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

INCOME TAX APPEAL NO. 753 OF 2017

Pr. Commissioner of Income Tax-1 .. Appellant
v/s.
Sygenta Bioscience Pvt. Ltd. .. Respondent

Mr. Suresh Kumar for the appellant
Mr. Nitesh Joshi i/b Mr. Atul K. Jasani for the respondent

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, J.J.
DATED : 16th SEPTEMBER, 2019

P.C.

1. By this appeal, the appellant – Revenue has challenged the order passed by the Income Tax Appellate Tribunal, Mumbai, dated 25th May, 2016. The present appeal pertains to the Assessment Year 2008-09.

2. The appellant has placed the following questions of law for our consideration which according to the appellant are substantial questions of law :-

(a) Whether on the facts and circumstances of the case and in law, the Tribunal erred in holding that Alphageo (India)

Ltd. is not a comparable to the assessee's Research & Technical Services business even though the assessee is carrying on the function of research and development activity in the field of agro chemical industry, while the Alpha Geo (India) Ltd. Is involved in the business of research and development of seismic data functions similar to the functions performed by the assessee herein?

(b) Whether on the facts and circumstances of the case and in law, the Tribunal erred in holding that Alphageo (India) Ltd. is not a comparable to the assessee's Research & Technical Services business even though the assessee and the Transfer Pricing Officer (TPO) has conducted comparability analysis by adopting the companies performing similar functions and activities without any similarity of products or industry?

(c) Whether on the facts and circumstances of the case and in law, the Tribunal erred in holding that Alphageo (India) Ltd. is not a comparable to the assessee's Research & Technical Services business even though the ITAT, Bangalore held, in the case of Bosch Ltd. Vs. ACIT (LTU) (IT(TP)A No. 670/Bang/2011 dated 20.08.2015), that M/s. Alphageo (India) Ltd., is in the business of research and development of seismic data, functions similar to the functioned performed by Bosch Ltd. i.e. research and development activities in the field of automobile industry?

(d) Whether on the facts and circumstances of the case and in law, the Tribunal erred in holding that refundable deposit of Rs.1,86,47,800/- made by the assessee with SIPCOT is allowable towards cost of acquisition of lease right, when transfer by way of assignment of deposit with SIPCOT by the

assessee as Vendor to the Purchaser is part settlement of overall consideration decided by the parties to the transaction at Rs.6,45,00,000/- for transfer of lease-hold land, building and plant and machinery?

3. The respondent assessee – Sygenta Bioscience Pvt. Ltd. carries out research and technical services to the Syngenta Group which is in business of HYV Seeds and Crop Protection Sciences internationally.

4. The return of income for the Assessment Year 2008-09 was filed by the respondent assessee on 30th September, 2008 declaring total income as NIL. After adjusting the brought forward loss and the respondent assessee paid tax on book profit of Rs.1,60,96,269/-.

5. The questions of law at (a), (b) and (c) are essentially the same viz. whether M/s. Alphageo (India) Ltd. (M/s. Alphageo) could be considered as comparable for bench marking to determine the Arms Length Price (ALP) of its services to its Associate Enterprises (AE). Thus, being considered together.

6. The case of the respondent assessee was selected for scrutiny. A reference was made to the Transfer Pricing Officer (TPO) under Section 92CA of the Income Tax Act (Act) for determination of Arms Length Price (ALP) in case of international transactions of respondent assessee. In its Transfer Pricing Study, the respondent assessee included 9 comparables, one of them was M/s. Alphageo. The TPO rejected three of the comparables as being functionally

different. The respondent assessee had filed a reply and had stated that as three of the nine comparables selected as comparables had been rejected on the ground of not being functionally similar, M/s. Alphageo also be removed as a comparable for being functionally different. The TPO did not accept the same and proceeded to consider M/s. Alphageo and others (excluding the three) as comparable and proceeded to make adjustment of Rs. 1,55,48,991/- by order dated 30th September, 2011. In terms of the above, the Assessing Officer i.e. the Deputy Commissioner of Income Tax passed an assessment order on 24th January, 2012 under Section 143(3) r/w Section 144C of the Act.

7. The respondent assessee filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) dismissed the appeal filed by the respondent assessee by the order dated 2nd December, 2014.

8. The respondent assessee thereafter filed an appeal before the Income Tax Appellate Tribunal. The respondent assessee contended that the ALP arrived at was not correct. The Tribunal upheld the contention of the respondent assessee that M/s. Alphageo was not comparable for bench marking the ALP. Thus, restoring the issue to the Assessing Officer / Transfer Pricing Officer to rework the ALP. Accordingly, the impugned order dated 22nd April, 2016 the Tribunal allowed the appeal of the respondent on this issue.

9. We have heard Mr. Suresh Kumar, learned Counsel appearing for the appellant and Mr. Joshi, learned Counsel appearing for the respondent.

10. The main contention advanced by Mr. Suresh Kumar on this question is that as the respondent assessee having itself included M/s. Alphageo as one of the comparables then it cannot now argue that this entity should not have been considered as comparable. It is not the case of the Revenue before us that M/s. Alphageo is includable as comparable on merits, but only that the respondent had relied upon it as comparable in its transfer pricing study. This submission is not correct. The Division Bench of this Court in the case of ***Principal Commissioner of Income Tax Vs. J.P Morgan India (P) Ltd.*** [1] held that mere fact that the assessee included an entity in the list of comparables, would not bar the assessee from contending otherwise before the TPO. The entire exercise of determining the ALP is not adversarial but an collaborative process and TPO's endavour is to arrive at the appropriate ALP. As the TPO is the authority to determine the appropriate ALP.

11. The next aspect is whether the Tribunal was right in holding that M/s. Alphageo was not a comparable for determination of Arms Length Price in respect of the respondent assessee. The authorities

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had rejected Dolphin Medical Services, Medinova Diagnostic Services and N.G. Industries as not comparables because they were functionally different than the respondent. Therefore, the TPO had adopted the functional test. On the basis of the above text, the respondent was right in making a grievance that same test should have been applied to M/s. Alphageo to determine its comparability.

12. M/s. Alphageo is in the business of oil exploration and production of oil. It carries out research activity in seismic data. The respondent does research and chemical analysis for agro chemicals. On the face of it the functions of two entities is different. This being the position, if the Tribunal held that M/s. Alphageo was not comparable, it is a possible view, on analysis of the evidence.

13. Mr. Suresh Kumar, sought to place before us a decision rendered by the Income Tax Appellate Tribunal, Banglore in the case of ***Basch Ltd. Vs. Assistant Commissioner of Income-tax (LTU), Banglore***[2] where the Alphageo was held to be comparable to the assessee therein. This decision was rendered in the context of the Tribunal on facts finding that the Assessee therein and M/s. Alphageo are functionally comparable. In the present case, the Tribunal on facts found that M/s. Alphageo and the respondent are not comprable. Thus, the decision of the Tribunal in the case of M/s. Bosh (supra) does not assist the appellant. Therefore, questions (a), (b) and (c) do not give rise to any substantial question of law and

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thus they are not entertained.

14. As regards question (d) is concerned, the Assessing Officer during the scrutiny proceedings noted that the respondent had sold its property in Tamil Nadu. It showed the sale consideration at Rs.4.58 crores and claimed as cost of acquisition Rs.23.31 lakhs while computing capital gains. The Assessing Officer added a sum of Rs.1.86 crores to the sale consideration being the deposit the respondent had made with State Industries Promotion Corporation of Tamil Nadu (SIPCOT) at the time of obtaining the lease and now returned to it. This amount was assessed by the Assessing Officer as short term capital gains on relinquishment of its rights in the property.

15. The Tribunal has held that the refundable deposit of Rs. 1,86,46,800/- made by the respondent with SIPCOT, Tamil Nadu is allowable towards cost of acquisition of lease hold rights of the property in Tamil Nadu, which is now sold. The Assessing Officer as well as the Commissioner of Income Tax (Appeals) included this amount as a part of sale consideration while computing capital gains. The Tribunal held that if it is considered as sale consideration then, the respondent assessee was entitled to it as a cost of acquisition for the purpose of computing capital gains.

16. Thus, the entire exercise would be Revenue neutral. In these

facts, there is no error in the view taken by the Tribunal. Thus, it does not give rise to any substantial question of law. Thus, not entertained.

17. In these circumstances, the Appeal is dismissed.

(NITIN JAMDAR, J.) **(M.S. SANKLECHA, J.)**