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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL No. 1468/2018**

Date of decision: 18<sup>th</sup> December, 2018

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL  
TAXATION -2 ..... Appellant  
Through: Mr. Ruchir Bhatia, Sr. Standing  
Counsel with Mr. Sanampreet Singh,  
Advocate.

versus

PHILIP MORRIS SERVICES INDIA SA ..... Respondent  
Through Mr. Neeraj Jain and Mr. Aniket  
Agarwal, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**SANJIV KHANNA, J. (ORAL):**

This appeal by the Revenue under Section 260A of the Income-Tax Act, 1961 (Act, for short) in the case of M/s Philip Morris Services India SA ('respondent- assessee', for short) relates to the Assessment Year 2009-10 and arises from the order of Income Tax Appellate Tribunal ('Tribunal', for short) passed on 21.06.2018.

2. Revenue is aggrieved by the direction given by the Tribunal to exclude M/s Aptico Ltd., Cameo Crop Ltd., Global Procurement Consultants, Killik Agencies Marketing Ltd. and TSR Darashaw Ltd. from the list of comparables.

3. The respondent-assessee had an Indian Branch office, which had provided various services to associated enterprises of the group. It was

engaged in the business of import and distribution of Marlboro brand of cigarettes, export of tobacco leaves and provision of market support services to its associated enterprises.

4. The Tribunal in the impugned order has gone into great depth and details to record findings as to why the five above mentioned companies should be excluded. For the sake of convenience and completeness, we would reproduce relevant portion of the reasoning given by the Tribunal, which reads:-

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**Apitco Ltd.,**

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*13. As could be seen from the annual report of this company, is company is one of the 18 TCOs was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise Apitco Ltd., was established to provide technical services to other government companies and body corporate. Further this company is engaged in providing services such as asset reconstruction and management, clustered allotment for mega footmarks, and environment services, energy-related services, infrastructure planning and development, energy audit etc. and undoubtedly this company is a high-end consultancy service provider. The annual report further reveals that this company is engaged in providing high-end technical services also.*

*14. Ld. AR brought to our notice that they Apitco Ltd., was rejected by a catena of decisions rendered by different Benches of this Tribunal including a coordinate Bench of this Tribunal in Ciena India (P) Ltd vs. DCIT in*

*ITA No. 2948 and 3224/del/2013 following which in Avaya India private limited versus DCIT in ITA No. 146/del/2013. He also placed reliance on the nation reported in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/del/2016. In International SOS services India private limited versus DCIT ITA No. 1631/del/2014 this company was excluded on account of being hundred percent government organisation and the appeal against this decision of the tribunal was dismissed by the Hon'ble jurisdictional High Court.. Further it could be seen in Vestegaard Asia private limited verses DCIT in ITA No. 6670/del/2015 and H & M Mouritz India private limited verses DCIT in ITA 282/bankg/2015 it is held that the Aptico Pvt Ltd., is not a good comparable with any company rendering business support services on the ground that this company is a public sector undertaking and its operations are mainly based the on the policy requirements of the government.*

*15. Further reliance is placed by the counsel on the decision of the Mumbai bench of this tribunal in TysokKrupp industries India private limited verses ACIT in ITA No. 6460/mum/2012 wherein it was held that this company being a government enterprises is not comparable with a private business service provider because in case of government enterprises profit motive is not irrelevant consideration, and government companies work for other public sector undertakings and in that sense the related party transactions are much more than the filter of 25%. This decision of the tribunal was upheld by the Hon'ble Bombay High Court in ITA number 20/02/2018 of 2013.*

*16. The reasons recorded by the Tribunal in all the decisions referred to above hold good for the assessee also inasmuch as the assessee is a private company in the*

*field of providing business support services. We, therefore, while respectfully following the ratio laid down in the above decisions hold that Apitco Ltd., is not a good comparable with the assessee and is accordingly liable to be excluded. We, therefore, directly Ld. TPO to exclude this company from the finalist of comparables to benchmark the international transaction relating to the market support services provided by the assessee to its AEs.*

**Cameo corporate services.**

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*20. We have gone through the financials of this company, including the profit and loss account incorporated page No. 96 and scheduled 8 incorporated at page number 102 of the paper book relating to the financials of the comparable companies and find that the entire income of Rs. 24,36,67,920/-was shown without any segmental bifurcations.*

*21. Further the comparability of the Cameo Corporate Services with the companies providing market support services like assessee was considered by a coordinate Bench of this Tribunal in Vestergaard Asia private limited ITA 6670/de1/2015 by order dated 30/11/2017, in the light of the annual reports of the companies and the decision in Adidas Technical Services Private limited vs. DCIT in ITA No. 862/de1/2016, discussed the desirability of retaining the Cameo corporate services as one of the comparables, and reached a conclusion that the functional profile of Cameo Corporate Services is similar to the profile of TSR Darashaw Ltd. and not to the companies like assessee in this matter. On that ground Cameo Corporate Services was directed to be excluded from the list of comparables. It is pertinent to note that in*

*Adidas technical services private limited (supra) TSR Darashaw Ltd. was considered and rejected. The Tribunal in Vestergaard Asia private limited (supra) found that Cameo corporate services and TSR Darashaw Ltd. stand on the same footing and are not good comparables to the market support service providers.*

*22. Going by the profile of Cameo corporate services extracted by the Ld. TPO in his order and also in view of the nonavailability of segmental information in the financials of this company coupled with the findings of a coordinate Bench of this Tribunal Vestergaard (supra), we are of the considered opinion that Cameo Corporate Services is not a good comparable to the assessee in view of the functionality similarity. We, accordingly, direct the Ld. TPO to delete this company from the final set of comparables.*

**Global Procurement Consultants Ltd.,**

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*26. We have gone through the material provided in the paper book in respect of Global Procurement Consultants Ltd. and find that Global Procurement Consultants Ltd., is primarily engaged in preparing and reviewing technical specifications, estimation of castes, selection of vendors, inspection and a expediting and quality control and time management. It is also clear that the company renders the procurement related services in exclusively in CIS countries, Eastern Europe and emerging economies in the African continent, by Kettering relates in the areas like Health, Education, Urban and Rural Development, agriculture, mining, transportation, communication, energy, water resources and other key factors. We also further find from the record that Global Procurement Consultants Ltd., conducts procurement pushed revenue*

*for World Bank financed projects, renders financial advisory services with a high volatile margins.*

*27. This profile what we have observed from the record certainly makes this company to stand apart from the market support service providers. Further it is submitted by the Ld. AR that this company rejected by Ld. DRP, Delhi in the case of travel security services(India) private Ltd. For assessment year 2011-12 by holding that this company is functionality similar and should be deleted from the set of comparable companies rendering business support services. Further a coordinate Bench of this Tribunal in Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/de1/2016 excluded this company as comparable to the marketing support services. So also in Adidas technical services Ltd vs. DCIT in ITA No. 862/de1/2016 and ITA No. 1233/de1/2015 a coordinate Bench of this Tribunal excluded this Global Procurement Consultants Ltd., as a good comparable to the marketing support service providers on the ground of functionality similarity.*

*28. The profile of this Global Procurement Consultants Ltd., as narrated by the Ld. TPO himself speaks in unequivocal terms that this Global Procurement Consultants Ltd., is a company established by the government to serve the purpose of professional procurement and management services needs and also to provide combines management services required by the government departments or their project execution agencies to carry out the procurement in a time bound and efficient manner within the framework of government regulations and guidelines of international institutions, which is not such a characteristic of the business of the assessee. The business model itself is different, let alone the disproportion is of the financials. We have no*

*hesitation, in the face of the profile of Global Procurement Consultants Ltd., that it is not a good comparable at all to the assessee and for that matter to any private marketing support service provider, as such we direct the Ld. TPO to exclude this company from the list of comparables to benchmark the international transaction of the assessee in providing the market support services to its AEs.*

**Killik Agencies and Marketing Ltd.**

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*32. From the Annual Report of this company we find that Killik Agencies and Marketing Ltd. is a public Ltd. unlisted company acting as agent for various foreign prince falls for sale of dredgers, Dredging Equipments, steerable Ruddar propulsion, maritime and aviation lighting, acoustic communication equipments etc. and this company also offers after sale services. Apart from this the company is involved in export of micro switches, engineering items, acoustic items and headsets.*

*33. It is brought to our notice that in the case of Parametric Technology India Private Limited, Ld. DRP rejected this Killik Agencies and Marketing Ltd to be a good comparable to the companies engaged in market support services and a Jurisdictional Tribunal that is a Bench of the Bangalore Tribunal upheld such a finding of the Ld. DRP. Further the Bangalore tribunal in the case of DCIT vs. Aruba Networks India Private limited in ITA-TP57/bank/2015 found that Killik Agencies and Marketing Ltd is not a marketing support service and it cannot find a place in the set of comparables for such companies.*

34. *On a perusal of the profile of this Killik Agencies and Marketing Ltd and also the findings of the tribunal on the comparability of this company with the companies rendering market support services, we are of the considered opinion that Killik Agencies and Marketing Ltd cannot be a good comparable to the assessee and is liable to be excluded from the final list of comparables and, accordingly we direct the Ld. TPO to exclude this company from the list of comparables for benchmarking the international transaction of market support services.*

**TSR Darashaw Ltd.**

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39. *On a perusal of record and the Annual Report of TSR Darashaw Ltd. we find that TSR Darashaw Ltd. is mainly into the payroll process outsourcing with a new global payroll ERP application called RAMCO for its payroll business. Further the order of Ld. TPO itself reads that TSR Darashaw Ltd. undertakes the registrar and transfer agent activity functions for equity and preference shares, venture instruments and bonds, commercial paper and private placements. Moreover this company, under this segment also undertakes transfer processing customer/query handling and correspondence split/consolidation/renewal of certificates, processing and distribution of interest to slash dividend warrants, payments by physical warrants/through ECS/director credited. In the segment of Records Management activity, TSR Darashaw Ltd. undertakes storage, retention and tribal of physical and/or electronic records. In the segment of payroll and trust fund activity, TSR Darshaw Ltd. handles the activities normally handled by "Payroll and Retirement Funds" section in any organisation including interface with the regulatory authorities. These*

*functions are not at all comparable with the functions performed by the assessee. At the same time no segmental information is available as to the revenues.*

*40. Further the coordinate benches of this tribunal in Microsoft Corporation India Private Limited vs. DCIT in ITA No. 5766/de1/2011, Eli Lilly and Co (India) Private Ltd vs. ACIT in ITA No. 788/de1/2015 and Kobelco Cranes India Private Limited vs. ITO in ITA No. 802/del/2016, Adobe Systems India Private Limited vs. JCIT in ITA No. 1163/de1/2014, and Adidas technology Services Private Limited vs. DCIT in ITA No. 862/del/2016 held that TSR Darashaw Ltd. is not a good comparable to the companies rendering market support services.*

*41. In this factual and legal position, where of the considered opinion that TSR Darashaw Ltd. is not at all a good comparable to the assessee who is rendering only market support services in no way comparable to the functions performed by the TSR Darashaw Ltd. We, therefore, direct the Ld. TPO to delete this company from the finalist of comparables.*

*42. For the reasons recorded in the preceding paragraphs, we find that the 5 companies, namely, Apitco Ltd., Cameo Corporate Services, Global Procurement Consultants Ltd, Kilik Agencies and Marketing Ltd. and TSR Drawshaw Ltd. opposed by the assessee before the authorities below are not good comparables to the assessee and they are liable to be deleted. We therefore direct the Ld. TPO to delete all these companies can define a list of comparables for benchmarking the international transaction of Market Support Services rendered by the assessee to AEs., and to recompute the*

*Arm's Length Price of the international transaction of Market Support Services."*

5. The aforesaid reasoning is factual and discloses the functional and other reasons to elucidate, dissimilarities between the five entities and the respondent-assessee. Keeping in view the aforesaid factual background, which is not doubted and debated nor challenged on the ground of perversity, we do not find any substantial question of law for consideration in this appeal.

The appeal is accordingly dismissed.

**SANJIV KHANNA, J.**

**ANUP JAIRAM BHAMBHANI, J.**

**DECEMBER 18, 2018**  
**rr/VKR**

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