

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER
AND

SHRI VIKAS AWASTHY, JUDICIAL MEMBER

[
ITA NO.2103/Mum/2014(A.Y.2009-10)

ITA NO.1658/Mum/2015(A.Y.2010-11)

ITA NO.1527/Mum/2016(A.Y.2011-12)

NGC NETWORK (INDIA) PRIVATE LIMITED

Star House, Urmi Estate,

95, Ganpatrao Kadam Marg,

Lower Parel (W), Mumbai 400 013.

PAN:AABCN1401A

..... Appellant

Vs.

The ACIT range 11(1)/16(1),

Aaykar Bhavan, M.K.Road,

Mumbai 400 020

..... Respondent

ITA NO.1245/Mum/2016(A.Y.2011-12)

The ACIT range 16(1),

Aaykar Bhavan, M.K.Road,

Mumbai 400 020

..... Appellant

Vs.

NGC NETWORK (INDIA) PRIVATE LIMITED

Star House, Urmi Estate,

95, Ganpatrao Kadam Marg,

Lower Parel (W), Mumbai 400 013.

PAN:AABCN1401A

.... Respondent

C.O.No.265/Mum/2017

(Arising out of ITA No. 1245/Mum/2016(A.Y.2011-12)

NGC NETWORK (INDIA) PRIVATE LIMITED

Mumbai 400 013.

PAN:AABCN1401A

.... Cross Objector

Vs.

ACIT, Range 16(1)

Mumbai.

.... Appellant in Appeal

Assessee by : S/Shri Porus Kaka& Divesh Chawla
Respondent by : Shri A. Mohan

Date of hearing : 11/02/2020
Date of pronouncement : 26/02/2020

ORDER

PER VIKAS AWASTHY, JM:

These appeals by the assessee are for assessment years 2009-10, 2010-11 and 2011-12 and the appeal by the Revenue for assessment year 2011-12 are taken up together as the issues involved in all these appeals are common and are arising from same set of facts. For the sake of convenience facts are extracted from appeal of the assessee in assessment year 2009-10.

ITA NO.2103/Mum/2014,A.Y. 2009-10.

2. This appeal by the assessee is directed against the assessment order dated 20/01/2014 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act').

3. Brief facts of the case as emanating from the records are: The assessee company is engaged in distribution of Satellite Television Channels namely, National Geographic Channel and History Channel(Now known as Fox Traveller Channel) in India. The assessee during the period relevant to the assessment year under appeal entered into international transaction with two of its Associated Enterprises (AEs) namely;(i) M/s. NGC Network Asia LLC ,USA & (ii) M/s. Fox International Channels (US) Inc. USA. The assessee provided business

support services in the form of (a) Promo Production Services; (b) Long Form Production Services; and (c) Quality Control Services in relation to content versioning. To benchmark transactions with its AEs, the assessee selected eight companies as comparables. The assessee adopted Transaction Net Margin Method(in short 'TNMM') as the most appropriate method. The OP/OC was the filter for determining PLI. The Transfer Pricing Officer (TPO) rejected five out of eight comparables selected by the assessee and introduced two fresh comparables. Thus the final set of comparables adopted by the TPO for determining Arms Length Price (ALP) of the assessee's international transaction and their average arithmetic mean is as under:-

S.No.	Name of the comparable company	PLI (%)
1	Apitco Ltd.	36.58
2	DLF Services Ltd.	5.21
3	Hindustan Housing Company Ltd.	9.09
4	IDC (India) Limited	9.99
5.	TSR Darshaw Limited	27.98
	Arithmetic Mean	17.77
	Assessee	9.00

4. The TPO made adjustment of Rs.29,69,557/- to determine ALP of the international transactions with AEs. On the basis of order of the TPO dated 17/01/2013, the Assessing Officer passed draft assessment order on 25/03/2013. Further, the Assessing Officer in the draft assessment order made disallowance of payment of agency commission Rs.4,70,26,793/- under section 40(a)(ia) of the Act. Aggrieved against the draft assessment order the assessee filed objection before the Dispute Resolution Panel (DRP), inter-alia assailing inclusion of Apitco Ltd. (in short 'Apitco') and TSR Darshaw Limited (in

short 'TSRDL') in the list of comparables by the TPO . The DRP vide direction dated 31/12/2013 rejected the assessee's objections in toto. The Assessing Officer passed the impugned assessment order in line with the directions of the DRP. Now, the assessee is in appeal before the Tribunal assailing the additions made by the Assessing Officer.

5 Shri Porus Kaka, appearing on behalf of the assessee submitted that in appeal the assessee has raised 17 grounds. The grounds No.1 to 13 are in respect of transfer pricing issues. The Ground No.14 of the appeal is in respect of disallowance under section 40(a)(ia) of the Act for non-deduction of tax at source under section 194H of the Act on payment of agency commission. The other three grounds i.e. ground No.15,16 & 17 are on the issue of charging of interest under section 234B & 234C of the Act and levy of penalty under section 271(1)(c) of the Act . The Id. Authorized Representative for the assessee submitted that if ground No.10 & 11 relating to inclusion/exclusion of the comparables is decided in favour of the assessee, the ALP of the assessee would be within plus minus 5% range and hence, the other grounds on TP issue i.e. ground Nos. 1 to 9 and 12 to 13 of the appeal TP issue would become academic.

6. The Id. Authorized Representative for the assessee submitted that TPO has selected Apitco as one of the comparables. The said company is a 100% Government Undertaking and is functionally different from the assessee. The Id. Authorized Representative for the assessee submitted that a perusal of Directors report of Apitco at page 336 of the Paper Book would show that the company is engaged in high end technical consultancy services, such as skill

development, tourism and research studies, micro enterprises developments, cluster development, asset reconstruction and management services, energy related services, environment management, infrastructure planning and development, etc. The activities carried out by Apitco are absolutely at variance with the activities of the assessee, which is primarily engaged in providing low end business support services. The Id. Authorized Representative for the assessee submitted that the Tribunal in assessee's own case in ITA NO.2223/Mum/2017 for assessment year 2012-13 decided on 30/04/2019 has rejected Apitco as comparable on both ground i.e. the said company being Government Company and being functionally different. The Id. Authorized Representative for the assessee further submitted that in the case of assessee's group concern, Star India Ltd vs. ACT in ITA No.1902/Mum/2016 for assessment year 2011-12 decided on 01/08/2019, the Tribunal held Apitco is not functionally comparable

6.1 The Id. Authorized Representative for the assessee in order to buttress his contention that a Government company cannot be considered as comparable referred to the decision of Tribunal in the case of M/s.Thyseen Krupp Vs. Addl. CIT, 154 TTJ 689(Mum-Trib). The Id. Authorized Representative of the assessee submitted that the Tribunal excluded Engineers India Ltd. from the list of comparables on the ground that it is a Government Undertaking. The Department carried the issue in appeal before the Hon'ble High Court. The Hon'ble High Court upheld the findings of Tribunal [CIT vs. Thyseen Krupp reported as 385 ITR 612(Bom).]

6.2 In respect of TSRDL, the Id. Authorized Representative for the assessee submitted that the said company is engaged in BPO/KPO activities and hence, cannot be compared to assessee, a business support provider. The Id. Authorized Representative for the assessee pointed that Tribunal in the case of assessee's group concern Star India Private Limited vs. ACIT in ITA No.1901/Mum/2016, assessment year 2011-12 decided on 1st Aug.2019 held that TSRDL is engaged in provision of Pay Roll Services and Provident Fund Management Services. The said company is also Registrar and share transfer agent, therefore, it cannot be compared to support service provider. The Id. Authorized Representative for the assessee contended TSRDL has been rejected as comparable by the Tribunal in series of decisions. Some of the Tribunal orders are as under:-

- (1) APL Logistics (India) (P) Ltd. vs. ACIT, ITA No.2162/Mum/2015, A.Y. 2010-11 dated 29th May, 2019.
- (2) Vestergaard Asia Pvt. Ltd. vs. DCIT, Cir.26(2), ITA No.6670/Del/2015 A.Y. 2011-12 dated 30th November, 2017.
- (3) Honeywell Turbo Technologies (India) Pvt. Ltd. v. DCIT, ITA No. 2584/Pun/2012, A.Y. 2008-09 dated 10th February, 2017.
- (4) Trend Micro India Pvt. Ltd vs. DCIT, Cir.25(2), ITA No.1585/Del/2015, A.Y. 2010-11 dated 20th November, 2015.

6.3 In respect of ground No.14, relating to corporate issue of disallowance under section 40(a)(ia) of the Act, the Id. Authorized Representative for the assessee submitted that the assessee offered trade discount to its customers. The trade discount is reflected in the invoice. The Assessing Officer wrongly

presumed that trade discounts are in the nature of agency commission paid by the assessee to the intermediaries for procuring business to the assessee. The Assessing Officer further erred in coming to the conclusion that the assessee has not deducted tax at source under section 194H of the Act, on all such payments on agency commission. Therefore, the Assessing Officer made disallowance of the said purported payments under section 40(a)(ia) of the Act. The Id. Authorized Representative for the assessee submitted that trade discounts offered by the assessee to its customers are neither payments made by the assessee to its agents nor it is claimed in the books of account. The assessee has been following this practice of offering trade discounts to its customers right through and the same are reflected in the invoice issued by the assessee. In the earlier assessment years, the Department has never raised any dispute on this count. The assessment year under appeal is the first year when the Department raised any query on trade discounts offered by the assessee and has wrongly assumed the same as agency commission. The Id. Authorized Representative for the assessee submitted that similar disallowance was made by the Revenue in assessee's group concern Star Entertainment Media Pvt. Ltd. in assessment year 2010-11. The DRP decided the issue in favour of the assessee. Thereafter, the Revenue carried the issue in appeal before the Tribunal in ITA No.1686/Mum/2015. The Tribunal vide order dated 09/03/2016 upheld the findings of DRP and dismissed the ground raised by the Department. Thereafter, the Department filed appeal against the order of Tribunal before the Hon'ble Bombay High Court in Income Tax Appeal No.950 of 2017. However, the Department did not challenge the

finding of the Tribunal on this issue. Thus, the Department accepted the findings of Tribunal on this issue.

7. On the other hand, Shri A. Mohan, representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id.Departmental Representative submitted that merely for the reason that comparable selected by the TPO is a Government Undertaking would not make the comparable bad. The Government Companies work under corporate environment and are competitive in every respect. The Id.Departmental Representative strongly supported the inclusion of Apitco and TSRDL in the list of comparables.

8. We have heard the submissions made by rival sides and have perused the orders of authorities below. The assessee in appeal has raised 17 grounds. The grounds No.1 to 13 of the appeal are in respect of transfer pricing. The Id.Authorized Representative of the assessee at this stage has confined his submissions only in respect of exclusion of two comparables i.e. Apitco and TSRDL. Our findings on the issue are as under:-

Apitco Limited

8.1 The assessee in ground No.10 of the appeal is seeking exclusion of Apitco from the list of comparables on two counts (i)the company is a Government Undertaking; and (ii) the company is functionally different. We find that in assessee's own case in ITA No.2223/Mum/2017 (supra), the Tribunal excluded Apitco from the list of comparables for the reasons that the

company is Government company and also being functionally non-comparable.

The relevant findings of the Tribunal on this issue read as under:-

“12. We have considered rival submissions and perused material on record. The first issue which requires consideration is, whether a Government Company can be treated as a comparable. In our view, the dispute on this issue is now fairly well settled by virtue of various judicial precedents. The Tribunal, Mumbai Bench, in Thyssen Krupp Industries India Pvt. Ltd. (supra), has held that Government Company cannot be treated as comparable as they are not driven by profit motive and have been created in furtherance of social obligation of the Government. Having held so, we are to examine whether Apitco Ltd., falls in the category of a Government Company / PSU. On a perusal of the material on record including the annual report of the company, we are of the considered opinion that Apitco Ltd. has to be treated as a Government Company / PSU. In fact, in the case of International SOS Services India Pvt. Ltd. v/s DCIT, [2016] 67 taxmann.com 73 (Del.), the Tribunal, Delhi Bench, has excluded Apitco Ltd., by treating it as a Government Company. The aforesaid decision of the Tribunal was upheld by the Hon'ble Delhi High Court while deciding Revenue's appeal in ITA no. 454 of 2016, dated 30th May 2017. It is relevant to observe, though the Department challenged the aforesaid decision of the Hon'ble Delhi High Court before the Hon'ble Supreme Court, however, the SLP was dismissed by the Hon'ble Supreme Court finding no merit therein. Thus, in view of the judicial precedents referred to above, Apitco Ltd., cannot be considered to be a comparable. Even otherwise also, in various other decisions, Apitco Ltd., has been rejected as a comparable due to functional dissimilarity and lack of segmental break-up. In view of the aforesaid, we direct the Assessing Officer to exclude Apitco Ltd., from the list of comparables and compute the arm's length price of business support service segment. This ground is allowed.”

8.2 We further find in the case of Star India Pvt. Ltd. vs. ACIT(supra), the Co-ordinate Bench of Tribunal after considering the facts came to the conclusion that Apitco is not a good comparable being Government company. The Tribunal further held that the said company is not functionally comparable with a company engaged in providing support services. The relevant extract of the findings of the Tribunal on this issue are as under:-

“12. We have heard the rival contentions and gone through the facts and circumstances of the case. We have gone through the arguments of the both the sides and noted that as per web site of APTICO is owned by a Public Sector undertakings. As per director's report for AY 2011-12, the Revenue of APTICO is

influenced by Govt. Procedures and budget allocation. We also notice that the share holding is by public sector undertakings and the support received by the government and its public sector share holders in the functioning of APTICO. For practical purposes it is a Government company. Even, the company is not functionally comparable as per the Director's of the Company and Schedules to the profit and loss account. It can be seen that the company generates revenue from services such as cluster development, project development services, entrepreneurship development and training, asset reconstruction and management services, micro enterprises development, tourism and research studies, skill development, energy and environment management related services. APTICO also offers wide range of consulting services in the nature of project identification, project counselling, pre feasibility reports, detailed project feasibility reports, infrastructure planning, market assessment, expansion, diversification and turn around strategies, skill development, project appraisals, asset valuation, HRD intervention, capacity building, etc. These services provided by the APTICO are in the nature of high end consultancy / project related services and hence APTICO cannot be compare as comparable to support to service providers. Even, company has not provided for any segmental break up for the income earned from various revenue streams as it is not clear from its audited accounts. Further, APTICO receives subsidy from central and state financial institutions for certain assignments. In view of the above reasons, we are of the considered view that APTICO cannot be considered as comparable to the assessee and we direct the AO to exclude this company from the list of comparables."

8.3 The Id.Departmental Representative has not placed on record any material to controvert the finding of the Tribunal rejecting Apitco as comparable being a Government company and functionally different from that of a support service provider. Thus, in view of similarity in facts of the case and the decision of Tribunal in assessee's own case in assessment year 2012-13, we hold that Apitco is not a good comparable and, hence, is to be excluded from the list of comparables.

8.4 The assessee in the Ground No.10 of the appeal is also seeking inclusion of Overseas Development & Employment Promotion Consultants Ltd. and Overseas Manpower Corporation Ltd. However, no submissions were made by the Id.Authorized Representative of the assessee in respect of the

said companies. Consequently, the ground No.10 of the appeal is partly allowed.

TSR Darshaw Limited

8.5 The assessee in ground No.11 of the appeal is seeking exclusion of TSRDL from the list of comparables on the ground of functional differences. The contention of the assessee is that TSRDL is engaged in providing Share Registrar and transfer services, depository services, pay roll and Provident fund Management Services, etc. The activities carried out by the said company are in the nature of BPO/KPO. We find that the Tribunal in the case of Star India Pvt. Ltd. (supra), a group company of the assessee, having activities similar to that of assessee has held, TSRDL is not comparable to support service provider. The relevant extract of the findings of Tribunal read as under:-

“13. As regards to TSR Darashaw Limited, we noted that this company is a registrar and transfer agent and also engaged in provision of pay roll services. We have gone through the annual report Schedule ‘J’ and as per note 7 revenue recognition of this company provides share registry and transfer services, depository services, record management, pay roll and provident fund management and corporate fixed deposit management services. We also noted from the directors report that this company has completed implementation of a new global pay roll ERP application called RAMCO pay roll business which will enable it to withstand competition and service clients in the overseas market. Accordingly, we are of the view that TSR Darashaw is a registrar and share transfer agent, who has also forayed into pay roll business as in house software development and cannot be compared as a sub agent as the functions are wholly different. Accordingly, we direct the AO to exclude this from comparable to support service provider like SIPL. We direct the AO accordingly. This issue of assessee’s appeal is allowed.”

8.6 No material is brought before us by the Department to controvert the findings of Tribunal in rejecting TSRDL as comparable to support service provider. Respectfully following the decision of Co-ordinate Bench of the

Tribunal, we hold that TSRDL is not comparable to a company engaged in providing business support services. Consequently, we direct the TPO/Assessing Officer to exclude TSRDL from the list of comparables. Consequently, Ground No.11 of the appeal is allowed.

9. In ground No.14 of the appeal, the assessee has assailed disallowance made under section 40(a)(ia) Rs.4,70,26,793/- The Assessing Officer has made disallowance on account of agency commission under section 40(a)(ia) of the Act on the ground that the assessee has not deducted tax at source under the provisions of section 194H of the Act in respect of said agency commission paid to the agents for procuring business for the assessee. The Id.Authorized Representative of the assessee has explained that the assessee is offering trade discount to its customers and the said trade discount is reflected in the invoice issued by the assessee. The trade discounts labelled as agency commission by Assessing Officer, are neither paid to the agents nor claimed in the books. Therefore, there is no question of deducting tax at source on such alleged payment of agency commission. The Id.Authorized Representative of the assessee has further pointed that in the past assessee was following similar practice of offering trade discounts to its customers, the discounts were reflected in the invoice, no dispute was ever raised by the Department. This fact has not been disputed by the Id. D.R. There has been no change in facts in the assessment year under appeal. Rule of consistency demands that if the transaction has been accepted by the Revenue in the past, without there being any change of facts or the provisions of law, the transaction should not be disturbed.

10. We find that similar issue had come up before the Tribunal in the case of assessee's group concern Star Entertainment Media Pvt. Ltd. The Tribunal in an appeal by the Department in ITA No.1686/Mum/2018(supra) after examining the facts on this issue concluded as under:-

"3.5. In our opinion, combined reading of facts of this case, order of the DRP, judgments relied upon by the learned Counsel as well as aforesaid circular of the Board clearly suggests that necessary ingredients for invoking the provisions of section 194H are missing in this case. It is noted that it is in the nature of trade discount and not the commission. There exists no relationship of agency. The transaction has been done on principle to principal basis. It is further noted by us that, no credit entries appear in the accounts of advertising agencies forming part of the books of the assessee in so far as the agency commission of 15% is concerned. In other words, this is a peculiar case, where no income is involved in reality. The term 'commission' has been used symbolically in the invoice, There was neither any credit entry in the books, nor any actual payment made by the assessee by any mode, on account of 'commission'. Thus, keeping in view the facts of this case and aforesaid legal position, we find that order of the DRP is in accordance with law and facts and no interference is called for therein and therefore same is upheld. Ground raised by the revenue is dismissed."

The Tribunal upheld the finding of DRP in deleting the addition made on similar facts. The Revenue filed appeal before the Hon'ble High Court against the said order of Tribunal. However, in appeal, the Revenue did not assail the findings of Tribunal on the issue of deleting the addition made in respect of agency commission under section 40(a)(ia) of the Act. Thus, the Revenue accepted the findings of Tribunal on this issue. Taking into consideration, the facts of the present appeal and the aforesaid decisions, we find merit in the contentions of the Id.Authorized Representative of the assessee. Accordingly, Ground No.14 raised in the appeal is allowed.

11. Since, we have accepted the contentions of the assessee in excluding Apitco and TSRDL from the list of comparables the margin of the assessee falls

within tolerance range of +/- 5%. As a result, the grounds No.1 to 9 and 12 to 13 relating to transfer pricing adjustment have become academic, hence, are not deliberated upon.

12. The Grounds Nos.15 & 16 of the appeal are respect to charging of interest under section 234B & 234C of the Act. Charging of interest is mandatory and consequential, hence, these grounds are dismissed.

13. In Ground NO.17 of the appeal, assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, therefore, this ground is dismissed as premature.

14, In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA NO.1658/MUM/2015, A.Y.2010-11:

15. The grounds raised by the assessee in assessment year 2010-11 are similar to the grounds raised in assessment year 2009-10. The Id. Authorized Representative for the assessee submitted that in present appeal the assessee is seeking exclusion of Apitco and TSRDL, as was in assessment year 2009-10. The submissions made in A.Y 2009-10 in respect of aforesaid comparables would equally apply to A.Y 2010-11. Apart from above two comparables, the assessee in the present assessment year has also assailed inclusion of WAPCOS Limited (in short 'WAPCOS').

16. The Id. Authorized Representative for the assessee submitted that WAPCOS is a Government Company and, hence, should be excluded from the

list of comparables for the parity of reasons APPLIED FOR excluding Apitco. The Id. Authorized Representative for the assessee further contended that the Tribunal in the VARIOUS decisions has excluded WAPCOS from the list of comparables being Government Company. To support his contentions, the Id. Authorized Representative for the assessee referred to following decisions:

- (1) Jacobs Engineering India P. Ltd. vs. DCIT, ITA No.1964/Mum/2016 A.Y.2011-12 dated 22/02/2019.
- (2) Genzyme India Pvt. Ltd. vs. ACIT, ITA No.892/Del/2014, A.Y.2009-10 Dated 20/04/2018.
- (3) Virginia Transformer India P. Ltd., vs. ITO, ITA No.1001/Del/2014 ,A.Y 2009-10 dated 10/07/2017.

17. The Id. Authorized Representative for the assessee further contended that WAPCOS is also liable to be excluded from the list of comparables on account of functional disparity. The Id. Authorized Representative for the assessee pointed that WAPCOS is engaged in providing high end consultancy services and undertakes turnkey contracts on regular basis. To substantiate his contention the Id. Authorized Representative for the assessee referred to P&L Account of the company at page 534 of the Paper Book. The Id. Authorized Representative for the assessee pointed that perusal of the P&L account of the said company would further show that there are two segments i.e. consultancy and engineering project and lumpsum turnkey projects. Thus, the activities carried out by WAPCOS are not comparables with that of the assessee, engaged in providing business support services.

18. The Id. Authorized Representative for the assessee stated at the bar that though name of some other companies is also mentioned in grounds of appeal but he is not pressing exclusion of other comparables viz. Best Mulyankan Consultancy Ltd., DLF Services, Genins India TPS Ltd., Killick Agencies and Marketing Ltd., Hindustan Housing Co. Ltd.

19. The Id. Authorized Representative for the assessee further pointed that ground No.14 to 19 of the appeal are on the issue of trade discounts treated as agency commission by the Revenue. The issue is similar to the one addressed in assessment year 2009-10.

20. The Id. Departmental Representative vehemently supported the finding of TPO/DRP in including WAPCOS Ltd. in the list of comparables. The Id. Departmental Representative fairly admitted that the ground raised in the present appeal are similar to the one raised by the assessee in assessment year 2009-10. The Id. Departmental Representative further contended that submissions made in the appeal of the assessee for assessment year 2009-10 would equally apply to assessment year 2010-11.

21. Both sides heard. The ground No.1 of the appeal is general in nature. In so far as Transfer Pricing issues raised in ground No.2 to 13, the Id. Authorized Representative for the assessee has restricted his submissions only qua exclusion of three comparables i.e. Apitco, TSRDL and WAPCOS. While deciding the appeal of the assessee in assessment year 2009-10 we have given detailed finding for excluding Apitco and TSRDL from the list of comparables. The aforesaid findings would *mutatis mutandis* apply to assessment year 2010-11, as well.

22. As regards exclusion of WAPCOS, the primary contention of the assessee is that the said company is a Government Company and, hence, should be excluded from list of comparables. In addition, the assessee has also assailed inclusion of WAPCOS on the ground of functional difference. The Balance Sheet of the company as on 31/03/2011 and the P&L Account for Financial Year 2009-10 at pages 533 to 564 of the Paper Book reveal that the said company is a Government of India Undertaking. The Co-ordinate Bench of the Tribunal in the case of Jacob Engineering India Pvt. Ltd.(supra) has held that WAPCOS being a Government Company cannot be treated as comparable. Similar view has been taken by the Tribunal in the of Genzyme India Pvt. Ltd vs. ACIT(supra) and Virginia Transformer India P Ltd vs. ITO (supra). The Id. Authorized Representative for the assessee also brought to our notice the business activities carried out by WAPCOS. As per Auditors Report, the company is engaged in providing consultancy and Engineering Project and lumpsum Turnkey Project. The activities carried out by WAPCOS are not comparable to a company engaged in providing business support services. Hence, the said company is liable to be rejected as comparable on account of functional disparity as well as, being a Government Company. In view of our above observation, we direct TPO /Assessing Officer to exclude WAPCOS from the list of comparables.

23. The assessee in ground No.9 of the appeal has also assailed inclusion of Best Mulyankan Consultants Ltd., DLF Services, Genins India TPA Ltd. and Killick Agencies and Marketing Ltd. The Id. Authorized Representative for the assessee stated at the bar that the assessee is not pressing exclusion of

aforementioned companies. Consequently, ground NO.8 of the appeal is allowed and ground No.9 of the appeal is partly allowed.

24. In ground No.10, the assessee has assailed inclusion of Hindustan Housing Company Ltd. The Id. Authorized Representative for the assessee stated at Bar that he is not pressing ground No.10 of the appeal, therefore, the same is dismissed as not pressed.

25. Since, we have adjudicated assessee's grounds relating to exclusion of certain comparables, consequently, the PLI of the assessee falls within +/- 5% range. The other grounds relating to transfer pricing issue raised in ground No.2 to 7 and ground No.11 to 13 have become academic and thus, are not deliberated upon.

26. In ground No.14 to 19 of the appeal, assessee has assailed the action of Assessing Officer in treating trade discount as agency commission. This issue we have adjudicated in the appeal of the assessee in assessment year 2009-10. Both sides are unanimous in stating that this issue is identical to the one raised in appeal for assessment year 2009-10. The finding given by us while adjudicating the issue of agency commission in assessment year 2009-10 would *mutatis mutandis* apply to ground No.14 to 19 of the present appeal. Consequently, these grounds are allowed in similar terms.

27. In ground No.20 of the appeal, assessee has assailed charging of interest under section 234B of the Act. The charging of interest under section 234B is mandatory and consequential, hence, the ground raised is dismissed.

28. In ground No.21, assessee has assailed penalty proceedings under section 271(1)(c) of the Act. This ground is premature at this stage. Accordingly, the same is dismissed as such.

29. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA No.1245/MUM/16, CO. 265/MUM/2017 & ITA 1527/MUM/2016.

ITA No.1527/Mum/2016:

30. The grounds raised by the assessee in this appeal are similar to the one raised in assessment year 2009-10 and 2010-11. The Id. Authorized Representative for the assessee has confined his submissions only for exclusion of following comparables:

- (1) Apitco,
- (2) TSRDL,
- (3) WAPCOS
- (4) Hindustan Housing Co. Ltd.

31. The Id. Authorized Representative for the assessee contended that the assessee is not pressing inclusion of following companies:

- (1) Best Mulyankan Consultants Ltd.,
- (2) DLF Services,
- (3) Genins India TPA Ltd.
- (4) Killick Agencies and Marketing Ltd

32. The Id. Authorized Representative for the assessee submitted that if aforementioned four companies are excluded from the list of comparables, the other ground relating to transfer pricing issues would become academic. The Id. Authorized Representative for the assessee submitted that ground No.14 to 18 of the appeal are in respect of trade discount treated as agency commission. This issue is similar to the one raised in assessment year 2009-10 and 2010-11. The Id. Authorized Representative for the assessee further submitted that in ground No.19 of the appeal the assessee has assailed the findings of authorities below in granting short credit of tax deducted at sources (TDS). The assessee had claimed TDS credit of Rs.3,43,33,893/-. The assessee had furnished necessary documents in support of its claim. However, the assessee allowed TDS credit short by Rs.32,911/-. The Id. Authorized Representative for the assessee prayed that the issue can be restored to Assessing Officer for verification.

33. The Id. Departmental Representative fairly admitted that the grounds raised by the assessee on transfer pricing issue and corporate issues are similar to the one raised in assessment year 2009-10 and 2010-11. The Id. Authorized Representative for the assessee vehemently defended the finding of Assessing Officer /DRP.

35. Both sides heard. In so far as assessee's prayer for exclusion of Apitco, TSRDL, WAPCOS is concerned, we have held that the said companies should be excluded from the list of comparables on account of functional disparity apart from the fact that Apitco and WAPCOS being Government companies are not good comparables. The detailed findings given by us in the preceding

assessment years would *mutatis mutandis* apply to the assessment year under appeal.

35. As regards Hindustan Housing Co. Ltd., the assessee is seeking exclusion of the same as the said company fails to qualify RPT Filter. The Id. Authorized Representative for the assessee submitted that the said company is having related party transactions of 25.75% of total revenue. The Id. Authorized Representative for the assessee submitted that the Tribunal in the case of DCIT vs. Aruba Networks India Pvt. Ltd. in IT(TP) A NO.571/Bang/2015 for assessment year 2010-11 decided on 30/09/2016 has excluded Hindustan Housing Limited for the reasons that it has related party transactions exceeding 25% of turnover. Similar view has been taken by the Tribunal in the case of ITO vs. Alcon Laboratories Pvt. Ltd. in IT(TP)A No.391/Bang/2015 in assessment year 2010-11 decided on 21/11/2017. The Id. Authorized Representative for the assessee submitted that there are catena of judgments where the company having related party transactions exceeding 25% of turnover have been rejected as comparable.

36. We have considered the contentions of the Id. Authorized Representative for the assessee. It is no denying fact that where an entity is having related party transaction in excess of 25% of the total turnover, the same is held to be bad comparables. In various judicial pronouncements tolerance of RPT filter has been accepted as 25% of the total turnover. We find that in the case of DCIT vs. Aruba Network Pvt. Ltd., Bangalore Bench of the Tribunal has excluded Hindustan Housing Co. Ltd. from the list of comparables as it has failed to qualify RPT filter of 25%. Taking into consideration, well

settled principle of rejecting comparable by applying RPT filter, we deem it appropriate to refer this comparables to the TPO for re-examination. In case the related party transactions of the said company exceeds 25% of the total turnover, the TPO is directed to exclude said company from the list of comparables.

37. In view of above findings, ground No.9 of the appeal is partly allowed and the ground No.10 of the appeal is allowed for statistical purpose.

38. Since, we have accepted assessee's contention on exclusion of some of the comparables, the PLI of the assessee falls within +/-5% range. Consequently, ground No.2 to 8 and 11 to 13 relating to transfer pricing issue have become academic and hence, not deliberated upon.

39. In ground No.14 to 19 of the appeal, the assessee has assailed the action of Assessing Officer in treating trade discount as agency commission. This issue we have adjudicated in the appeal by assessee in assessment year 2009-10. Both sides are unanimous in stating that this issue is identical to the one raised in appeal for assessment year 2009-10. The finding given by us while adjudicating this issue in assessment year 2009-10 would *mutatis mutandis* apply to ground No.14 to 19 of the present appeal. Consequently, these grounds are allowed.

40. In ground No.19 of the appeal, assessee has assailed the action of TPO in granting short credit of TDS. This issue is restored to the Assessing Officer for re-verification of the supporting documents filed by the assessee for claiming TDS credit. The Assessing Officer is directed to examine the documents filed

by the assessee in support of the claim and allow TDS credit, in accordance with law. Thus, ground No.19 of the appeal is allowed for statistical purpose.

41. In ground No.20 of the appeal, assessee has assailed charging of interest under section 234B of the Act. The charging of interest under section 234B is mandatory and consequential, hence, the ground raised is dismissed.

42. In ground No.21, assessee has assailed penalty proceedings under section 271(1)(c) of the Act. This ground is premature at this stage. Accordingly, the same is dismissed.

ITA NO.1245/MUM/2016,A.Y.2011-12Departmental appeal:

43. The Revenue in appeal has assailed the findings of Assessing Officer /DRP in deleting disallowance under section 40(a)(ia) r.w.s. 194J of the Act in respect of channel placement fee.

44. The Id. Authorized Representative for the assessee has submitted that Hon'ble High Court in the case of UTB Entertainment Television Ltd., Times Global Broadcasting Co. Ltd. and in assessee's own case has deleted the disallowance on account of channel placement fee.

45. We find that DRP has granted relief to the assessee by placing reliance on the decision of Tribunal in assessee's own case for the immediately preceding assessment year . Since this issue has already been laid to rest by the decision of the Hon'ble High Court in various cases including in assessee's own case , we find no infirmity in the directions of DRP in deleting the disallowance on account of channel placement fee. Consequently, ground

No.1 to 6 raised in the appeal by the Revenue on the single issue is dismissed. Consequently, appeal of the Revenue are dismissed.

C.O.No.265/Mum/2017:

46. The assessee filed cross objections supporting the findings of Assessing Officer/DRP. Since we have dismissed the appeal of the Revenue, the cross objections filed by the assessee have become infructuous, and the same are dismissed as such.

47. To sum up, ITA No. 2103/Mum/2014 (A.Y.2009-10), ITA NO.1658/MUM/2015, (A.Y.2010-11) and ITA No.1527/Mum/2016 (A.Y.2011-12) by the assessee are partly allowed. ITA No.1245/Mum/2017(A.Y.2011-12) by the Revenue and C.O. No.265/Mum/2017 by the assessee are dismissed.

Order pronounced in the open court after the hearing on Wednesday, the 26th day of February, 2020.

Sd/
(R.C.SHARMA)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 26/02/2020
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai