

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.337 OF 2014

Commissioner of Income Tax-II, Pune .. Appellant.
v/s.
PTC Software (I) Pvt. Ltd. .. Respondent

....
Mr. Suresh Kumar, for the Appellant.

Mr. Percy Pardiwala, Senior Counsel, a/w. Mr. Madhur Agrawal, i/b. Mr. Atul Jasani, for the Respondent.

....
**CORAM: M.S.SANKLECHA, &
S.C. GUPTE, JJ.**

DATE : 10 OCTOBER, 2016.

P.C:-

. This appeal under Section 260-A of the Income Tax Act, 1961 (“the Act”) challenges the order dated 30 April 2013 passed by the Income Tax Appellate Tribunal (“Tribunal”). The impugned order relates to Assessment Year 2006-07.

2. The Revenue has urged the following questions of law for our consideration :

(1) Whether on the facts and circumstances of the case, the Tribunal erred in excluding M/s. Megasoft Ltd., M/s. Software Technology Group International Ltd. and M/s. Transworld Infotech Ltd. from the list of comparable companies holding that the data for the three concerns considered by the Transfer

Pricing Officer was not for the relevant financial year i.e. 01.04.2005 to 31.03.2006?

(2) Whether on the facts and circumstances of the case, the Tribunal erred in directing to exclude M/s. Megasoft Ltd., M/s. Software Technology Group International Ltd. and M/s. Transworld Infotech Ltd. from the list of comparable companies without appreciating the fact that the above three comparable cases were submitted by the assessee itself as pertaining to F.Y. 2005-06?

(3) Whether on the facts and circumstances of the case, the Tribunal erred in referring to Rule 10B(4) of the Income Tax Rules to hold that no case has been made out by the Transfer Pricing Officer for using the data for comparability for the earlier years when the Transfer Pricing Officer/Assessing Officer had specifically given a finding that data for F.Y.2005-06 only has been used for comparability as provided by the assessee?

(4) Whether on the facts and circumstances of the case, the Tribunal erred in excluding Vishal Information Technologies Ltd. from the list of comparable companies without appreciating the fact that the above company was into ITEs industry and was functionally comparable to that of the assessee and hence had rightly been included for the comparable analysis?

(5) Whether on the facts and circumstances of the case, the Tribunal erred in excluding M/s. Ultra Marine & Pigments Ltd. for the purpose of comparability analysis without appreciating the fact that the Transfer Pricing Officer had selected the company as a comparable case as RPT transactions were less than 25% and further the RPT transactions were not associated with the ITEs segment of the company?

3. **Re. Question No.(1):**

(a) Mr. Suresh Kumar, learned Counsel appearing for the Revenue, very fairly states that an identical question (in principle) as raised herein was raised by the Revenue in its appeal, being Income Tax Appeal No.732 of 2014, from an order dated 30 April 2016 of the Tribunal relating to Assessment Year 2007-08. Mr. Suresh Kumar states that this Court, by an order dated 26 September 2016, found that the question as proposed in Income Tax Appeal No.732 of 2014 did not give rise to any substantial question of law.

(b) Therefore, for the reasons mentioned in our order dated 26 September 2016, in Income Tax Appeal No.732 of 2014 filed by the Revenue in respect of the same Respondent Assessee, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

4. **Re. Question No.(2):**

(a) The impugned order of the Tribunal directed the Assessing Officer to exclude M/s. Megasoftware Ltd., M/s. Software Technology Group International Ltd. and M/s. Transworld Infotech Ltd. from the list of comparables while arriving at Arms Length Price (ALP) in respect of its IT Services.

(b) The grievance of the Revenue is that the Respondent Assessee

had itself relied upon M/s. Megasoft Ltd., M/s. Software Technology Group International Ltd. and M/s. Transworld Infotech Ltd. as comparable for the Respondent Assessee's operations for the financial year 2005-06. Therefore, it is submitted that it is not open to the Tribunal to discard the same or for the Respondent Assessee to urge that the same are not comparable.

(c) The requirement under Rule 10B(4) of the Income Tax Rules are clear in as much as it obliges that the data to be used for comparability analysis should be contemporaneous with the time when international transactions are entered into by the tested parties.

(d) In view of the clear mandate of the law, no question of estoppel can arise. Moreover, the provisions of Rule 10B(4) of the Act, being self evident, the question as proposed, does not give rise to any substantial question of law. Thus, not entertained.

5. **Re. Question No.(3) :**

(a) Mr. Suresh Kumar, learned Counsel for the Revenue, very fairly states that the question as framed for consideration was not a submission made by the Revenue before the Tribunal.

(b) Moreover, at the hearing before the Tribunal on facts it is found that the Transfer Pricing Officer was referring to a financial year other than the subject financial year. Consequently, it could not be read as a comparable. Thus, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

6. **Re. Question No.(4):**

(a) Mr. Suresh Kumar, learned Counsel for the Revenue, very fairly states that this very issue had been raised by the Revenue in its Income Tax Appeal No.732 of 2014 filed in this Court in respect of the same Respondent Assessee for A.Y. 2007-08. In the above appeal the Revenue has pressed identical question as raised herein as in Question Nos. (iv) and (v) therein. This Court, on 26 September 2016, passed an order in the above appeal finding that this question did not give rise to any substantial question of law.

(b) Accordingly, for reasons mentioned in our order dated 26 September 2016 in Income Tax Appeal No.732 of 2014, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

7. **Re. Question No.(5):**

(a) The impugned order of the Tribunal has rendered a finding of fact that the tested party is not functionally comparable to M/. Ultra Marine & Pigments Ltd. as it is engaged in rendering Engineering and Technical Services while the Respondent Assessee is engaged in routine customer support services. Thus, the two services are not comparable. The benchmarking for the purposes of arriving at Arms Length Price (ALP) has necessarily to be done with companies functionally similar. Once the functional profile is different, then the resources to be used and the profits

earned would inherently be different. The Revenue is not able to point out why this finding on facts by the Tribunal is perverse. Accordingly, this question also does not give rise to any substantial question of law. Thus, not entertained.

8. Appeal dismissed. No order as to costs.

(S.C. GUPTE,J.)

(M.S.SANKLECHA,J.)