

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 16TH DAY OF JULY 2018

PRESENT

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MRS.JUSTICE S.SUJATHA

I.T.A. No.616/2016

BETWEEN :

M/s SWISS RE GLOBAL BUSINESS SOLUTIONS
INDIA PRIVATE LIMITED
[FORMERLY KNOWN AS
SWISS RE SHARED SERVICES
(INDIA) PRIVATE LIMITED]
(A PRIVATE COMPANY LIMITED
BY SHARES, INCORPORATED UNDER
THE COMPANIES ACT, 1956)
HAVING ITS OFFICE AT
2ND TO 5TH FLOOR,
FAIRWINDS BUILDING,
EMBASSY GOLF LINKS
BUSINESS PARK
CHALLAGHATTA VILLAGE,
BENGALURU-560071.

(CAUSE TITLE AMENDED VIDE
COURT ORDER DATED 07.06.2018)

...APPELLANT

(BY SRI NAGESWAR RAO, SRI K.MALLAHA RAO &
SRI SANDEEP S. KARHAIL, ADVS.)

AND :

ASSISTANT COMMISSIONER OF
INCOME TAX, CIRCLE 6(1)(2)
BENGALURU

...RESPONDENT

THIS ITA IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 08.07.2016 PASSED IN IT(TP)A NO.380/BANG/2016, FOR THE ASSESSMENT YEAR 2011-2012 ANNEXURE-A. PRAYING TO: (I) ADMIT THE INSTANT APPEAL TO ANSWER THE SUBSTANTIAL QUESTIONS OF LAW SET OUT IN PARA 23 ABOVE; (II) SET ASIDE IMPUGNED ORDER AT ANNEXUE 'A' PASSED BY THE INCOME TAX APPELLATE TRIBUNAL AND DIRECT EXCLUSION OF ICRA ONLINE LIMITED AND JEEVAN SCIENTIFIC TECHNOLOGIES LIMITED FROM THE SET OF COMPARABLE COMPANIES FOR ASSESSMENT YEAR 2011-12, IN IT(TP)A NO.380/BANG/2016 DATED 08.07.2016 ANNEXURE-A.

THIS APPEAL COMING ON FOR ADMISSION, THIS DAY, **Dr. VINEET KOTHARI, J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

Mr. Nageswar Rao, Mr. K.Mallaha Rao & Mr. Sandeep S. Karhail, Advs. for Appellant – Assessee.

The Assessee – M/s Swiss Re Global Business Solutions India Private Limited has filed this appeal u/s 260A of the Income Tax Act, 1961 ('Act' for short) raising the following purported substantial questions of law from the Order of the Income Tax Appellate Tribunal, 'A' Bench, Bangalore, in **IT [TP] A No.380/Bang/2016** dated **08.07.2016** relating to the Assessment Year **2011-12**.

2. The substantial questions of law suggested by the Assessee in the Memorandum of Appeal are as under:

*“a) Whether in the facts and circumstances of present case, Tribunal’s decision to uphold inclusion of **M/s ICRA Online Limited** in set of comparable companies to the Appellant-Assessee is perverse and contrary to law and facts?*

*b) Whether remand to Assessing Officer/TPO to verify comparability of **M/s Jeevan Scientific Technologies Ltd.**, is totally justified and whether Appellant is entitled to final and conclusive determination on the issue by Tribunal?”*

3. Though prima facie the question about the selection of comparables are finding of facts, which are binding on this court and unless an ex-facie perversity is in the Order of the learned Tribunal is established, in our considered view, no substantial question of law arises on such issues and we have recently rendered a Judgment in **I.T.A. Nos.536/2015 c/w 537/2015**

dated **25.06.2018 (Prl. Commissioner of Income Tax & Anr. -v- M/s Softbrands India Pvt. Ltd.,)** expressing the aforesaid opinion in a more detailed manner. Our conclusions in the Judgment are quoted below for ready reference:

“Conclusion:

55. *A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the Treaties over the Domestic Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could be raised before the High Court under **Section 260-A** of the Act, the Courts could have embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor*

as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.

56. We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law do not meet the requirements of **Section 260-A** of the Act and thus the appeals filed by the Revenue are found to be devoid of merit and the same are liable to be dismissed.

57. We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assesseees, because, there may be cases where the Tribunal giving its own reasons and findings has found certain comparables to be good comparables to arrive at an **'Arm's Length Price'** in the case of the assesseees with which the assesseees may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not

*at all a sufficient reason to invoke **Section 260-A** of the Act before this Court.*

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs.”

4. However, learned counsel for the Assessee Mr.Nageshwar Rao specifically drew our attention to the finding of the learned Tribunal with respect to two comparables viz., **M/s ICRA Online Limited** and **M/s Jeeven Scientific Technologies Ltd, (seg)**, in paragraphs 28 to 31 of the Order of the learned Tribunal, which we quote below for ready reference:

“28. Type of work being done by the assessee captured by us at para three above would show that assessing was also doing analysis of results, testing and calibration etc., I had to use market intelligence, maintain e-tools and provide reporting analytics. In our opinion the level of expertise being used by the assessee in its technology enabled services and that being used by ICRA Online Ltd, were comparable, though they were in different streams of operation. Hence we are one with the argument

of Ld. DR that exact **fitting in the mould of comparables is not necessary in a TNMM study. However, once the level of knowledge that is being used for the outsourcing is on a reasonably comparable pedestal, the type of service industry to which the concerns cater may not matter much.** In the case of Ramgreen Solutions P. Ltd, (supra), their Lordship had observed that there could be different **level of skill sets used within the very same ITES services** and a comparison can be attempted only after making a proper analysis of the skill sets that were being employed. **In our opinion** considering the observation of their Lordship in Rampgreen Solutions P. Ltd, (supra), **ICRA Online Ltd, was correctly considered by the lower authorities as a proper comparable.** We do not find any reason to interfere with the orders of authorities below in this regard.

29. Seeking exclusion of **Jeevan Scientific Technologies Ltd, (seg)**, Ld. AR submitted that the turnover of the said company was **less than Rs.1 crore.** As per the Ld. AR, TPO himself had excluded companies having turnover below Rs.1 crore. Relying on paper book, page 719, which is a part of the annual report report Jeevan Scientific

Technologies Ltd. (seg), Ld. AR submitted that the revenue from BPO operations of the said company came to only Rs.79.21 lakhs. As per the Ld. AR, the total operating revenue of the said company for the relevant previous year was only Rs.2.49 crores of which substantial part was from **other streams of operation**

30. Per contra, Ld.DR submitted that the **segment considered by the TPO had a turnover of Rs.246,75,00,000/-**. Thus according to him Jeevan Scientific Technologies Ltd, (seg), was a good comparable.

31. We have heard the rival contentions. Audited balance sheet and financial statement of Jeevan Scientific Technologies Ltd, (seg), taken from capitaline data base has been filed before us by the assessee at paper book page.677 to 740. Net revenue of the said company for the relevant previous year from its operation was **Rs.2,45,39,231/-**, as per its income statement at paper book page 725. TPO had considered the revenue as Rs.2,46,75,000/-. However **segmental revenue of the said company, as it appear at paper book page 719 show its earning from BPO operations is Rs.71.219 lakhs**. Thus TPO had considered the total revenue instead of the

segmental revenue. The turnover of the segment which was being compared was less than **Rs.1 crore** and by the yardstick applied by the TPO himself, the **company ought have been excluded from the list of comparables.** Whether the segmental information of the said company given by the assessee at paper book **page 719, nevertheless requires a verification.** We therefore set aside the comparability of Jeevan Scientific Technologies Ltd, (seg), back to the file of the AO/TPO for consideration afresh. In case the earning of the said company from its BPO operation is less than **Rs.1 crore** it has to be excluded from the list of comparables.”

5. As far as the second comparable M/s Jeevan Scientific Technologies Ltd (seg) is concerned, the learned Tribunal has only remanded the case back to the file of AO/TPO for fresh consideration and therefore, we are of the opinion that selection of that comparable has not yet become final at the hands of AO/TPO. AO/TPO have to look into the facts and figures with regard to the said comparable once again. Though the

learned counsel for the appellant-Assessee apprised this court that in pursuance of the learned Tribunal's order, the learned TPO has reiterated its previous order and even Misc. Application filed before the learned Tribunal came to be rejected by the learned Tribunal on **22.2.2017**. We are not presently seized of any appeal arising from such later order, nor these later orders are part of the record of this appeal. As far as the present order of the learned Tribunal is concerned, we do not find any substantial question of law to be arising with regard to the said company-M/s Jeevan Scientific Technologies Ltd (seg).

6. As far as the other comparable- M/s ICRA Online Ltd., is concerned, learned counsel for Assessee emphasized that the said comparable M/s ICRA Online Ltd. was a Knowledge Processing Outsourcing (**KPO**) company, whereas the Assessee -company was providing low end Business Processes Outsourcing

(BPO) services. Learned counsel drew our attention to the Judgment of the Division Bench of Delhi High Court in the case of **Rampgreen Solutions Pvt. Ltd. -v- Commissioner of Income Tax**, decided on **10.08.2015** in **ITA No.102/2015** reported in **377 ITR 533**, in which the Division Bench of Delhi High Court has quoted Rule **10TA(g)** of the **Income-Tax Rules, 1962** which defines KPO service as under:

*“(g) “knowledge process outsourcing services” means the **following business process outsourcing services** provided mainly with the assistance or use of information technology requiring application of knowledge and advanced analytical and technical skills, namely:-*

- (i) geographic information system;*
- (ii) human resources services;*
- (iii) engineering and design services;*
- (iv) animation or content development and management;*
- (v) business analytics;*
- (vi) financial analytics; or*
- (vii) market research,*

but does not include any research and development services whether or not in the nature of contract research and development services;”

7. Learned counsel submitted that KPO services are high end Information Technology Enabled Services (ITES), whereas the Assessee-Company in the present case was providing Voice Call Services, which is a low end type of service of ITES and therefore, the said comparable has been wrongly selected by the TPO and the learned Tribunal has fallen in error in upholding the said comparable with the case of the Assessee.

8. We find ourselves unable to agree with the said submission of the learned counsel for the appellant – Assessee. From the aforesaid quoted definition of KPO, it appears to be a specie of genus BPO and both being ITES services provided by the Software industry to their clients, the area of KPO may fall in the indicated areas of operation and the exclusion as specified in Rule 10TA(g) is only for Research and Development Services

whether or not in the nature of contract Research and development services, but we do not find any water tight compartment or any specified classification of KPO and other types of BPOs in Rule 10TA. If the concerned KPO which falls within the definition of genus category of BPO as per the segmental information available in public domain, the Assessee could very well persuade the Authorities below to compare only segmental information so available in public domain, but we cannot accept the broad submission made at the Bar by the learned counsel for the appellant-Assessee that since the declared comparable- M/s ICRA Online Ltd., was a KPO, therefore, the same should not be compared with the case of the Assessee, because as per its own TPO analysis, it was engaged only in low end BPO services viz., Voice Call Centre etc., and on the said basis, we do not find that the reasons assigned by the learned Tribunal in paragraph 28 of its order, quoted

above, are perverse or lack any foundation in that regard.

9. The learned Tribunal has clearly noted that though the comparable ICRA Online Ltd., and the Assessee were in different stream of operations, but the comparables need not exactly fit in the mould of comparables while adopting the TNMM study for arriving at the Arm's Length Price for the purpose of Chapter-X of the Act.

10. The learned Tribunal, in our opinion, has rightly observed in paragraph 28 that once the level of knowledge that is being used for Outsourcing is at a reasonably comparable pedestal, the type of service industry to which the comparable company and the Assessee-Company cater may not matter much.

11. In our afore cited Judgment in the case of **Soft Brands (supra)** we have already observed that the

Court u/s 260A of the Act cannot itself engage in undertaking the study of the comparables itself nor it has any wherewithal, the necessary facts and figures and expertise to undertake such a hairsplitting exercise at its own end and the perversity in the findings of the learned Tribunal to invoke the jurisdiction of this court u/S 260-A of the Act has to be palpable, explicit and established on the face of it. No such infirmities are found in the present order of the learned Tribunal before us.

Therefore, no substantial question of law arises for our consideration. The appeal of Assessee thus stands dismissed. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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