

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

INCOME TAX APPEAL NO. 732 OF 2014

Commissioner of Income Tax-II,
Pune

.. Appellant

v/s.

PTC Software (I) Pvt. Ltd.

.. Respondent

Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the appellant
Mr. Percy Pardiwala, Senior Counsel a/w Mr. Madhur Agarwal, Mr Atul
Jasani for the respondent

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

DATED : 26th SEPTEMBER, 2016.

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 30th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. The Revenue has raised following questions of law for our consideration :-

(i) *Whether on the facts and circumstances of the case, the Tribunal erred in excluding FCS Software Solutions from the list*

of comparables by considering RPT % with respect to sales income only with RPT constitutes both sales as well as expenses ?

(ii) Whether on the facts and circumstances of the case, the Tribunal erred in excluding KALS Information Solutions Ltd. and M/s. Helios & Matherson Information Technology Ltd. from the list of comparables on the basis of previous years documentations of the assessee without verifying the functions performed by the comparables in the year under consideration ?

(iii) Whether on the facts and circumstances of the case, the Tribunal erred in excluding Transworld Infotech Ltd. from the list of comparables only on the basis that the said concern had prepared financials for the year ending on June, 2007 against the financials prepared by the assessee as on March, 2007?

(iv) Whether on the facts and circumstances of the case, the Tribunal erred in excluding Vishal Information Technology Ltd. from the list of comparables without appreciating the fact that the said company operates only in ITEs segment and functionally comparable to the assessee's ITEs segment?

(v) Whether on the facts and circumstances of the case, the Tribunal erred in excluding Vishal Information Technology on the basis of RPT filter without appreciating the fact that the data given in the notes to accounts was incomplete?

(vi) Whether on the facts and circumstances of the case, the

Tribunal erred in excluding M/s. Vishesh Info Technique Ltd. from the list of comparables without appreciating the fact that services of KPO/LPO are not different from the segment of BPO?

(vii) Whether on the facts and circumstances of the case, the Tribunal erred in including M/s. Galaxy Commercial Ltd. in the list of comparables without appreciating the fact that comparables engaged in different activity and whose segmented results are not available cannot be considered as comparable at entity level?

3. For the Assessment Year 2007-08, the respondent assessee filed its return of income declaring an income of Rs.11.25 crores. The respondent assessee is a wholly owned subsidiary of an American Company M/s. Para Metric Technology Corporation USA (holding Company). The respondent assessee is engaged in providing Information Technology (IT) services and IT enabled Services to its holding company. In the above view, Chapter X of the Act was applicable. Therefore, the respondent assessee determined the Arms Length Price (ALP) on Adoption of Transaction Net Margin Method (TNMM) in its transfer pricing study. It determined the Profit Level Indicator (PLI) in respect of the IT Services segment at 14.02% while the arithmetic mean of the PLI of comparable companies was 10.70%. Similarly, in respect of its IT enabled Services its PLI was determined at

14.23% while the arithmetic mean of the PLI of comparable cases was 10.51%. In the above view, as the PLI of the assessee was higher / favourable than that of the comparables, no transfer pricing adjustment was called for in terms of its transfer pricing study. Thus, the consideration of Rs.95.49 crores as received from its holding Company in respect of IT Services and Rs.5.75 crores received from its holding Company in respect of IT enabled services was the ALP.

4. However, the Transfer Pricing Officer (TPO) after accepting the TNMM method as the most appropriate method to benchmark the international transactions, did not accept the respondent's transfer pricing study that no transfer pricing adjustment is called for. According to the TPO on comparison with appropriate comparables, the ALP in respect of its IT Services was determined at Rs.105 crores and in respect of IT enabled services was determined at Rs.6.73 crores. This resulted in the TPO passing order dated 29th October, 2010 under Section 92CA(3) of the Act determining the upward adjustment of International Transaction at Rs.10.38 crores.

5. Consequent to the TPO's order dated 29th October, 2010, the Assessing Officer passed a draft assessment order u/s 143(3) r.w.s.

144C(13) of the Act determining the respondent assessee's income at Rs.21.63 crores in view of the transfer pricing enhancement of Rs.10.38 crores.

6. Being aggrieved, the respondent assessee preferred objections to the Dispute Resolution Panel (DRP) from the draft assessment order. By directions dated 20th May, 2011, the DRP did not disturb the proposed adjustment in the draft assessment order. This resulted in the Assessing Officer passing a final order dated 5th October, 2011 under Section 143(3) r/w Section 144C(13) of the Act. This resulted in the total income of the respondent assessee being determined at Rs.21.63 crores as against the income declared in the Return of income at Rs.11.25 crores.

7. Being aggrieved, the respondent assessee challenged the order dated 5th October, 2011 before the Tribunal. By the impugned order dated 30th April, 2013, the Tribunal set aside the order dated 5th October, 2011 to the extent it related to international transactions and restored the issue to the Assessing Officer to determine the Transfer Price adjustment in terms of the directions contained in the impugned order of the Tribunal.

8. Being aggrieved by the impugned order dated 30th April, 2013 of the Tribunal, the Revenue is in appeal before us having raised the aforesaid questions for our consideration.

9. Re. Question (i) :-

(a) The assessment order dated 5th October, 2011 had included amongst the comparables M/s. FCS Software Solutions Ltd. (M/s. FCS Software Ltd.) as well as M/s. Compucom Software Ltd. (M/s. Computcom Ltd.) to determine the ALP of the respondent assessee's transactions with its holding company. The submission of the respondent assessee before the Tribunal was that the TPO had in his Transfer Pricing Study applied the filter of 25% in respect of related party transaction (RPT) as against the 10% adopted by the respondent assessee in its transfer pricing study. The respondent assessee had no grievance in respect of the adoption of 25% filter in respect of RPT. However, the grievance was with the method applied in case of M/s. FCS Software Ltd. and M/s. Compucom Ltd. to compute 25% filter as under :-

*“RPT sales divided by (total sales + total expenses)
multiplied by 100 i.e. Rs.36.89 crores divided by (Rs.131.27 +*

Rs.107.58) multiplied by 100.”

It was submitted that this resulted in skewed result of the percentage of RPT resulting in its RPTs being 15.40% i.e. less than 25% filter.

(b) The impugned order of the Tribunal accepts the grievance of the respondent assessee. It records the fact that the denominator in the formula adopted by the TPO is incorrect as it also includes the total expenses when the TPO on facts has held that there are no expenses in respect of the RPT. Therefore, the adoption of the denominator by considering total sales + total expenses when there are no RPT expenses would lead to misleading results. The denominator was restricted to only total sales and the result would be the RPT are at 28.10% i.e. in excess of 25% filter and, therefore, is excludable from the list of comparables.

(c) Mr. Suresh Kumar, learned Counsel for the Revenue reiterates the findings in the order of the TPO. No reasons are forthcoming from the Revenue as to what exactly is its grievance with regard to the findings of the Tribunal in case of M/s. FCS Software Ltd.

(d) We find that this is a purely factual determination and the RPTs have to be considered in the context of total transactions and not by a conversion formula as adopted by the Assessing Officer. In fact, as

recorded in the impugned order of the Tribunal, the determination of percentage of RPT as adopted by it is similar to the method adopted by the TPO in the earlier assessment years. It may be noted that an identical method as directed in the case of M/s. FCS Software Ltd. was also done in case of M/s. Compucom Ltd. by the Tribunal. However, the Revenue has made no grievance in case of the impugned order to the extent of M/s. Compucom Ltd. No reason for the same is also forthcoming.

(e) In the above view, question (i) as proposed being a factual, it does not give rise to any substantial question of law. Thus, not entertained.

10. Re. Question (ii) :-

(a) M/s. KALS Information Solutions Ltd. (KALS Ltd.) and Helios & Matheson Information Technology Ltd. (Helios & Matheson Ltd.) were included by the TPO in his comparability analysis. The grievance of the respondent assessee before the Tribunal was that both are functionally different from the respondent assessee and, therefore, could not be used as comparables. The respondent assessee pointed out that KALS Ltd and Helios & Matheson Ltd. are engaged in the business of selling of software products while the respondent assessee renders software

services to its holding company.

(b) The Tribunal in the impugned order records that for the preceding assessment year i.e. A.Y. 2006-07, the TPO had found that KALS Ltd. and Helios & Matheson Ltd. were functionally not comparable with the respondent assessee. In the subject assessment year also, on the basis of Annual Report, it was noted that the KALS was engaged in selling of software products which is different from the activity undertaken by the respondent assessee, namely, rendering of software service to its holding company. Further, the impugned order also records that no attempt was even made by the Revenue before it to bring on record any change in the nature of activities carried out by KALS Ltd. and Helios & Matheson Ltd. in the subject assessment year, making them functionally comparable to the respondent assessee. In the aforesaid facts, the Tribunal rendered a finding of fact that KALS Ltd. and Helios & Matheson Ltd. are not comparable with the respondent assessee.

(c) Even before us, no submissions were advanced justifying the order of the Assessing Officer that the services rendered by KALS Ltd. and Helios & Matheson Ltd. are comparable for the subject assessment year with that of the respondent assessee.

(d) In the above view, as the findings of the Tribunal being one of the

fact which has not been shown to be perverse, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

11. Re. Question (iii) :-

(a) The Assessing Officer on the basis of the order of the TPO included M/s. Transworks Information Services Ltd. (Transworks Ltd.) in his comparability analysis. The grievance of the respondent assessee before the Tribunal was that Transwork Ltd. cannot be a comparable as the respondent assessee's financial period is from 1st April, 2006 to 31st March, 2007 while the financial period in respect of the comparable is from 1st July, 2006 to 30th June, 2007. This grievance based on fact was not disputed by the Revenue before the Tribunal or even before us. In terms of Rule 10B(4) of the Income Tax Rules, 1962, the analysis for comparison shall be on the data relating to the financial year in which the international transaction has been entered into. In the above view, the Tribunal held that as the financial period during which the international transaction was entered into is different, M/s. Transwork Ltd. could not be treated as comparable and thus not includable.

(b) We find that the provisions of Section 10B(4) of the Rules are clear in as much as it obliges that the data to be used for comparability

analysis should be of the same financial year in which the international transactions were entered into by the tested party. In fact, this principle / mandate was applied by the TPO while considering M/s. Power Soft Global Services Ltd. as a comparable because it had a financial year ending in September, 2006 and not 31st March, 2007 as in the case of respondent assessee. The same yardstick ought to have been applied by the TPO while considering whether Transwork Ltd. was comparable. The submission on behalf of the Revenue that the mandate of Rule 10B of the Rules can be ignored as the difference is only of three months is without any basis. No such liberty is granted in terms of Rule 10B(4) of the Rules.

(c) The findings of the Tribunal being on the basis of the unambiguous mandate of Rule 10B(4) of the Rules, question (iii) as proposed does not give rise to any substantial question of law. Thus, not entertained.

12. Re. Questions (iv) and (v) :-

(a) In respect of the IT enabled services, the Assessing Officer on the basis of the TPO's order included M/s. Vishal Information Technologies (Vishal) as a comparable. The grievance of the respondent assessee before the Tribunal was that Vishal is not a comparable as it was

engaged not only in IT enabled services but also in providing agency services by way of outsourcing services to third party vendors. Therefore, functionally its services were different from the services provided by the respondent assessee.

(b) The impugned order of the Tribunal on the basis of factual data available before it rendered a finding of fact that the functional profile of Vishal was different from that of the respondent assessee. It also notes as a fact that Vishal had entered into RPT at 86% i.e. far in excess of 25% filter. Further, although the question as framed states that Vishal was excluded on the basis of RPT filter without considering the fact that the notes to the account were incomplete. This was not the submission which was made before the Tribunal. Even before us, no submission has been made with regard to percentage of RPT undergoing a change if the notes to accounts are considered in their entirety.

(c) The finding of the Tribunal is in the realm of facts. Nothing has been shown to us to evidence that the finding of fact is perverse.

(d) In the above view, question nos.(iv) and (v) do not give rise to any substantial question of law. Thus, not entertained.

13. Re. Questions (vi) :-

(a) The Assessing Officer on the basis of the order of the TPO had included M/s. Vishesh Infotechnics Ltd. (Vishesh Ltd.) as a comparable in the comparability analysis. The grievance of the respondent before the Tribunal was that Vishesh Ltd. was engaged in three different activities, namely, IT Solutions and Product Supports, Enterprise Software and IT enabled services. The IT enabled service engaged in by Vishesh Ltd. was in the field of Knowledge Process Outsourcing (KPO) and Legal Process Outsourcing (LPO) and the same cannot be compared with the IT services rendered to the respondent assessee, which were in the nature of providing back office services to its holding company.

(b) The impugned order of the Tribunal while accepting the grievance of the respondent assessee records as a fact that M/s. Vishesh was concerned with providing high end knowledge services. This would require a superior level of man power and human resources than that required by the respondent assessee in providing back office services to its holding company. The aforesaid difference further evidenced from the fact that the profit margin of M/s. Vishesh is not comparable with that of the respondent assessee as recorded by the Tribunal. This was essentially due to qualitative difference in the

nature of services provided. In the above view, the impugned order of the Tribunal excluded M/s. Vishesh from comparability analysis.

(c) We find that the impugned order of the Tribunal renders a finding of fact that the services rendered by M/s. Vishal Ltd. of KPO and LPO are inherently different from the nature of services being rendered by the BPO i.e. by the respondent assessee.

(d) We find that the impugned order of the Tribunal rendered a finding of fact and the same is not been shown to be perverse in any manner. Thus, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

14. Re. Question (vii) :-

(a) The Assessing Officer, on the basis of the order of the TPO excluded M/s. Galaxy Commercial Ltd. (M/s. Galaxy Ltd.) as a comparable for comparability analysis. The Assessing Officer excluded M/s. Galaxy Ltd. from the comparability analysis on the ground that it was not only engaged in providing BPO services but was also earning income from rental and transportation services. Further, in the absence of availability of segmental results, it held that M/s. Galaxy could not be considered as comparable.

(b) The grievance of the respondent assessee before the Tribunal was

that the principal business of M/s. Galaxy Ltd. was providing back office processing services similar to that provided by the respondent assessee.

(c) The impugned order of the Tribunal notes that the income earned from transportation business is merely 7% while the income earned from BPO operations is 87% of the total revenue earned by M/s. Galaxy Ltd. This BPO operation by M/s. Galaxy Ltd. was similar to that rendered by the respondent assessee. In the above view, the Tribunal by the impugned order held that M/s. Galaxy Ltd. is a comparable and, therefore, includable in the list of comparable for comparability analysis.

(d) From the above, it is clear that the impugned order of the Tribunal has essentially rendered a finding of fact on the available record that M/s. Galaxy Ltd. is engaged in the business similar to that of the respondent assessee so as to be a comparable. This is not shown to be perverse in any manner. Therefore, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

15. Accordingly, the appeal is dismissed. No order as to costs.

(S.C. GUPTE, J.)

(M.S. SANKLECHA, J.)