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

INCOME TAX APPEAL NO.1815 OF 2016

Pr. Commissioner Income Tax .. Appellant
Versus
Lionbridge Technologies Pvt. Ltd. .. Respondent

Mr. Suresh Kumar for appellant
Mr. B.M.Chatterji, Senior Advocate with Shreyas and Vishesh Srivastav with Pritesh Chatterji I/b.Girish Pikale for respondents.

CORAM : AKIL KURESHI &
SARANG V. KOTWAL , JJ.

DATE : 18th March 2019.

P.C.

This appeal is filed by the revenue to challenge the judgement of Income Tax Appellate Tribunal (Tribunal for short). Following questions are presented for our consideration:-

(1) Whether on the facts and circumstances of the case and in law, the Tribunal is justified in directing to exclude the comparable of M/s. Bodhtree Consulting Ltd. for 2010-11 while determining the Arm Length Price?”

(2) Whether on the facts and circumstances of the case and in law the ITAT was correct in law in holding

> that foreign exchange gain attributable to the delivery of good outside India as included in the total turnover by AO is also entitled to be included in the export turnover for proper computation of deduction under section 10A of the Act?"
>
> (3) Whether on the facts and circumstances of the case and in law the ITAT was correct in law in holding that expenditure incurred in foreign exchange is excludable from the total turnover and also from the export turnover for computation of deduction under section 10A of the Act.?
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> (4) Whether on the facts and in the circumstances of the case and in law, the ITAT erred in solely relying on the Bombay High Court's decision of Gem Plus Jewellery (330 ITR 175 (Bom)] which has been contested by the Revenue before the Hon'ble Apex Court."?

2] Learned Counsel for the revenue fairly points out that the question Nos. 2, 3 and 4 had come up for consideration before this Court in the case of this very assessee in Income Tax Appeal No.97 of 2015 and Income Tax Appeal No.1528 of 2016. These appeals of the revenue were dismissed by this Court by orders dated 18th September 2017 and 30th January 2019 respectively. Without separate discussion therefore, these questions are not entertained.

3] The sole surviving question relates to the determination of arms length price in case of respondent assessee. The focal issue relates to excluding one M/s. Bodhtree Consulting Limited. Brief facts are that in the arms length price determination, the assessee had itself included the said entity viz., Bodhtree Consulting as one of the comparables. The transfer pricing officer TPO proceeded on such basis and gave his report which included Bodhtree Consulting as one of the comparables. Before the Tribunal, the assessee took a stand that Bodhtree consulting was not a comparable and while determining the arms length price the said entity should be excluded. The tribunal accepted the said contention, which decision has aggrieved the revenue.

4] In the impugned judgement, the tribunal noted that undisputedly the assessee was a product manufacturing company, whereas the Bodhtree Consulting were software product manufacturer. It was on this basis that the tribunal found that the two instances cannot be compared. The relevant observations of the tribunal in this regard may be noted.

> "24(a) In the department's written submissions at page 4, para 3.2.3 as also by way of his oral arguments,

the DR has sought to place reliance on the assessee's Transfer Pricing Report (TPR) as per which, acording to the ld. D.R., the assessee is into "application development", which includes, inter alia, "product release". Therefore, according to the Ld. DR, the assessee is a product manufacturing company. This however, has been emphatically denied on behalf of the assessee. It has been contended that the TPR is, in fact, being grossly misconstrued and mis-read inasmuch as "product release" does not, in any manner have any equivalence whtsoever with product manufacture. As a matter opf fact, according to the ld. Counsel for the assessee, if the TPR is correctly construed, it refers to the product release only in the context of application development, software development being the sole business activity of the assessee.

24(b) Here also, the argument of the ld. DR is found to be misplaced. He has sought to develop this argument out of para 3.2.2 of the TPR of the assessee, as contained at page 72 of the assessee's paper book for Y 2009-10. It would be apt to reproduce the relevant portion thereof;

> *"application development includes testing, application building quality assurance, program assembly and product release.*"

A plain reading of the above sentence belies the department's contention. Reading this sentence as it is shows that it concerns the components of "application development" only and "product release" is but one such component. In the absence of any evidence to the contrary, either in the TPR or elsewhere in the record, this argument of the Ld. DR is unsustainable and is rejected.

25(c) Besides, the TPO's order does not record any

> finding that the assessee is a product manufacturing company. Rather, the assessee was found to be in the calling of localisation and software services, as recorded by the TPO in para 5.1 of his order. This finding of the TPO was confirmed by the ld. DRP. The Department cannot now be allowed to set up a new case, as is sought to be done. Even otherwise, the case sought to be now set up at this stage i.e. that the assessee manufacturing company is a product company, is factually incorrect.
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> 26. On the basis of the above, it is correct that Bodhtrede Consulting Ltd. Being a software product manufacturer, is not comparable to the assesseel company. Moreover, it has been excluded in “Nethawk Networks Pvt. Ltd.”, (supra) “Wills Processing Services (I) Pvt. Ltd. (supra) and “CISCO” Systems Pvt. Ltd. (supra). Accordingly, here also, it is ordered to be excluded from the final set of comparables.

5] These findings are based on materials on record. We do not find any error in the view of the Tribunal that because of fundamental difference in the profiles of the two companies, they did not present the comparable instances.

6] The only question is, could the assessee have changed the stand regarding comparability once having included the said Bodhtree Consulting as one of the comparables in the transfer pricing analysis presented by the assessee. This issue had come up before this Court earlier in case of Commissioner of Income Tax -7 Vs. Tata Power Solar Systems Ltd., reported in (2017) taxman.com 326 (Bombay) in which, in the context of similar controversy the court has observed as under:-

> "3(c) By the impugned order, the Tribunal allowed the respondent – assessee's appeal. It held that merely because an assessee has included M/s. Indowind Energy Ltd. And B.F.Utilities Ltd. In itslist of comparables to determine the ALP would not by itself estop a party from establishing that these companies are not comparable. The impugned order found that the two comparables viz., M/s. Indowind Energy Ltd. And B.F.Utilities Ltd., were engaged in completely different line of business i.e. generation of wind energy while the respondent – assessee is engaged in generation of solar energy. Thus, not functionally comparable. In the above view, the impugned order on the basis of function, assets and risk (FAR) analysis excluded M/s. Indowind Energy Ltd. A d B.F.Utilities Ltd, from the list of final comparables to determine the ALP-.

> "3(d) We find that the impugned order of the Tribunal holding that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is foundto have been included on account of mistake as on facts, it is not comparable. The Transfer Pricing Mechanism requires comparability analysis to be done between like companies and controlled and uncontrolled transactions. This comparison has to be done between like companies and requires carrying out of FAR analysis to find the same. Moreover, the assessee's submission in arrriving at the ALP is not final. It is for the TPO to examine and find out the

companies listed as comparables which are, in fact, comparable. The impugned order has on FAR analysis found that M;/s. Indowind Energy Ltd. And B.F.Utilities Ltd., are not comparable. They are in a different area i.e. wind energy while the respondent – assessee is in the field of solar energy.”

6] In the result, the appeal is dismissed.

(SARANG V. KOTWAL, J) (AKIL KURESHI, J)