

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.2513/Bang/2019
AssessmentYear: 2010-11

M/s. Citrix Systems India Private Limited Prestige Dynasty #33/2, Ulsoor Road Bangalore-560 042 PAN NO :AAACP9889R	Vs.	Deputy Commissioner of Income-tax Circle-11(2) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Rishi Harlalka, A.R.
Respondent by	:	Shri PriyadarshiMisra, D.R.

Date of Hearing	:	18.02.2020
Date of Pronouncement	:	20.03.2020

ORDER

PERB.R. BASKARAN, ACCOUNTANT MEMBER:

The appeal filed by the assessee is directed against the order dated 30-09-2019 passed by Ld CIT(A)-2, Bengaluru and it relates to the assessment year 2010-11.

2. The ground Nos.1 and 6 are general in nature. At the time of hearing, the Ld A.R did not press ground nos. 3 & 4 by making necessary endorsement in the grounds of appeal. The remaining grounds relate to the following two issues:-

- (a) Wrong inclusion of certain comparable companies

(b) Non-granting of working capital adjustment and risk adjustment while computing Transfer pricing adjustment.

3. The facts of the case are set out in brief. The assessee company is engaged in providing marketing services in India to its Associated Enterprises (AEs) located abroad. The nature of services provided by the assessee include:-

- (a) Answering customer inquiries, telemarketing calls
- (b) Building awareness about the products by conducting exhibitions, road shows, conferences, customer events etc.
- (c) Liaison with PR Agencies for marketing activities
- (d) Other related marketing support to AEs.

4. The assessee had received a sum of Rs.15.00 crores from it's A.E. on account of marketing and technical support services. The assessee bench marked the transaction under TNM method by adopting OP/OC as profit level indicator (PLI). The PLI of the assessee was 10.04% and the arithmetic mean of PLI of the comparable companies selected by the assessee was 10.72%. Accordingly, the assessee claimed that the international transaction with it's A.E. was at arm's length. The TPO rejected the transfer pricing study of the assessee and finally selected following 6 comparable companies with an arithmetic mean of 24.48%.

Sl.No.	Name of the company	OP/Cost (%)
1.	Asian Business Exhibition & Conferences Ltd.	58.64
2.	Cyber Media Research Ltd.	19.52
3.	HCCA Business Services Pvt. Ltd.	19.11
4.	Hindustan Housing Co. Ltd.	19.59
5	ICC International Agencies Ltd.	13.27
6.	Killick Agencies & Mktg. Ltd.	16.77
	Average	24.48%

Accordingly, the TPO made an adjustment of Rs.1.96 crores u/s 92CA of the Act. The A.O. completed the assessment by making above said addition.

5. The assessee preferred appeal before Ld. CIT(A) challenging the transfer pricing adjustment made by the A.O./TPO. The Ld. CIT(A) noticed that the comparable company named Asian Business Exhibition & Conferences Ltd. was held to be not a good comparable by the ITAT in the assessee's own case for assessment year 2011-12. Accordingly, the Ld. CIT(A) directed the AO/TPO to exclude above said company from the final list of comparables. The Ld. CIT(A) confirmed other comparables selected by the TPO.

6. Before the Tribunal, the assessee is seeking exclusion of following three companies:

1. HCCA Business Services Pvt. Ltd.
2. Killick Agencies and Mktg. Ltd.
3. Hindustan Housing Co. Ltd.

The assessee is also seeking direction to compute the profit margin of another comparable company named IDC (India) Limited (earlier known as "Cyber Media Research Ltd") correctly.

7. It is pertinent to note that the assessee has mentioned in the grounds of appeal the name of M/s. Asian Business Exhibition & Conferences Ltd., for exclusion. However, the same has been amended by way of an additional ground of appeal by replacing the above said company with HCCA Business Services Pvt. Ltd.

8. We heard the parties and perused the record. The Ld. A.R. submitted that all these three companies are not functionally

comparable. He furnished business profile of these three companies as under:-

(A) HCCA Business Services P Ltd:-

This company is engaged in HR consultancy services like payroll processing & compensation structuring, HR operations & administration, management of labour and legal compliances, reimbursement processing, accounting services.

(B) Killick Agencies and Mktg Ltd:-

This company is engaged in the business of supplying construction and earthmoving machinery. Further it is also engaged in the business of purchase and sale of products like micro switches, engineering items, acoustics items, head sets etc. It also fails the 75% services revenue filter.

(C) Hindustan Housing Co. Ltd:-

This company does not derive any revenue from marketing activity. Instead, it is engaged in providing diversified services like air-conditioning services, lift services, computer services, communication services, general administrative services, photocopying services, housekeeping services, dining room services, strong room services and board room services. The related party transactions (RPT) is 26.97%, i.e., more than 25% of total sales.

The Ld A.R submitted that coordinate bench, in the case of Electronics for Imaging India Pvt. Ltd. (2016) 70 taxmann.com 299, has excluded M/s. HCCA Business Services Pvt. Ltd. and Killick Agencies and Mktg. Ltd. from the list of comparables. He further submitted that M/s. Hindustan Housing Company Ltd. was restored to the AO/TPO to examine the RPT filter by the co-ordinate

bench in the case of ITO Vs. Alcon Laboratories Pvt. Ltd. (2017) 88 taxmann.com 240.

9. We heard Ld. D.R. and perused the record. We noticed that the coordinate bench in the case of Electronics for Imaging India Pvt. Ltd. (pertaining to AY 2010-11) has excluded M/s. HCCA Business Services Pvt. Ltd. and Killick Agencies and Mktg. Ltd. with the following observations:

“40. The assessee challenged the action of TPO before the DRP. The DRP excluded 3 out of 6 comparable companies selected by the TPO against which Revenue has filed appeal before us. We will discuss comparability of two companies which are excluded by the DRP and challenged by the Revenue as under:-

(1) *HCCA Business Services Pvt. Ltd.*

41. The assessee objected against inclusion of this company in the list of comparables on the ground that this company is engaged in providing payroll process services and therefore it is functionally different. In support of its contention, the assessee referred to Notes to the Accounts wherein the company's operations comprise of payroll processing services is mentioned and hence it is not possible to give the quantitative details of sales and certain information separately.

42. The DRP after considering the annual report noted that except the Note 2.14, there is no other observation in the annual report from which it can be established that *the company is engaged in marketing and sales support services comparable to the assessee. Accordingly, the DRP directed the AO to exclude the said company from the comparables.*

43. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. The DRP has considered the fact that payroll processing services was main part of the operations of the company and quantitative details of sales and certain information as required under Part II of Schedule VI to

Companies Act was not possible. Thus, in the absence of any contrary fact on record brought before us, we do not find any reason to interfere with the finding of the DRP, when the functions and business activity of this company was found to be different from marketing and sales support services of the assessee. Accordingly, the objection of the Revenue is rejected.

(2) Killick Agencies & Marketing Ltd.

44. The assessee objected against this company on the ground that commission/service charges income of this company is Rs. 2,19,00,000 out of the operating revenue of Rs. 3,39,00,000. Therefore, the commission/service charges income constitute about 65% of the operating revenue which is less than 75% of the operating revenue filter applied by the TPO. In the absence of segmental results, this company was sought to be excluded from the set of comparables.

45. The DRP found that this company conducts business as an agent of the foreign principal and deal in maritime equipments. Further, the receipts are mainly in the nature of commission income and service charges. Therefore, this company was functionally dissimilar to that of assessee.

46. We have heard the Id. DR as well as Id. AR and considered the relevant material on record.

47. The Id. DR has submitted that the TPO has considered the relevant information as reported in the annual report of the company and it was found that this company is acting as an agent for various foreign principals for sale of dredgers, dredging equipment and also offers after sales service. Therefore, this company was found to be in the business of marketing support services which is similar to the assessee.

48. On the other hand, the Id. AR has submitted that this company is engaged in the business of construction equipments and earth moving machinery and is not into marketing support services.

49. Having considered the rival submissions as well as relevant material on record, we note that in the profit & loss account for the year under consideration, this company has shown sales

(export of Rs. 1,18,00,000 and commission/service charges of Rs. 2,19,00,000. Therefore, export income revenue of this company is less than 75% of the total revenue, a filter applied by the TPO. Once the TPO has applied a filter of 75% of export sale, then this company which fails the filter applied by the TPO cannot be considered as a good comparable. Further, we note that this company is entirely in a different activity with that of the assessee. Undisputedly, this company is acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipments and machineries. Accordingly, we do not find any error or illegality in the findings of the DRP and direct the AO to exclude this company from the comparables.

10. We notice that M/s HCCA Business Services P Ltd is engaged in payroll processing services and the same has been held to be not comparable with a company engaged in providing marketing services by the co-ordinate bench in the case of Electronics for Imaging India P Ltd (supra). Though it was not the only reason for excluding this company by the co-ordinate bench, we are of the view that the decision taken therein can be conveniently applied here also. Accordingly, we direct the AO/TPO to exclude this company.

11. With regard to Killick Agencies and Mktg. Ltd, the main business of the company as mentioned in its Annual Report (Page 843 of paper book) is given below:-

“Killick Agencies & Marketing Ltd is public limited company. Company is acting as agent for various foreign principals for sale of Dredgers, Dredging equipments, Steerable Rudder Propulsions, Maritime and aviation lighting, Acoustic communication equipments etc. Company also offers after sales services. Apart from this company is involved in export

of micro switchers, engineering items, acoustic items & head sets.”

However, the business profile of the assessee company is noted by the TPO as under:-

- (a) Answering customer inquiries, telemarketing calls
- (b) Building awareness about the products by conducting exhibitions, road shows, conferences, customer events etc.
- (c) Liaison with PR Agencies for marketing activities
- (d) Other related marketing support to AEs.

We notice that the TPO has selected this company as good comparable only for the reason that this company is also providing market support services. While M/s Killick Agencies & Marketing Ltd., is acting as marketing agent for foreign companies for their products, the assessee is seen providing marketing support services to its AE. The former is marketing the products on commission basis, while the assessee is only providing only support services. Hence, in our view, functions performed by both the companies are different. Accordingly we direct exclusion of M/s Killick Agencies & Marketing Ltd from the list of comparables.

12. In respect of Hindustan Housing Co. Ltd, the contention of the assessee was that this company was providing various types of services. Another contention raised was that the Related Party Transaction of this company exceeds 25%. We notice that the co-ordinate bench has restored this company to the file of AO/TPO for examining it afresh in the case of Alcon Laboratories P Ltd (supra). Accordingly, following the above said decision, we restore this comparable company to the file of AO/TPO for examining afresh by considering the RPT filter also.

13. The assessee has also raised a ground contending that the mark up of IDC India Ltd. (Cyber Media Research Ltd.) has been wrongly computed by the TPO. It is the submission of the Ld A.R that the TPO has not included “depreciation” as part of operating cost and wrongly included “financial cost” as part of operating cost. The Ld. A.R. submitted that the financial cost does not form part of operating cost and depreciation should be included in the operating cost.

14. We heard Ld. D.R. and perused the record. There should not be any doubt that, while computing “Operating Cost”, a uniform practice should be followed for all the comparable companies. It is the submission of the assessee that depreciation forms part of Operating cost, while the financial expenses does not. We notice that the assessee has taken a general ground before Ld CIT(A) and hence it appears that the Ld CIT(A) has not adjudicated the same. Before us, the assessee has taken a specific ground in respect of IDC India Ltd. (Cyber Media Research Ltd.). As observed by us, a uniform methodology should be followed while determining operating cost. It is not clear as to whether the same method was followed in respect of the assessee as well as in respect of other comparable companies. Hence, this issue requires examination at the end of AO/TPO. Accordingly, we restore this issue to the file of AO/TPO for examining it.

15. The assessee in ground No.5 has contended that the working capital adjustment and risk adjustment should be given to the assessee. The Ld. A.R. submitted that the assessee has claimed this adjustment before Ld. CIT(A) and accordingly, the Ld. CIT(A) called for remand report from the A.O. The TPO has expressed the

view that these adjustments could not be given for want of required details. The Ld. A.R. submitted that the working capital adjustment and risk adjustments are given in various cases and accordingly pleaded that suitable direction may be issued to the AO/TPO.

16. We heard the Ld. D.R. on this issue and perused the record. It is stated by the AO/TPO in the remand report that the required details were not furnished by the assessee. Hence we direct the assessee to furnish required details to the AO/TPO. Since this issue also requires examination at the end of the A.O./TPO, we restore this issue also to their file.

17. After affording adequate opportunity of being heard, the AO/TPO may take appropriate decision in accordance with law.

18. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 20.03.2020.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 20th March, 2020.
/VG/

Copy to:

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.