

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

INCOME TAX APPEAL NO.912 OF 2016

Pr.Commissioner of Income Tax-4, Mumbai. ... Appellant

V/s.

J.P.Morgan India Pvt. Ltd. ... Respondent

Mr.Sham Walve for the Appellant.

Mr.Percy Pardiwalla, Senior counsel with Mr.Madhur Agrawal
i/by Mr.Atul Jasani for the Respondent.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 14, 2019.**

P.C.:-

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 22nd July, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). This Appeal relates to Assessment Year 2006-07.

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

“1. Whether in the facts and the circumstances of

the case and in law, is the Tribunal justified in directing the Assessing Officer to delete the addition in respect of transaction charges amounting to Rs.2,86,69,998/-?

2. Whether in the facts and circumstances of the case and in law, is the Tribunal justified in directing the Assessing Officer to factor in the additional interest earned by the Assessee while computing the brokerage income earned by the Assessee by rendering brokerage services to its AEs?

3. Whether in the facts and circumstances of the case and in law was the Tribunal justified in rejecting Keynote Corporate Services Limited as a comparable on the ground of it being undergone an amalgamation during the year is not a proper comparable to the assessee company?

4. Whether in the facts and circumstances of the case and in law, was the Tribunal justified in directing the Assessing Officer to exclude Khandwala Securities Limited from the list of comparables to determine the ALP of its merchant banking services rendered by Assessee to its AEs?"

3. Respondent is a company engaged in Merchant Banking, Stock Broking and providing related financial and advisory services. In the course of its business, the respondent has entered into certain international transactions with his Associated Enterprises(AE). Therefore, the income arising therefrom was a subject to determination of Arms Length Price (ALP) in terms of Chapter X of the Act. In the above view, question Nos. 2 to 4

above, originate in transfer pricing adjustments of transactions with AE's.

4. Re:Quetion No.1

(i) The Authority under the Act had disallowed the payment of Rs. 2.86 cores made to National/Bombay Stock Exchange on account of transaction charges under Section 40(a)(i) of the Act. This for failure to deduct tax at source under Section 194J of the Act while making payment for transaction charges.

(ii) In appeal, the Tribunal deleted the disallowance on the basis of the Bombay High Court decision in **CIT Vs. Kotak Securities Ltd.**¹

(iii) Mr.Sham Walve, learned counsel for the appellant very fairly states that this issue now stands concluded in favour of the respondent-assessee and against the revenue by virtue of the decision of the Supreme Court in **CIT Vs. Kotak Securities Ltd.**². In the above decision it is held that no tax is deductible on the transaction charges under Section 194J of the Act.

(iv) Therefore, the question as proposed stands concluded by the decision of the Apex Court, no substantial question of law

1 340 ITR 333.

2 383 ITR 1

arises. Thus, not entertained.

5.Re:-Question No.2

(i) The respondent inter-alia provided broking services for future and option trade to AE's. The TPO while determining the ALP of the respondents services for future and option trade adopted the Comparable Uncontrolled Price (CUP) method to determine the ALP of its brokerage services in respect of future and option trade to AE's. It noted that as the AE's had kept a large amount of margin money with the respondent who in turn earned interest thereon the interest earned. TPO determined the interest earned from related and unrelated parties as a percentage of respective turnover at 0.0348% and 0.0212% respectively. Thus, the TPO factored in the additional interest earned in respect of related parties at 0.0136% (0.0348 % minus 0.0212%). Thus, resulting in addition of Rs.4.30 crores. The respondent's objections that the additional interest earned should not be computed as a percentage of turnover, was rejected both by the TPO and the DRP.

(ii) Consequently, an assessment order was passed by the

Assessing Officer which was challenged in appeal before the Tribunal.

(iii) The impugned order of the Tribunal while agreeing with the orders of the lower authorities held that an adjustment on account of interest earned on the margin money deposited by the AE should be factored in to determine the ALP. However, it held that instead of determining it on the basis of turnover of AE's and unrelated parties, it should be done on the basis of interest earned on the margin money placed by AE's and unrelated parties with the respondent. Thus, restored the issue to the Assessing Officer to determine the ALP on the above basis.

(iv) The Revenue has not pointed out any reason why the above methodology adopted by the Tribunal is bad or does not give the correct ALP as compared to the turnover basis adopted by the TPO.

(v) We find that the view taken by the Tribunal on these facts is a reasonable view, being directly linked to the interest earned on the margin money deposited by the AE's and unrelated parties while engaging the services of the respondent as a broker in future and option trade.

(vi) As the view taken is a plausible view, the proposed question does not give rise to any substantial question of law. Thus, not entertained.

6. Re:- Question No.3

(i) The respondent-assessee rendered merchant banking services to its AE's. These services were bench marked with similar services by others to determine the ALP by using the Transactional Net Margin Method as the most appropriate method. The TPO amongst various entities also considered Keynote Corporate Services Limited as a comparable to determine the ALP of the transaction between the respondent and its AE's. Both the TPO and the DRP rejected the respondent's objection that M/s Keynote Corporate Services Limited could not be included as a comparable. This for the reason that according to the respondent during the previous year relevant to the subject assessment year the financial result of Keynote Corporate Services limited was not comparable, as it had undergone an amalgamation affecting its profitability.

(ii) Thereafter, the respondent filed an appeal to the Tribunal.

By the impugned order the Tribunal accepted the respondent-assessee's contention and held that in view of the merger/amalgamation resulting in restructuring of its business affected its profitability. This it held was an exceptional circumstance and not a normal incident of business. Thus, concluding that M/s Keynote Corporate Services Limited is to be excluded from the final list of the comparables to determine the ALP of the respondents Merchant Banking Services to its AE's.

(iii) Mr. Walve, learned counsel appearing in support of the appeal submits that the impugned order of the Tribunal placed reliance upon the decision of its co-ordinate Bench in the case of **Petro Araldite Pvt. Ltd. (ITA No.6217/Mum/2012) decided on 18th January, 2013**, wherein it was held that merger would affect the financial results of the company concerned and thus would cease to be an appropriate comparable. The above decision of the Tribunal was challenged by the Revenue before this Court in case of **The Commissioner of Income Tax-8 Vs. Petro Araldite Pvt. Ltd. (ITXA No. 1804 of 2013) on this very issue and it was admitted on 24th November, 2015**. Therefore, it is submitted that this question also ought to be admitted.

(iv) Mr.Percy Pardiwalla, learned senior counsel appearing on behalf of the respondent invited our attention to the final decision of this Court in **The Principal Commissioner of Income Tax-1 Vs. Aptara Technology Pvt. Ltd. (Income Tax Appeal No.1209 of 2015) decided on 26th March 2018 and The Pr.Commissioner of Income Tax-2, Pune Vs. PTC Software (I) Pvt.Ltd. (Income Tax Appeal No.598 of 2016) decided on 16th April, 2018.** In both the above decisions this Court has taken a view that merger/ amalgamation is an extra ordinary event and would have an impact /effect on the financial results of the company. Thus, in both the aforesaid decisions, this Court upheld the view of the Tribunal that where merger/amalgamation have taken place and it is not a normal event then such a company would cease to be comparable. This ofcourse is subject to the Revenue being able to show that amalgamation/merger did not have any effect of the profitability of the company. This has not been shown by the Revenue either to the Tribunal or before us. Therefore, this issue stands covered by the decision of this Court in **Aptara Technology Pvt. Ltd. (supra) and PTC Software (I) Pvt.Ltd. (supra)** in favour of the respondent. This

more particularly in view of the absence of the Revenue even attempting to show that the merger and amalgamation that took place in the case of comparable M/s Keynote Corporate Securities Limited was such that it would not have any impact on its profitability. It is true that in case of **PTC Software (I) Pvt.Ltd. (supra)** this question has been admitted, however, the admission was on the facts and circumstances of that case. In any case the issue now stands concluded by final orders of this Court in case of **Aptara Technology Pvt. Ltd. (supra)** and **PTC Software (I) Pvt.Ltd.(supra)** and it is being followed.

(v) In view of the above, as the proposed question is covered by the decision of this Court, no substantial question of law arises. Thus, not entertained.

7.Re:-Question No.4

(i) The TPO had included M/s Khandwala Securities Limited in the final list of comparable to determine the ALP of Merchant Banking Services provided by the respondent to its AE's.

(ii) The respondent in appeal before the Tribunal contended that M/s Khandwala Securities Limited ought to be excluded

from the list of comparables as the services rendered by it is that of securities and stock brokers and therefore not comparable to the services rendered by the respondent-assessee of Merchant Banking i.e. Investment Advisory Services.

(iii) Before the Tribunal the only contention urged by the revenue for including M/s Khandwala Securities Limited as a comparable was that it had been included by the respondent in its transfer pricing study as a comparable. It was not contended by the Revenue before the Tribunal that functionally the services provided by M/s Khandwala Securities Limited and the respondent-assessee are similar/identical. The impugned order of the Tribunal on facts found that the services rendered by the respondent-assessee and its AEs does not involve broking services but only merchant banking activities. Thus, it was noted that the activities of M/s Khandwala Securities Limited would not be comparable to the activities of the respondent. Thus excluded from the final list of comparables.

(iv) In view of the above, findings of the fact by the Tribunal that the services are rendered by M/s Khandwala Securities Limited being different from the service rendered by the

respondent to its AE's, the exclusion of M/s Khandwala Securities Limited from the list of comparison cannot be disturbed. This in the absence of the respondent pointing out how function of the two are similar. The mere fact that the respondent had included M/s Khandwala Securities Ltd as a comparable, would not bar the respondent from contending otherwise. The object and purpose of the entire exercise of determining the ALP is by having proper comparables. Thus, there is no merit in the above objection taken by the Revenue.

(v) In the above, the question does not give rise to any substantial question of law. Thus, not entertained.

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

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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