

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I', NEW DELHI)**

**BEFORE SHRI N.K.SAINI, ACCOUNTANT MEMBER
AND SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.(TP) No.1722/Del/2015

(Assessment Year 2010-11)

Hyundai Rotem Company, Vs. ACIT, Circle 2(1)(1),
N-3, 3rd Floor, New Delhi
South Extnsion, Park No.1,
Delhi-110 049

GIR / PAN :AABCK6367L

(Appellant)

(Respondent)

Appellant by :Shri Salil Kapoor, Adv.,
Ms. Ananya Kapoor, Adv.

Respondent by : Shri Amrendra Kumar, CIT DR

Date of hearing: 17.06.2016

Date of Pronouncement:05.08.2016

ORDER

PER BEENA A. PILLAI, JM:

The present appeal has been preferred by the assessee against the order of Ld. ACIT Circle 2 (1) (1), International taxation, New Delhi dated 16/02/2015 for assessment year 2010-11 on the following grounds of appeal:

“1. On the facts and circumstances of the case and in law, the assessment order/directions passed by the Learned Assessing Officer ('AO') / Transfer Pricing Officer ('TPO') / Dispute Resolution Panel ('DRP') is illegal, unjust, bad in law and highly excessive.

2. On the facts and circumstances of the case and in law, the reference made by the AO suffers from jurisdictional error. The AO has not recorded any reason in the draft assessment order based on which,

he reached to the conclusion that it was 'necessary or expedient' to refer the matter to the Transfer Pricing Officer ('TPO') for computation of the arm's length price (ALP), as is required under section 92CA(1) of the Income-tax Act 1961 ('Act').

3. On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in law and in facts by not following the principle of consistency without change of facts vis a vis previous years. In other words, Assessing Officer/TPO/DRP erred in law in rejecting the benchmarking approach adopted by appellant in Transfer Pricing documentation, whereas admittedly, the functional profile and nature of international transactions in the current year are same as previous year. The Assessing Officer/DRP/TPO failed to consider that similar benchmarking approach and TP documentation has been accepted in previous years.

4. On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in law and in facts by not taking cognizance of the Article 7(5) of the India Korea tax treaty.

5. On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/ Ld. TPO failed to understand the business model and functional and risk profile of the assessee. Hence, comparison has been made with companies having different functional profile.

6. On the facts and in circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred by not accepting the economic analysis undertaken by the assessee in accordance with the provisions of the Act read with the Rules, and modifying the economic analysis for the determination of the ALP of the assessee's international transactions and holding that the international transactions are not at arm's length.

7. On the facts and circumstances of the case and in law, the Ld. Assessing Officer/ Hon'ble DRP/Ld.

TPO erred by disregarding the functional comparability of the companies considered comparable at the time of the documentation by the assessee.

8. On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in considering companies functionally different from Rotem - POs as comparable.

9. Without prejudice, on the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in following an inconsistent approach in the selection of the comparable companies.

10. Without prejudice, on the facts and in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in law and in facts and circumstances of the cases, by using incorrect filters.

11. On the facts and in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in treating foreign exchange gain or loss as non-operating item for the computation of net operating margins of the comparable companies.

12. Without prejudice, on the facts and in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in using single year data as against the multiple year data used by the Appellant, to compute the arm's length price of the international transaction of the appellant using Transactional Net Margin Method ("TNMM") method.

13. Without prejudice, on the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in placing reliance on the financial data which was not available in the public domain at the time when the economic analysis was undertaken and transfer pricing study was conducted.

14. *On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred in not making suitable adjustments to account for differences in the risk profile of the assessee vis-a-vis the comparables.*

15. *On the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO erred by not applying the Proviso to section 92C of the Act and failed to allow the appellant the benefit of variation of 5 percent in determining the Arm's Length Price .*

16. *On the facts and circumstances of the case and in law, the Assessing Officer/DRP/TPO failed to use segmental results of companies for the purposes of benchmarking wherever available.*

17. *On the facts and circumstances of the case and in law, the Assessing Officer/DRP/TPO erred in comparing appellant with companies having disproportionate scale of operations, large turnover, different cost structure and asset base.*

18. *On the facts and circumstances of the case and in law, AO/DRP/TPO erred in including companies with peculiar economic circumstances and also erred in excluding companies with declining turnover.*

19. *On the given facts and circumstances of the case and in law, AO erred in charging interest u/s 234B.*

20. *That the explanations given, evidence produced and material placed and made available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.*

21. *That the addition / disallowance made are illegal, unjust and bad in law and are based on mere surmises and conjunctures and the same cannot be justified by any material on record.”*

2. The brief facts of the case that emanates from the order of the authorities below are as under:

2.1 Assessee is a company incorporated in Korea and has project offices (PO) in India for carrying out on-site work in relation to specified licensing, coordination and other activities. During the year under consideration, assessee had 3 project offices in India being Rotem RS 1, Rotem RS 3 and BRCL. The role of the Rotem RS1 project office, is to overview the replacement/modification job being undertaken by outsourcing companies and lace with the MRC personnel in relation to maritime and troubleshooting in relation to rolling stock supplied under contract Rotem RS 3 undertakes the supply of components to BEML and is not involved in on-site activities. The on-site activities of testing and commissioning in India are undertaken by BEML as an independent member to MR MB Consortium. RS3 PO only acts as a communication channel between Rotem and the MRC even though the meeting may pertain to on-site portion of the contract. The role of BMRCL PO is largely similar to those under DMRC's RS3 contract.

2.2 The international transactions undertaken by the assessee for the year under consideration are as under:

RS 1 PO:

| Name of the transaction | Method selected | Value of International transaction |
|---|-----------------|------------------------------------|
| Rendering of administrative support and coordination services | TNMM(OP/TC) | 3,50,73,914 |

RS 3 PO:

| Name of the transaction | Method selected | Value of International transaction |
|---|-----------------|------------------------------------|
| Rendering of administrative support and coordination services | TNMM(OP/TC) | 17,03,58,098 |
| Reimbursement of expenses to AE | | 93,51,586 |
| Reimbursement of expenses by AE | No Benchmarking | 1,19,98,903 |

BMRCL PO

| Name of the transaction | Method selected | Value of International transaction |
|---|-----------------|------------------------------------|
| Rendering of administrative support and coordination services | TNMM(OP/TC) | 73,82,625 |
| Reimbursement of Expenses of AE | | 12,76,556 |

2.3 The assessee has chosen transaction net margin method (TNMM) as the most appropriate method (MAM) and operating profit/operating costs (OP/OC) as the profit

level indicator (PLI). In the transfer pricing study, the assessee had arrived at 12 comparable companies with an average margin of -4.05%, each using multiple year data, for all the three PO's. This has been compared with the assessee with operating margin of 8.82% for RS 3 project, 9% for RS 1 project and 9.08% for BMRCL project.

2.4 The comparables selected by the assessee for benchmarking international transactions with its AE's are as under:

| S.NO. | Name of the comparable company |
|--------------|--|
| 1 | Access India Advisors Ltd. |
| 2 | Asian Business Exhibition & Conferences Ltd. |
| 3 | EDCIL (India) Ltd. |
| 4 | ICARA Management Consulting Services Ltd. |
| 5 | Cyber Media Research Ltd. (Earlier IDC (India) Ltd.) |
| 6 | In House Productions Ltd. |
| 7 | India Tourism Development Corporation Ltd. |
| 8 | Ma Fol Global Services |
| 9 | Ma Fol Management Consultants Ltd. |
| 10 | Overseas Manpower Corpn. Ltd. |
| 11 | Times Innovative Media Ltd. |

2.5 The Ld.TPO applied various filters and held the comparables selected by the assessee were functionally

different in some cases, and in some comparable he held that the financial year ending were different. He thus rejected the comparables selected by the assessee and arrived at new set of comparables consisting of 6 companies having an average OP/TC at 27.74% which are as under:

| S.No | Name of the comparable company |
|------|-------------------------------------|
| 1 | Apitco Ltd. |
| 2 | Cyber Media Research Ltd. (IDC) |
| 3 | Global Procurement Consultants Ltd. |
| 4 | HCCA Business Services Pvt. Ltd. |
| 5 | TSR Darashaw Ltd. |
| 6 | Quadrant Communications Ltd. |

3. Aggrieved by the order of the Ld.TPO the assessee filed its objections before the DRP. The DRP upheld the addition made by the Ld. TPO. Subsequently the DY. CIT gave effect to the directions of the DRP and made adjustment to an extent of Rs.21,640,167/- to the returned income of the assessee.

3.1 Aggrieved by the order of the Dy.CIT the assessee is in appeal before us now.

4. The only issue that needs to be addressed is in respect of selection of comparables. The assessee is

challenging inclusion of 4 comparables which are as under:

| S.No. | Name of the comparable company | OP/OC |
|-------|-------------------------------------|--------|
| 1. | Apitco Ltd. | 40.09% |
| 2. | Global Procurement Consultants Ltd. | 37.19% |
| 3. | HCCA Business Services Ltd. | 20.05% |
| 4. | TSR Darshaw Ltd. | 41.15% |

4.1 Apart from that assessee is insisting on inclusion of 7 comparables which are as under:

| S.No. | Name of the comparable company | OP/OC |
|-------|--|---------|
| 1. | Educational Consultants(I) Ltd. | 7.37% |
| 2. | ICRA Management Consulting Services Ltd. | 1.37% |
| 3. | In House Production Ltd. | 4.09% |
| 4. | India Tourism Development Corp.Ltd. | 1.13% |
| 5. | HT Music Entertainment Ltd. | 3.98% |
| 6. | Ma Foi Global Services | -43.45% |
| 7. | Overseas Manpower Corpn. Ltd. | -21.03% |

5. At the outset the Ld. AR pointed out that the issue of inclusion/exclusion of certain comparables stands covered by the order of Id.TPO for assessment year 2009-10 and 2011-12 which are as under:

Comparables excluded by the Ld. TPO for assessment year 2009-10 and 2011-12:

1. Global Procurement Consultants Ltd.

2. HCCA Business Services Ltd.

3. TSR Darashaw Ltd.

Comparables accepted by the Ld. TPO for assessment year 2009-10 and 2011-12:

1. Educational Consultants(I) Ltd.

2. ICRA Management Consultants Ltd.

5.1 He submitted that in the event these five comparables are excluded / included accordingly, the assessee would be well within the range of +/- 5%. He submitted that the functionality and the financial segments have not changed in previous and subsequent assessment years, *viz-a-viz* the year under consideration. We are thus restricting the adjudication only to the extent of the comparability of the five companies disputed by the assessee from being excluded/included as mentioned hereinabove.

5.2 Ld.AR placed reliance upon the following judgments in support of his plea regarding the application of principle of *res judicata* to the facts of the present case:

a) Radhasoami Satsang vs. CIT reported in 193 ITR 321 (SC);

- b) Tamasek Holdings Advisors (I) (P) Ltd vs. DCIT (2013) 38 Taxmann.com 80 (Mumbai-Trib);
- c) Britons Carpet Asia Pvt. Ltd. Vs. DCIT (2011) 46 SOT 289 (Pune);
- d) CIT vs. Neo Poly Pack (P) Ltd. (2000) 245 ITR 492 (Del).

5.3 The Ld. AR submitted that these comparables have been considered and has been decided consistently in the preceding and subsequent assessment year, in a particular manner, for the sake of consistency, the same view should continue to prevail in the year under consideration, unless there is some material change in the facts.

6. On the other hand the Ld. DR submits that the basic characterization is different and every year has to be considered differently. He submitted that the inclusion/exclusion of a particular comparables must be considered independently.

7. We have perused the orders passed by the authorities below, records/paper book placed before us, and the judgments relied upon by the Ld.AR. The order passed by the Ld.TPO for assessment year 2009-10 reveals that these comparables has been excluded/included as prayed for herein above. The transfer pricing documentation maintained by the assessee in respect of Rotem RS 1 project office and Rotem RS 3 project office reveals that this contract has

been entered into by the assessee, way back in 2001 and 2007 respectively. It is also observed that the international transactions undertaken by the assessee in the year under consideration are similar to the international transactions undertaken by the assessee for assessment year 2009-10 and 2011-12. Further neither the Ld. TPO nor the Ld. DR has been able to point out even a single distinguishing feature in respect of the assessment year in question which could have prompted the Ld. TPO to take a different view from assessment year 2009-10 and 2011-12. Without any proper reason or change in the functionality and financial data, it cannot be held that these companies are to be excluded/included (as prayed for herein above), in the intermediary period of the assessment year under consideration. The Ld. TPO has to bring some material on record to show as to why these comparables which were excluded/included (as prayed for herein above) in the earlier year and also in succeeding year, cannot be excluded/included in the year under consideration.

Global Procurement Consultants Ltd.

8. This company has been chosen by the TPO as a comparables. This company is mainly engaged in rendering services to government bodies and international organization. It is engaged in providing varied services inconsistency segment like bit support services, performance review, valuation assignments, financial

advisory services etc. whereas Rotem RS 1 PO is performing functions like licensing, coordination maintenance and troubleshooting and marketing and contracting activities, contract execution, testing and commissioning, lies innig/interfacing with the DMRC carried on by Rotem RS 3 PO, without any risk being bone by the assessee. Thus this company is not functionally similar to the activities carried on by the assessee and more so when it has been rejected by the Ld. TPO in the earlier assessment year as well as in the succeeding assessment year. The ld. DR does not dispute regarding the rejection of this company by the Ld. TPO in the earlier as well as succeeding assessment year. Thus following the rule of consistency we direct the ld. TPO to exclude this company in the list of comparables.

HCCA Business Services Ltd.

9. This company has been chosen by the Ld.TPO. This is a company that offers services like payroll processing and compensation structuring, management of labour and legal compliances, payroll legs regulatory compliances, employee reimbursement processing and accounting services. In a nutshell this company is a leading service provider in the entire gamut of HR operations and administration.

9.1 Thus this company is not functionally similar to the activities carried on by the assessee and more so when it

has been rejected by the Ld. TPO in the earlier assessment year as well as in the succeeding assessment year. The ld. DR does not dispute regarding the rejection of this company by the Ld. TPO in the earlier as well as succeeding assessment year. Thus following the rule of consistency we direct the ld. TPO to exclude this company in the list of comparables.

TSR Darshaw Ltd.

10. This company has been chosen by the TPO. This company has been found to be one of India's leading business process outsourcing organization. This company has well-trained HR personnel this which are the key requirements for handling BPO activities carried on by this company. Basically this company is into rendering specific payroll services to its clients. Thus this company is not functionally similar to the activities carried on by the assessee and more so when it has been rejected by the Ld.TPO in the earlier assessment year as well as in the succeeding assessment year. The ld. DR does not dispute regarding the rejection of this company by the Ld. TPO in the earlier as well as succeeding assessment year. Thus following the rule of consistency we direct the ld. TPO to exclude this company in the list of comparables.

Educational Consultants(I) Ltd.

11. This company has been chosen by the assessee as a comparable. The Ld. AR submitted that this company has

been accepted by the Ld. TPO in for assessment year 2009-10 and 2011-12 on the segmental basis. It is further submitted that the assessee has taken the segmental information relating to income earned from technical assistance and human resource development for the purposes of compatibility of this company with that of the assessee. The ld. DR does not dispute regarding the rejection of this company by the Ld. TPO in the earlier as well as succeeding assessment year. Thus following the rule of consistency we direct the ld. TPO to include this company in the list of comparables.

ICRA Management Consultants Ltd.

12. This company has been chosen by the assessee as a comparable. The Ld. AR submitted that this company is functionally similar as it offers consultancy services in the areas of strategy risk management operations improvement regulatory economics and transaction advisory. It has been pointed out by the ld.AR that, this comparable was accepted by the TPO in assessee's own case for assessment year 2009-10 and 2011-12. The ld. DR does not dispute regarding the rejection of this company by the Ld. TPO in the earlier as well as succeeding assessment year. Thus following the rule of consistency we direct the ld. TPO to include this company in the list of comparables.

12.1 In respect of the remaining comparables which has been disputed due to its inclusion or exclusion has not been objected by the Ld. AR. We accordingly are not inclined to adjudicate upon the compatibility of those companies with that of assessee.

13. In the result the ground raised by the assessee stands partly allowed.

Order pronounced in the open court on 05th Aug., 2016.

Sd./-

(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 05.08. 2016

Sd./-

(BEENA A. PILLAI)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayakan Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi)

| S.No. | Details | Date | Initials | Designation |
|-------|--|--------|----------|-------------|
| 1 | Draft dictated on | | | Sr. PS/PS |
| 2 | Draft placed before author | | | Sr. PS/PS |
| 3 | Draft proposed & placed before the Second Member | | | JM/AM |
| 4 | Draft discussed/approved by Second Member | | | AM/AM |
| 5 | Approved Draft comes to the Sr. PS/PS | 5/8/16 | | Sr. PS/PS |
| 6 | Kept for pronouncement | 5/8 | | Sr. PS/PS |
| 7 | File sent to Bench Clerk | 8/8 | | Sr. PS/PS |
| 8 | Date on which the file goes to Head Clerk | | | |
| 9 | Date on which file goes to A.R. | | | |
| 10 | Date of Dispatch of order | | | |