

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

INCOME TAX APPEAL NO.1384 OF 2015

The Pr. Commissioner of Income Tax-1 .. Appellant.
v/s.
Barclays Technology Centre India
Private Ltd. .. Respondent.

Mr. Suresh Kumar, for the Appellant.
Mr. Nishant Thakkar with Ms. Jasmin Amalsadvala i/by PDS Legal,
Advocates for Respondent.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE, JJ.**
DATE : 26th June, 2018.

P.C:-

1 This appeal under Section 260A of the Income Tax Act, 1961(Act) challenges the order dated 28.1.2015 of the Income Tax Appellate Tribunal (Tribunal). The impugned order dated 28.1.2015 is in respect of Assessment Year 2008-09.

2 The Revenue has urged following question of law for our consideration:

“ Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in law in excluding M/s. E Zest Solutions Ltd., M/s. FCS Software Ltd., M/s. KALS information Systems Ltd. and M/s. Bodhtree Consulting Ltd. from the set of comparables selected by the TPO ?”

3 The Respondent/Assessee is engaged in rendering software

development services to its Associated Enterprises (AE) worldwide on captive basis at cost plus basis. For the purposes of determining the Arm's Length Price (ALP) of the services rendered by the Respondent to its AE's, the impugned order excluded E-Zest Solutions Ltd., Kals Information Systems Ltd., Bodhtree Consulting Ltd., Infosys Technologies Ltd., FCS Software Solutions Ltd. from the list of comparables selected by the Transfer Pricing Officer (TPO). The parties are agreed that the Transactional Net Margin Method (TNMM) is the most appropriate method to determine the ALP of the Respondent's services to its AE's.

4 The impugned order of the Tribunal has examined services rendered and consideration received by each of these companies with the services rendered and consideration received by the respondent-assessee. On facts it comes to the conclusion that all the aforesaid four companies cannot be said to be comparable for the purposes of determining ALP of the Appellant's services to its AE's as under:

(i) E-Zest Solutions Ltd.

(a) On facts the Tribunal placed reliance upon the order of its coordinate bench in the case of M/s. Symphony Services (Pune) Private Ltd., Pune rendered on 30.4.2014 for Assessment Year 2008-09 itself. It was found that M/s. E-Zest Solutions Ltd. is rendering Knowledge Process Outsourcing (KPO) services. Therefore, not comparable to software

development service being rendered by the Assessee therein as being rendered also by Respondent-Assessee herein.

(b) No distinguishing features in this case to that of M/s. Symphony Services (Pune) Pvt. Ltd. (Supra) are pointed out either before the Tribunal or before us. The Revenue has also not shown to us any challenge to the order of the Tribunal in M/s. Symphony Services Pvt. Ltd. (Supra) before this Court.

(c) It follows that the exclusion of M/s. E-Zest Solutions Ltd by the Tribunal is a finding of fact which cannot be disturbed in the absence of any perversity being shown.

(ii) Kals Information Systems Ltd.

(a) On facts the Tribunal again placed reliance upon the order of its coordinate bench in case of M/s. Symphony Services (Pune) Pvt. Ltd. (Supra) since it was on facts for the subject assessment year. In the above case, it was found that Kals Information Systems Ltd. was engaged in developing and selling software which is functionally different from software development services performed by the Assessee therein and also the Respondent-Assessee herein.

(b) No distinctive feature in this case from that in M/s. Symphony Services (Pune) Pvt. Ltd. was shown before the Tribunal or before us. Nor has any challenge to the order of the Tribunal in case of M/s. Symphony

Services Pune Pvt. Ltd. (Supra) shown to us.

(c) Thus, there is no reason to disturb the finding of fact by the Tribunal excluding M/s. Kals Information Systems Ltd. from the list of comparables in the absence of any perversity being shown.

(iii) Bodhtree Consulting Ltd.

(a) The impugned order finds that M/s. Bodhtree Consulting Ltd. is engaged in sales of software products besides software services and therefore not functionally comparable to the Respondent-Assessee. There is also absence of Segmental Accounts which makes the comparison skewed. In fact, the impugned order of the Tribunal relies upon the decision of its Coordinate Bench at Mumbai in NetHawk Networks India Pvt. Ltd. rendered on 6.11.2003 in respect of subject assessment year where M/s. NetHawk was performing same functions as the Respondent-Assessee herein and it records the fact that TPO on enquiry from the Chartered Accountant of Bodhtree Consulting Ltd. found that it is engaged in providing data cleaning services to its clients for whom it had developed the software application.

(b) Besides, the impugned order also holds that M/s. Bodhtree Consulting Ltd. has adopted pricing model of fixed price project method, as against cost plus basis adopted by the Respondent-Assessee. The impugned order relied upon decision of the coordinate bench at Mumbai

in the case of **Qlogic (India) Private Ltd.** decided on 21.10.2014 for the Assessment Year 2009-10 on the same issue.

(c) Mr. Suresh Kumar for the Revenue submits that this appeal requires admission. This for the reason that the decision of the Tribunal in **QLogic (India) Private Ltd. (Supra)** relied upon by the impugned order was challenged in this Court as being Income Tax Appeal No.1205 of 2015 decided on 5.12.2017. This appeal of the Revenue has been admitted on the following substantial question of law:

“ Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in directing the Assessing Officer to exclude the concern namely M/s. Bodhtree Consulting Limited in the final set of comparables when the same concern has been included in the set of comparables by the assessee itself in the Transfer Pricing study report ?”

(d) It would be noted that the question of law on which appeal has been admitted is not with regard to exclusion of M/s. Bodhtree Consulting Ltd. on account of different methods of pricing adopted by it but on the issue of it being included in its list of comparables by the Respondent therein and thereafter, it seeking to withdraw it from the list of comparables.

(e) In any event, the impugned order of the Tribunal has come to a finding that Bodhtree Consulting Ltd. and the Respondent herein are not functionally comparable as they are engaged in different activities. In

support the Respondent-Assessee placed reliance upon the decision of the Mumbai Bench of the Tribunal in M/s.NetHawk Networks (P) Ltd. (Supra). The Revenue has not shown any challenge to it. In the above view, we have no reason to disturb the finding of fact arrived at by the Tribunal in excluding M/s Bodhtree Consulting (P) Ltd. from the list of comparables.

(iv) FCS Software Solutions Ltd.

(a) The impugned order of the Tribunal excluded M/s. FCS Software Solutions Ltd. from the list of comparables in view of its abnormally high profit margin for the subject Assessment Year at 57.02% as compared to operating profit margins in the preceding financial year of 19.94% to 14.75% and in the succeeding financial year at 37.09%.

(b) The impugned order of the Tribunal following the decision of the Special Bench in Maersk Global Centrea (India) Pvt. Ltd. rendered by the Tribunal on 7.3.2014 carried out further analysis and concluded that high profit margin of FCS Software Solutions Ltd. was not a normal business condition. Consequently, the same could not be considered as comparable.

(c) It is pertinent to note that before the Tribunal the Revenue has not disputed the above factual analysis submitted by the Respondent and accepted by the Tribunal to hold that high profit margin for the subject Assessment Year was abnormal. Even today nothing is shown to us as to

why analysis done in the impugned order to conclude that the high profit margin are abnormal for the subject Assessment Year and therefore it could not be included as comparable.

(d) Thus, we see no reason to interfere with the finding of fact arrived at by the Tribunal in excluding M/s. FCS Software Ltd. from the list of comparables.

5 In the above view, the finding of the Tribunal is entirely one of the fact and the Revenue has failed to show as to how the finding arrived at by the Tribunal is perverse in any manner. Nor has the Revenue even attempted to demonstrate that analysis done by the Tribunal while excluding the aforesaid four companies from the list of comparables, was in any manner contrary to the settled position in law. Thus, we see no reason to entertain this appeal.

6 However, before closing, we would like to record the fact that we find that the Revenue is regularly filing appeals from the orders of the Tribunal in respect of Transfer Pricing particularly with regard to exclusion and inclusion of certain companies as comparables to determine ALP of tested parties. These appeals are being filed in a ritualistic manner. This results in the orders of the Tribunal which are essentially findings of fact in respect of exclusion/inclusion of a comparable being challenged without pointing out in any manner perversity of finding or failure to

adhere to the settled principles of law while determining comparables such as Rule 10B of the Income Tax Rules, 1961. This unnecessarily takes up the scarce time of the Court. The Revenue and the Assessee would do well to bear in mind observations of the Delhi High Court in **Principal Commissioner of Income-Tax-9 v. WSP Consultants India (P) Ltd.**²⁵³ **Taxman 58 (Delhi)** wherein it has been observed:

“10. Any inclusion or exclusion of comparables per se cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower authority took into account irrelevant consideration or excluded relevant factors in the ALP determination that impact significantly.”

7 We hope the above observations would be kept in mind both by the Revenue and the Assessee who seek to prefer appeals from the orders of the Tribunal on Transfer Pricing particularly inclusion/exclusion of comparables. The Commissioner of Income Tax and the Assessee in general would do well to also review the appeals filed and withdraw the same, in case the only challenge therein is to finding of facts, if the same is without evidence of any perversity or is in the face of settled legal position. The counsel of the Revenue is directed to serve a copy of this order on the Principal Chief Commissioner of Income Tax within the State of Maharashtra for necessary action

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8 Accordingly, Appeal dismissed. No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)