

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI H.S. SIDHU: JUDICIAL MEMBER

ITA no. 5582/Del/2012

A.Y. 2008-09

Intrepid Travel Pty. Ltd., India Branch Office, New Delhi. PAN: AACFI 1289 F	Vs.	Asstt. Director of Income-tax, Circle 1(2), New Delhi.
---	-----	---

(Appellant)

(Respondent)

	Appellant	by	:	Shri Himanshu S. Sinha; Sh. Manoneet Dalal & Ms. Megha Agarwal AR
	Respondent	by	:	Shri Ajit Kumar Singh CIT(DR)
	Date of hearing	:	:	24-02-2015
	Date of order	:	:	27-02-2015.

ORDER

PER S.V. MEHROTRA, A.M:-

This appeal, preferred by the assessee, is directed against the assessment order dated 19-09-2012, framed by the AO pursuant to DRP directions u/s 144C, pertaining to assessment year 2007-08.

2. Brief facts are that the assessee for the relevant assessment year filed its return of income declaring income of Rs. 1986319/-. The assessee had entered into following international transactions:

No.	Description of transaction	Method	PLI	Value (In Rs.)
1.	Provision of coordination and support services	TNMM	OP/TC	8,89,01,984
2.	Reimbursements made to AEs	NA	NA	10,53,691
3.	Reimbursements received from AEs	NA	NA	2,84,623

2.1. The AO made a reference to TPO to determine the ALP u/s 92C(3) in respect of aforementioned transactions. The assessee's operating margins to cost was 4.25%. In order to justify its ALP, the assessee had taken 12 comparables, which are referred in para 4.3 of TPO's order. The TPO only accepted two comparables out of 12, selected by assessee and rejected the rest of the ten. He resorted to search suitable comparables and selected ten more comparables and thus determined the PLI at 21.48%. The assessee filed objection before DRP and the DRP excluded 3 comparables after which the AO finally determined the operating profit at 15.23%. Being aggrieved, the assessee is in appeal before us and has, inter alia, taken following grounds of appeal:

1. That the learned AO has agreed on the facts and in law in rejecting the TP Documentation maintained by the appellant and making an addition of Rs. 92,82,443 on account of difference of Arm Length Price as determined by the learned TPO and Transfer Pricing of the appellant. The addition of Rs. 92,82,443 made to the income of the Appellant is illegal, erroneous and controversy to law and fact.

2. The Honorable DRP and the learned AO has erred in facts and in law by considering the appellant's ground level coordination & support services as primarily consultancy services.

3. The learned AO has erred in facts and in law by rejecting the comparable companies selected by the appellant and by hand picking the companies by placing arbitrary filters. Some of such filters wrongly used by the learned AO are:

- *Rejecting companies with turnover less than INR 1 crores:*

- *Rejecting companies having different accounting years;*
- *Accepting companies earning super normal profits*

4. That on facts and in law, the Hon'ble DRP and learned AO have erred in rejecting the appellant's claim to use of multiple year data for computing the arm's length price and, instead, has adhered to the use of single year updated data to conclude the arm's length price of the international transaction.

5. That on facts and in law, the learned AO has erred in determining the ALP by considering data relating to FY 2007-08 only and using powers u/s 133(6) to obtain information from third parties, which were not available in the public domain at the time of compliance with TP documentation requirement.

6. The Honorable DRP and the learned AO has erred in Law and facts by not providing suitable adjustments on account of risk profile of the assessee with comparable companies. /

7. The Honorable DRP & learned AO has erred in Law by not considering that the adjustments to the ALP, should be lited to the lower end of 5 percent range as the assessee has the right to exercise this option under the proviso to section 92C of the Act.

8. That the learned AO has erred, in law, and on facts in initiating penalty proceedings under section 271(1)(c) of the Act against t he appellant.

9. Without prejudice to the above grounds, the learned AO has erred in levying interest under section 234A/B/C of the Act while completely disregarding the provisions of the Act and the judicial precedents.”

3. Ground nos. 4 & 5 have not been pressed, hence the same stand rejected being not pressed.

4. Ground nos. 1, 2 and 3 deal with comparables. The main dispute in the present appeal is with regard to selection of 3 comparables by TPO viz.

- (i) Chokshi Laboratories Ltd.
- (ii) Indus Technical & Financial consultants Ltd.
- (iii) WAPCOS Ltd. (Seg.)

4.1. The assessee is a branch office of Intrepid Travel Pty. Limited, having head office at Australia and is engaged in the business of organizing package tours and trips for tourists in various parts of the world including India. The assessee provides ground support travel related services, which include attending to the administration and co-ordination of the tours, arranging hotel accommodation, travel, transport, tour guides and other such travel related services to Intrepid Australia. Intrepid group was started in 1989 in Australia as a tour and travel agency providing specialized tours to various locations in Asia. Intrepid group focuses on travelling in which travelers experience the local public, transport for commuting, small scale locally owned establishments for lodging and eating, travelling in small groups while still maintaining high 'travelling' standards. Thus, partly the services rendered by assessee included the following:

- To provide on-ground co-ordination and logistical support to enable the successful operation of the Intrepid Itineraries. This logistical support includes the provision of group leaders and the organization of local suppliers.
- To operate the trips in accordance with Intrepid's Safety and Responsible Travel policies;
- To operate these trips in accordance with Intrepid Travel's branding guidelines;
- To communicate any necessary itinerary alterations to Intrepid Travel at the earliest opportunity;
- To assist in handling of any passenger complaints in a prompt and professional manner.
- To negotiate competitive fees with local operators, for itineraries and product as requested by Intrepid Travel within agreed timeframes.

4.2. In respect of transactions of Project Support Services, the assessee had benchmarked the same by using TNMM as the most appropriate method. The PLI used was OP/OC. The calculation of operating profit by the assessee had been carried out at an entity level. There is no dispute on these issues.

4.3. The assessee has also not pressed the ground relating to selection/ use of multiple year data vis a vis current year's data for computing the ALP.

4.4. The assessee's main objection before DRP was that it was in 'supporting/ cooperation services' under broad category of 'business support' whereas the comparables selected by TPO and confirmed by Id. DRP were in sophisticated engineering and technical consultancy having different FAR. Ld. counsel pointed out that Id. DRP, after considering the assessee's objections, had excluded Apitco Limited, RITES Ltd. and Vapi Waste & Effluent Management. As regards the three comparables in dispute viz. Chokshi Laboratories Ltd., Indus Technical & Financial consultants Ltd.; and WAPCOS Ltd. (Seg.), Id. DRP did not agree with the assessee's contention that it was an engineering company since it had consultancy segment also. The Ld. DRP further observed that since neither the department nor the assessee had found any consultancy comparables in the tourism sector, therefore, this comparable could not be rejected.

5. Ld. counsel pointed out that Chokshi Laboratories Ltd was engaged in providing calibration and lab testing services, consultancy services and pollution control services of various products. Therefore, functionally it could not be compared with the assessee.

5.1. As regards Indus Technical & Financial consultants Ltd., Id. counsel pointed out that this company was engaged in the manufacturing activity, which is not

comparable activity with that performed by the assessee. Further, on the web site of this company, it was noted as under:

“We are also a renowned manufacturer of TMT Bars. We are a dynamic and fast growing company with diverse exposure in many fields. Our firm has been serving the industry for over two decades with a range of unbeatable services. With the twin advantages of strong experience and excellent expertise, we enjoy the strong support of innumerable clients in India.”

5.2. He, therefore, submitted that this company also was not functionally comparable with the assessee being performing highly technical nature.

5.3. As regards WAPCOS, ld. counsel submitted that it was engaged in providing sophisticated engineering consultancy services in the field of infrastructure in areas like ports and harbours, environmental impact assessment, water and sanitation, micro canalization, rural electrification both in India as well as outside India. It was providing engineering and technical consultancy services which entail completely different function, asset and risk profile as compared to assessee’s routine coordination and support services.

5.4. Ld. counsel submitted that in view of Rule 10B(2)(b), these three comparables have to be excluded.

5.5. Ld. counsel relied on following decisions:

- (i) DCIT Vs. M/s MCI Com India P. Ltd. & ors. (ITA no. 4187/Del/2010 & ors dated 30-8-2012), wherein, in the TP study, the assessee’s description of business and its comparable company was as follows:

“Water and Power Consultancy Services (India) Ltd. (WAPCOS) WAPCOS provides consulting in the domestic and international water and power sectors. Services offered include

market intelligence, feasibility studies, planning/ project formulation, field investigations and testing, engineering design, contract management, quality assurance & management and human resource development.

The company has identified its business activity into two business segment i.e. Consultancy & Engineering projects and Lump Sum Turnkey projects (As per the Annual Report for financial year 2003-04). WAPCOS has been providing consultancy services in all facets of Water Resources, Power and Infrastructure Sectors in India and Abroad.

"Main fields of the company cover Irrigation, Water Management, Drainage, Ground Water Exploration, Development, Flood Control, Reclamation and River Management, Dam and Reservoir, Power Engineering; Hydro Power Generation; Agricultural Development; Waterways; Systems Studies and Information Technology, Human Resources Development.

WAPCOS has also been venturing into newer fields such as Software Development, City Development Plans, financial Management System Technical Education, Quality Control and Construction supervision, Roads & Bridges. "

5.6. He further pointed out that high risk profile of EIL, Rites, Wapcos and TCE rendered the company's financial results non-comparable to the margins earned by the assessee from its marketing support activities. The Tribunal, after considering these submissions, accepting the finding of first appellate authority, observing as under:

"We agree with the view of the First Appellate Authority that EIL, Rites, Wapcos and TCE are engineering companies and provide end-to-end solutions and whereas the assessee company provides marketing support services to the parent

company, which is in the nature of support service and hence not functionally comparable.”

5.7. Ld. counsel further submitted that this decision has been confirmed by Hon’ble Delhi High court vide its order dated 29-5-2013 in the case of CIT Vs. Verizon Indi Pvt. Ltd. (ITA no. 271/2013).

(ii) H&M Hennes & Mauritz India Pvt. Ltd. Vs. DCIT (ITA no. 4704/Del/2012 dated 12-4-2013).

Ld. counsel pointed out that in this decision also the Wapcos was excluded from comparables on the ground of being technical and engineering companies not comparables to administrative support services.

(iii) Nortel Networks India P. Ltd. Vs. Addl. CIT (ITA nos. 4765/Del/2011 & 427/Del/2013 dated 25-02-2014)

In this decision all the earlier decisions have been considered and in paras 11 and 11.1 of its order the Tribunal has observed as under:

“11. We have heard the rival contentions and perused the material available on record. Apropos the issue of comparability and the exclusion of Choksi, Rites and WAPCOS, Delhi Tribunal in the cases of M/s MCI Com India P. Ltd. and M/s Verizon India P. Ltd. has held that companies like EIL, Rites, Wapsos and TCE are engineering companies which provide end to end solutions and therefore they cannot be compared with assesseees who provide marketing support services to the parent company. They were held to be functionally not comparable with thee engineering companies.

11.1. Following the orders of coordinate benches of ITAT in the cases of M/s MCI Com India P. Ltd.; M/s Verizon India P. Ltd. (supra); Estel in ITA no.584/Bangalore/06and our own decision in case of Actis Advisers Pvt. Ltd. ITA No. 6390/Del/2012, we hold that Choksi, Rites and WAPCOS being functionally different cannot be applied as appropriate comparable to the assessee. Therefore, they are to be excluded from TP adjustment while determining the ALP.”

5.8. He, therefore, submitted that in view of these decisions, these three comparables being not functionally comparables with the assessee's FAR, are to be excluded.

6. Ld. CIT(DR) submitted that ld. DRP has not examined Choksi Laboratories Ltd. and Indus Technical & Financial Consultants Ltd. and has given finding only with regard to WAPCOS. Therefore, the matter should be restored to the file of ld. DRP.

7. In rejoinder, ld. counsel pointed out that assessee had raised specific objection before ld. DRP, which is available at pages 12 & 13 of the objections raised before ld. DRP.

8. We have considered the rival submissions and have perused the record of the case. There is no gain saying that unless the comparable is functionally similar to the tested party's function, the same cannot be included in the list of comparables for computing ALP as per the provisions of Rule 10B(2)(b). Ld. DRP while considering the comparable Wapcos, inter alia, observed that neither the department nor the assessee has found any consultancy comparables in the tourism sector. Therefore, it becomes imperative that only those comparables should be taken into consideration which have close similarity with the functions carried out by tested party.

8.1. As regards Wapcos Ltd., we find that ld. DRP has approved the inclusion of this comparable on the basis that there is consultancy segment of Wapcos. However, no segmental details of this comparable have been brought on record.

Therefore, since this comparable was admittedly an engineering company, the same could not be included in the list of comparables. This aspect is also covered by various decisions noted in ld. counsel's arguments.

8.2. As regards Chokshi Laboratories Ltd. , it is not in dispute that the said comparable was engaged in providing testing services for various products, calibration, pollution control services and therefore, we failed to appreciate as to how this could at all be considered comparable with the business profile of assessee. Therefore, this has to be excluded from the list of comparables.

8.3. As regards Indus Technical & Financial consultants Ltd., as per web site details, reproduced earlier, this company was engaged in the manufacturing activity and, therefore, had completely different FAR from the tested party.

8.4. Accordingly, in view of above discussion, we direct the AO to exclude the above three comparables from the list of comparables selected by him.

9. Ground nos. 6 & 7: Ld. counsel pointed out that after exclusion of above three comparables from the list of comparables, the PLI would come within (+)(-) 5% range and, therefore, this ground has become academic .

10. Ground no. 8 relating to levy of penalty, is premature and stands rejected accordingly.

11. Ground no. 9: The charging of interest u/s 234A/B/C is consequential. The AO shall recalculate the charging of interest, if any, while giving effect to appellate order.

12. In the result, assessee's appeal is partly allowed for statistical purposes.

Order pronounced in open court on 27-02-2015.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Dated: 27-02-2015.

MP: Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR

		Date	Initial	
1.	Draft dictated on	24.02.2015		PS
2.	Draft placed before author	25 .02.2015		PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on			PS
7.	File sent to the Bench Clerk			PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			