



\$~13

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

%

Date of Decision: 25.11.2024

+ **ITA 665/2019**

THE PR. COMMISSIONER OF INCOME TAX -3Appellant

Through: Mr Ruchir Bhatia and Mr Anant Mann and Mr Abhishek Anand, Advocates.

Versus

FLUOR DANIEL INDIA PVT. LTD.

.....Respondent

Through: Mr Vishal Kalra and Mr Ankit Saini, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (Oral)

1. The Revenue has filed the present appeal impugning an order dated 17.01.2019 passed by the learned Income Tax Appellate Tribunal (hereafter the *ITAT*) in ITA No.973/Del/2016 captioned *Fluor Daniel India Pvt. Ltd. v. ACIT* in respect of assessment year (AY) 2011-12.

2. The respondent (hereafter *the Assessee*) had preferred the aforementioned appeal against the final assessment order dated 29.01.2016 passed by the Assessing Officer (hereafter *AO*) under Section 143(3) read with Section 144C of the Income Tax Act, 1961 (hereafter *the Act*). The Assessee has preferred the said appeal assailing the transfer pricing adjustment as directed by the Transfer Pricing Officer (hereafter *TPO*) on



the basis of which the Assessee's returned income was enhanced by ₹7,44,04,229/-. The Assessee is engaged in providing engineering and design services and is a subsidiary of a US Company named Fluor Corporation and Daniel International.

3. It is a captive service provider and provides services solely to its PE. The Assessee filed its income for AY 2011-12 declaring an income of ₹19,87,61,183/-, which was subsequently revised to ₹19,87,61,183/-.

4. The Assessee had declared the following international transaction during the previous year:

“2.1 International Transactions

Sl. No.	International Transaction	Amount (In Rs.)
1	Provision of services	1,224,193,283
2	Receipt of services	45,276,486
3	Training costs	4,960,379
4	Payment of software charges	47,515,618
5	Reimbursements received	21,037,547

5. The Assessee furnished its transfer pricing analysis to establish that the consideration received was on the arm's length basis. The Assessee used transactional net margin method (TNMM) with operating profit to operating costs as its profit level indicator (PLI). The Assessee selected eight comparable entities and worked out their average mean PLI at 6.99%. Since the Assessee's PLI was 12.70%, Assessee claimed that no transfer pricing adjustment was necessary. The TPO rejected the transfer pricing analysis and conducted its own analysis.

6. The TPO selected seven entities as comparables for conducting the



benchmark analysis. The names and the PLI of the seven entities as set out by the TPO in its order is set out below:

“Sl. No.	Company Name	OP/OC (%)
1	Acropetal Technologies Ltd. (Segment)	14.36
2	Accuspeed Engineering Service India Ltd.	10.37
3	Cades Degitech Pvt. Ltd.	5.47
4	Kitco Ltd.	27.48
5	Mahindra Consulting Engineers Ltd.	30.92
6	Project and Development India Ltd.	39.32-
7	T C E Consulting Engineers Ltd.	29.29
AVERAGE		22.46”

7. Based on the benchmark analysis, the TPO directed enhancement of ₹10,05,97,632/-, on the Assessee’s declared income. The Assessee filed its objections before the Dispute Resolution Panel (DRP). The objections raised by the Assessee, which are the subject matter in the present appeal, relate to the inclusion of the following four companies as comparables:

Sl. No.	Company Name
1	Kitco Ltd.
2	Mahindra Consulting Engineers Ltd.
3	Project and Development India Ltd.
4	TCE Consulting Engineers Ltd.

8. According to the Assessee, the FAR (functionality, asset and risk)



analysis of the said entities indicated that the same were not similar to that of the Assessee. However, the learned DRP rejected the said objections on the ground that the dissimilarity as pointed out by the Assessee was not significant. The DRP also held that TNMM method was tolerant to functional dissimilarity and therefore, rejected the Assessee's objection to the inclusion of the aforesaid four entities as comparables.

9. Aggrieved by the said decision, the Assessee preferred the appeal before the learned ITAT.

10. In regard to the inclusion of Kitco Ltd. as a comparable, the learned ITAT examined the Kitco Ltd.'s functional profile and held that the same was not comparable.

11. It is material to note that the Assessee had also raised an objection that the Kitco Ltd. was owned by the Government. However, the learned ITAT did not accept that the ownership of the company could be a ground for finding the same as uncomparable. The relevant extract of the learned ITAT's decision is set out below:

“KITCO, the first Technical Consultancy Organization (TCO) in India, was established in 1972 by Industrial Development Bank of India, other national and state level financial institutions, Govt. of Kerala and 7 Public Sector Banks for rendering services to Entrepreneurs, Govt. Departmental PSUs, Local Bodies, etc. Presently, Small Industries Development Bank of India (SIDBI) is the prime shareholder with 49% shares of the company.

Would KITCO successfully implemented projects like Cochin International Airport Ltd., Cochin Special Economic Zone, etc and is involved in implementing a multimodal Mobility Hub at Cochin all of which are first of its kind in the country in their own respect. KITCO successfully is stated to have completed



Phase-I of CIAL Golf Course & Country Club and Ghallah Wentworth Golf Course at Muscat, Sultanate of Oman, thereby establishing itself in an area, which was considered to be the forte of European Consultants. The prestigious overseas assignments completed by KITCO include technical evaluation of electrical power distribution network at King Abdul Aziz International Airport, Jeddah. It is also observed that this company is working in divisions like infrastructure, tourism, aviation, IT services, HRD, financial services etc. which are dissimilar to the functional profile of the assessee company. Snapshot enclosed.

In our considered opinion this company is involved in executing huge projects with a motive to earn profits. We therefore reject the argument of Ld. Counsel that since this company is owned by government it cannot be considered to be a fit comparable. However we observe that functions performed, risks assumed and assets owned by this company is huge and fast as compared to that of assessee who is acting as a sub contractor for its AE, rendering engineering and design services and is remunerated on cost plus basis.

We therefore reject this company as it does not satisfy the functionality test with that of assessee's"

12. We find no infirmity with the aforesaid decision. Undisputedly, Kitco Ltd. was working in divisions like infrastructure, tourism, aviation, IT services, HRD and financial services, which were not similar to the functions performed by the Assessee. As noted above, the Assessee was engaged in engineering and design services.

13. Whilst the TNMM method is broadly tolerant to certain functional dissimilarity as the method entails comparison is based on net margins. However, it is essential that the broad functional profile of the comparables are similar. It would be erroneous to compare companies with different



functionalities as similar only on the ground that TNMM is a more tolerant method.

14. Insofar as the TCE Consulting Engineers Ltd. is concerned, the Tribunal accepted that the said company was providing high end technical services, which were also not comparable with the functions performed by the Assessee. The relevant extract of the learned ITAT's decision is set out below:

“(III) TCE Consulting Engineers Ltd.

Ld.TPO included this comparable into the final list, as it provides engineering and designs services to its customers. On the contrary Ld.Counsel submitted before us that it is not a fit comparable as it is functionally dissimilar.

On the contrary Ld. CIT DR placed reliance upon the observations of Ld. TPO/DRP.

We have perused submissions advanced by both sides in the light of records placed before us.

It is submitted that this company is engaged in providing high-end technical services. Profile submitted by the assessee at page 310-395 of paper book volume 1 shows that it successfully managed complex engineering projects across infrastructure spectrum and is associated with prestigious urban infrastructure facilities such as Airports, Railways and metropolis engineering consulting projects.

Therefore, in our view it is apparent that this company is engaged in providing high end engineering consulting services which is not comparable with limited functions performed by assessee. Therefore we direct to exclude



this comparable.”

15. Similarly, the learned ITAT also examined the FAR comparability of Project and Development India Ltd. and Mahindra Consulting Engineers Ltd. on the basis of their respective FAR analysis.

16. Insofar as the Project and Development India Ltd. is concerned, the learned ITAT concluded that it could not be compared with the limited functions as performed by the Assessee. A similar view was also expressed in respect of Mahindra Consulting Engineers Ltd. The relevant extract of the decision of the learned ITAT setting out the reasons for excluding the said two entities as comparables for the purposes of benchmarking the ALP are set out below:

“(II) Project and Development India Ltd:

Ld. TPO included this comparable into the final list as it provides engineering and designs services to its customers. On the contrary Ld.Counsel submitted before us that it is not a fit comparable as it is functionally dissimilar.

On the contrary Ld. CIT DR placed reliance upon the observations of Ld. TPO/DRP.

We have perused submissions advanced by both sides in the light of records placed before us.

Functional profile of this company, as submitted by assessee, and as per the annual report placed at page 396-479 of paper book is as under:

Under engineering and consultancy division this company has played a vital role in development of fertiliser industries in India. It is still maintaining



strength in the sector and is ready to take up new challenges in executing the Brownfield, Greenfield, revamp and expansion projects of many fertiliser units in country. Ld.Counsel submitted that the services rendered by this company are directly to its clients and not on a sub-contract basis.

From the above, it is evident that this comparable is not functionally comparable due to difference in functions performed by this company with that of assessee, In our view this company cannot be compared with limited functions performed by assessee, because it is the nature of services rendered and not per se rendering of services that is relevant in accepting or rejecting it as comparable.

Therefore, we direct exclusion of this comparable from the list of comparables.

(IV) Mahindra Consulting Engineers:

Ld.TPO included this comparable into the final list, as it provides engineering and designs services to its customers. On the contrary Ld.Counsel submitted before us that it is not a fit comparable as it is functionally dissimilar.

On the contrary Ld. CIT DR placed reliance upon the observations of Ld. TPO/DRP.

We have perused submissions advanced by both sides in the light of records placed before us.

It has been submitted that this company is engaged in services which are highly technical. Functional profile is placed at page no.271, 272 of the Paper Book and objections before the ld. TPO at page 480-498 of Paper Book volume 1. It is observed from the functional profile that this company is part of Mahindra Partners’.



It does not show functional profile of Mahindra Consulting Engineers. However it shows that this company is engaged in providing services and has proved its capability to execute innovative projects and to penetrate into new areas of operation. It is further submitted that it is engaged in providing infrastructure engineering and consulting services. Therefore it is apparent that it is functionally different.

We therefore direct to exclude this company, in view of highly technical capabilities of executing infrastructure development projects *vis-a-vis* that of assessee who is rendering engineering and related services as a sub-contract limited to specific functions as per the requirement of its affiliate.”

17. We find no infirmity with the aforesaid view. The findings of the learned ITAT are in consonance with the ALP provisions under Section 92C of the Act.

18. No substantial question of law arises in the present appeal. This appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 25, 2024
RK

Click here to check corrigendum, if any