

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 57 OF 2016

The Commissioner of Income Tax-2, Pune .. Appellant.
v/s.
Principal Global Services Pvt. Ltd., Pune .. Respondent.

Mr. Suresh Kumar, for the Appellant.
Mr. Madhur Agrawal i/b. A. K. Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.**
DATE : 12th JUNE, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 10th April, 2015, passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 10th April, 2015 is in respect of Assessment Year 2009-10.

2 Revenue urges the following question of law, for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was correct in excluding M/s. Kals Information Systems Ltd without analysing its revenue model and without considering FAR analysis of the assessee company and that of the comparable company?”

(b) *Whether Tribunal is right in excluding the comparable M/s. Transworld Infotech Ltd., (earlier Known as Sterling International Enterprises Limited) from final set of comparable being non-related financial year data despite assessee following the method of inclusion of such comparable?*

(c) *Whether Tribunal is right in excluding the comparable M/s. Compucon Software Ltd from final set of comparables being functionally not similar?*

(d) *Whether Tribunal is right in excluding the comparable M/s. Infosys BPO Ltd., on turnover basis?*

(e) *Whether Tribunal was correct in directing to exclude the company M/s. Cosmic Global Ltd., from final set of comparables without taking into account FAR analysis?"*

3 Respondent-Assessee is engaged in providing Software Solutions and Back Office Operations, exclusively to its Associated Enterprises (AE) abroad. The Arms Length Price (ALP) of the Respondent-Assessee's transaction with its AE was arrived at by using the Transactional Net Margin Method (TNMM) as a most appropriate method to determine the same.

4 Revenue's grievance is essentially with the impugned order of the Tribunal excluding certain companies from the list of comparables to determine the ALP through the TNM Method.

5 **Re Question (a):-**

(i) M/s. Kals Information System Ltd., is engaged in developing Software Products, development of software services and also engaged in running a training centre for software professional on online projects. The Respondent-Assessee is engaged in the activities of providing software solution i.e. software services.

- (ii) The Tribunal found that the above company same is not comparable to the Assessee as its activities are different. Therefore, could not be used as a comparable. In support, reliance was placed upon the orders of the Transfer Pricing Officer (TPO) for Assessment Years 2007-08 and 2010-11 – wherein, this very entity was excluded from the list of comparables.
- (iii) The Tribunal by the impugned order held that the above company is functionally different from the Respondent-Assessee and therefore not comparable. Reliance was placed upon the order of the Tribunal in the case of PTC Software (India) Pvt. Ltd., v/s. DCIT rendered on 30th April, 2013. In the above case, on similar circumstances, the above company was not found comparable with the Assessee therein. The Revenue's Appeal from the above order to this Court being CIT v/s. PTC Software (I) Pvt. Ltd., (Income Tax Appeal No. 732 of 2014) was dismissed on 26th September, 2016. The Revenue is not able to point out any distinction which will make the above decision inapplicable while excluding M/s. Kals Information Systems, as a comparable. The impugned order of the Tribunal excluding M/s. Kals Information Systems Ltd., as a comparable is on the basis of functional difference. The Revenue is not able to point out how the finding of fact on account of differences between M/s. Kals Information Systems Ltd., and the tested party, is perverse.
- (iv) In the above view, the question as proposed, does not give rise to any substantial question of law. Thus, not entertained.

6 Re Question (b):-

- (i) M/s. Transworld Infotech Ltd., was excluded from the list of comparable by the impugned order of the Tribunal. This, as the data of the comparable was for a financial year, that did not correspond to the financial year of the Respondent-Assessee's transaction with its AE's . This was by relying upon Section 10(B) (4) of the Income Tax Rules, 1962. Further, the Tribunal also noted that the TPO included M/s. Transworld Infotech Ltd., as comparable without in any manner showing the same to be a comparable when the data available of the comparable is in respect of a financial year different from the financial year of the tested party to determine its ALP. The financial year of the Respondent-Assessee is 1st April, 2008 to 31st March, 2009 while the data of the comparable is with regard to 1st July, 2008 to 30th June, 2009.
- (ii) It is also pertinent to note that the TPO while including M/s. Transworld Infotech Ltd., as comparable, had excluded certain other companies on the ground that its data relates to multiple financial years. In fact, the same test ought to have been applied by the TPO to exclude M/s. Transworld Infotech Ltd., also from the list of comparable, this the Tribunal by the impugned order has done.
- (iii) This finding of fact by the Tribunal, that M/s. Transworld Infotech Ltd., is a possible view.
- (iv) In the above view, the question No.(b) as proposed does not give rise to any substantial question of law. Thus, not entertained.

7 **Re Question (c):-**

- (i) M/s. Compucom Software Ltd., was excluded from the list of comparable by the impugned order of the Tribunal. It was found as a fact that the comparable was not only engaged in running of software development services but also sale of software products end to end mobile solutions as infrastructure services etc.. Further, this very comparable had been excluded by the TPO for the Assessment Years 2007-08 and 2011-12.
- (ii) The Revenue contends that the application of TNMM would require broad comparability and not identical product for comparison. Therefore, it should have been included as a comparable after keeping in view functional similarity.
- (iii) We find that the Tribunal found on fact that, the software development services are completely different from that provided by the Assessee. Further, the impugned order also notes the fact that the customer profile of M/s. Compucom Software Ltd., is completely different inasmuch as it dealt with Government bodies as against, Respondent dealing only with its AE. The Tribunal also notes the fact that the above functional differences were pointed out before the lower authorities but the same was not dealt with by them. In the circumstances, the Tribunal took the view that M/s. Compucom Software Ltd., was not a comparable.
- (iv) We note that on above facts, the view taken by the Tribunal that M/s. Compucom Software Ltd., is not a comparable, is a possible view.

- (v) In the above view, the question No.(c) as proposed does not give rise to any substantial question of law. Thus, not entertained.

8 Re Question (d):-

- (i) M/s. Infosys BPO Ltd., was excluded by the Tribunal from the list of comparable to determine ALP in respect of International Transaction of the Respondent's activity of rendering of back office support services to its AE.
- (ii) The impugned order of the Tribunal noted the facts that turnover of the comparable was to the tune of R.9028 Crores while the turnover of the Respondent-Assessee, as noted by the TPO was only Rs.18 Crores.
- (iii) The impugned order further records that in view of the difference in turnover between M/s. Infosys BPO Ltd., and the Assessee, the two are not comparable. In fact, the impugned order placed reliance upon the decision of the Delhi High Court in *CIT v/s. Agnity India Technologies (P) Ltd., [2013] 219 Taxman 26* – wherein, it was held that the huge turnover difference between the comparable in that case, M/s. Infosys Technologies Ltd., with the Assessee therein, coupled with the fact that the Assessee therein was providing only services to its AE while M/s. Infosys Technologies (P) Ltd., provided services to outsiders, make it not comparable. These facts are identical to the present facts and would make Infosys BPO Ltd., not comparable. No difference is shown to us which would warrant a different view in the present facts. Moreover, this Court in *CIT v/s. Pentair Water India (P) Ltd., 381 ITR 216* has taken a view

that huge difference in turnover between the tested party and the comparable would necessarily require the proposed comparable to be excluded from the list of comparables.

- (iv) We find that the view taken on the aforesaid finding of fact is a possible view.
- (v) Therefore, the question No.(b) as proposed does not give rise to any substantial question of law. Thus, not entertained.

9 Re Question (e):-

- (i) By the impugned order of the Tribunal, M/s. Cosmic Global Ltd., was also excluded from the list of comparable to determine the ALP of the Respondent-Assessee's transaction with its AE. The impugned order of the Tribunal noted the fact that M/s. Cosmic Global Ltd., had a business model of sub-contracting its work to others while providing services. As against above, it noted the business model of the Assessee was an in-house business model. This would result in a difference in the profit margin and, therefore, not comparable.
- (ii) We find that in an identical situation, this Court has in Principal Commissioner of Income Tax v/s. Aptara Technology Pvt. Ltd., (Income Tax Appeal No. 1209 of 2015) decided on 26th March, 2018, has upheld the order of the Tribunal in not including M/s. Cosmic Global Ltd., because of identical difference in business model in that case also.
- (iii) In the present facts also, the business model of the comparable

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being of out sourcing its servicing is different from the in-house business model of providing services adopted by the Respondent. This finding of fact by the Tribunal based on difference in business model, resulting in Cosmic Global Ltd., not being a comparable, is a possible view on facts.

- (iv) In the above view, the question No.(b) as proposed does not give rise to any substantial question of law. Thus, not entertained.

10 Accordingly, **Appeal dismissed.** No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)