in providing engineering and consultancy services, which can be of no match to the assessee's marketing support services. This company is also directed to be excluded from the list of comparables."

28. Keeping in view the facts and circumstances of the case, WAPCOS is into providing distinct services and is a 100% Government owned company, being not driving by profit motive and following the decision of the coordinate Bench of the Tribunal in taxpayer's own case for AY 2006-07 (supra), it cannot be a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

RITES LTD. (RITES)

29. The taxpayer sought exclusion of Rites on grounds inter alia that it is functionally dissimilar and that it is a Government of India undertaking under the aegis of Indian Railways; that Rites has been excluded by the DRP in taxpayer's own case for AY 2007-08 on the ground that it is functionally different being in niche area of engineering consultancy.

30. Rites has been excluded by the Tribunal in taxpayer's own case for AY 2006-07 (supra) by returning following findings :-

"16.2. We find that this company is primarily a consultancy organization rendering consultancy services in all facets of transportation. Its major areas of operations are consultancy services; Export of Rolling Stock, Equipments and Spares; and leasing of Railway Rolling Stock and Equipments. It can be seen that the functional profile of this company is nowhere near the assessee, which is simply providing marketing support services by largely creating customer awareness for the Microsoft products in India. This company is, therefore, directed to be excluded."

31. Keeping in view the facts and circumstances of the case that Rites being into providing engineering and consultancy services and is an international recognised company engaged in

transport infrastructure has been excluded by the Id. DRP in taxpayer's own case for AY 2007-08 on ground of functional dissimilarity being in niche area engineering consultancy and following the order passed by the coordinate Bench of the Tribunal in AY 2006-07 in taxpayer's own case is not a suitable comparable vis-à-vis the taxpayer who is a routine low end marketing support services provider on cost plus mark up basis, hence ordered to be excluded. VIMTA LABS LTD. (VIMTA)

32. The taxpayer sought exclusion of Vimta as a comparable vis- à-vis the taxpayer on grounds inter alia that it is functionally different; that it has high proportion of plant and machinery applied and it has significant intangibles; that it is a high risk bearing entity; that it has been ordered to be excluded by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2006-07 and 2007-08 (supra).

33. Perusal of annual report, available at page 517 of the paper book, shows that Vimta is engaged in contract research (clinical and pre-clinical), clinical specialty diagnostics, analytical testing of water, food, drugs, chemicals, petroleum products, minerals, metals, etc. and environmental monitoring and impact assessment. Perusal of schedule forming part of the Accounts at page 527 of the paper book shows that it has displayed high proportion of plant and machinery.

34. Coordinate Bench of the Tribunal in AY 2007-08 in taxpayer's own case excluded Vimta in taxpayer's own case on ground of functional dissimilarity by returning following findings:-

"22. We do not find any force in the functional comparability of this company with the assessee. Spectrum of the services rendered by this company covers analytical food and drugs; clinical reference lab services to address the specialties and central lab services for clinical trials; clinical trials phase-I-IV and BA/BE studies; pre-clinical safety assessments; and environmental assessments. A cursory look at the nature of services provided by this company divulges that the same is functionally dissimilar from the assessee. How a company conducting clinical trials on foods and drugs can be considered as comparable with the assessee undertaking marketing support services, is anybody's guess. This company being in the nature of business totally alien to that of the assessee, cannot be considered as a comparable. Similar view has been taken by the Tribunal in the case of the assessee for the immediately preceding assessment year. We, therefore, direct the exclusion of this company from the list of comparables."

35. In view of facts and circumstances of the case and following the order passed by the coordinate Bench of the

Tribunal (supra), we order to exclude Vimta from the final set of comparables on ground of functional dissimilarity vis-à-vis the taxpayer, hence ordered to be excluded from the final set of comparables."

12. A perusal of the order of the Id. CIT(A) for Assessment Year 2004-05 shows that at para 4.4. of his order, the Id. CIT(A) has held "While passing the appellate order in the appellant's case for Assessment Year 2003-04 dated 18.07.2016 in appeal No. 113/2003-04-CIT(A)-44, I have held that the appellant is providing high end services and accordingly the six companies cannot be excluded from the final list". This shows that the first appellate authority himself has followed the order of the Assessment Year 2003-04 on finding parity in the facts.

13. As mentioned elsewhere, the Tribunal in Assessment Year 2003-04 has directed for exclusion of six comparable companies. Therefore, respectfully following the same, we direct the Assessing Officer/TPO to exclude the six comparable companies mentioned hereinabove.

14. All the grounds relating to TP adjustments are allowed.

15. Coming to the second grievance of the assessee which relates to the claim of depreciation @ 15%, during the course of assessment proceedings, the assessee was asked to furnish details of the additions to fixed assets made during the year.

16. On perusal of the same, the Assessing Officer found that the assessee has made addition in the nature of lease hold improvement to its fixed assets and has claimed depreciation @ 15% under the block furniture and fixtures.

17. The Assessing Officer was of the firm belief that the assessee has claimed depreciation under a wrong block i.e. furniture and fittings @ 15% under the block furniture and fixtures whereas in view of Explanation 1 to section 32, any capital expenditure incurred by the assessee on the construction of any structure or by way of renovation or extension or improvement to the building in respect of which the assessee holds a lease or other right of occupancy for the purposes of its business, then provision regarding depreciation shall apply as if the said structure or work is a building owned by the assessee. Accordingly depreciation @ 10% was allowed.

18. When the matter was agitated before the Id. CIT(A), the Id. CIT(A) held as under;

"On the similar issues. I have confirmed the addition for A.Y. 2005-06. The addition in assets is similar in nature as discussed in A.Y. 2005-06. The relevant portion of appeal order for A.Y. 2005-06 is reproduce as under:-

I have considered the findings of the AO, written submission and the oral arguments of the Ld AR carefully. I have perused the items of the expenditure which has been reproduced by the assessing officer in the assessment order and also reproduced earlier. Majority of the expenditure are on account of Civil and interior works amounting Rs 2.26 crores paid to M/s M. S. Decorators Pvt. Ltd. similarly for interior designing Rs 49.8 lacs has paid and other main expenditure are retable to electric fitting and air-conditioning work amounting to Rs approximately 2.15 crores, the rest is architect fee amounting to Rs 35.78 lacs and sliding portion 11.98 lacs. From pattern of expenditure which is clear that there is improvement of civil supply in the expending/altering the building by a civil work, interior design coupled with electric fitting and air-conditioning work. Pattern of expenditure reveals that though there is lease hold assets there is improvement in the expending building which is of enduring life. Therefore, I confirmed the decision of the

assessing officer to all depreciation @ 10% treating them as part of building in respect of furniture and fixture.

I have considered the reliance of Ld AR on the decision of jurisdiction High court in the case of Installment Supply Pvt. Ltd. cited supra where which has been held the customer on lease hold as revenue expenditure. I have perused the order the expenditure and question was made for Rs. 5000 was in the order of thousand here the expenditure is crores of rupees where the head of expenditure is apparently for civil work. Therefore the said decision will not apply to the facts of the case. In my view the expenditure shows that there is addition of civil work, such addition of civil work even on long lease is to be treated a building for providing depreciation. Hence, action of the Assessing Officer is confirmed. Accordingly these grounds of appeal are dismissed."

19. Before us, the ld. counsel for the assessee vehemently stated that expenditure incurred by the assessee are towards furniture and fixtures and, therefore, rate of depreciation applied for block of furniture and fixtures should be allowed.

20. The ld. DR strongly supported the findings of the first appellate authority.

21. We have given thoughtful consideration to the orders of the authorities below. Undisputedly, expenditure on account of civil and interior works and payment has been made only to one M/s Decorator Pvt Ltd. Considering the nature of expenditure, it can be safely concluded that the entire expenditure has been made for improvement of civil supply altering building by civil work. In our considered opinion, such civil work definitely gives a benefit of enduring nature. Therefore, we do not find any error or infirmity in the findings of the Id. CIT(A). This grievance is accordingly dismissed.

22. Before closing, there was a prayer for allowing benefit of working capital adjustment. We find that in the earlier year and subsequent year, the TPO himself has given benefit of working capital adjustment. Therefore, in the same line, we direct the Assessing Officer/TPO to allow working capital adjustment to the assessee.

23. In the result, both the appeals of the assessee in ITA Nos. 3701 and 3723/DEL/2017 are partly allowed.

The order is pronounced in the open court on 07.08.2020.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 07th August, 2020.

VL/

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(A)
5. DR

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ITAT, New Delhi

Date of dictation	
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Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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