IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1916 OF 2017

Pr. Commissioner of Income Tax -8 ….Appellant

V/s.

3I India Ltd …Respondent

Mr. Suresh Kumar for Appellant
Mr. Nitesh Joshi a/w Mr. Rajesh Poojary i/b Mint & Confreres for Respondent

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CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 15th NOVEMBER 2021

P.C. :

1 Appellant is impugning an order dated 16th September 2016 passed by the Income Tax Appellate Tribunal (ITAT), Mumbai.

2 Respondent filed its return of income on 7th October 2010 for A.Y.-2010-2011 declaring income of Rs.12,52,11,166/-. The return was processed under Section 143(3)(1) of the Income Tax Act 1961 (the Act) on 14th April 2011 accepting the declared income. After scrunity assessment notice under Section 143(2) was issued on 19th September 2011, notice under Section 142(1) alongwith questionnaire was also issued to respondent on 20th December 2013 seeking further details. As the international transaction with Associate Enterprises (AE) entered into by respondent exceeded the threshold limit of Rs.15 crores, a reference to the Transfer Pricing Officer (TPO) was made after the approval of CIT-8, Mumbai for computing the arms' length price of international transaction. In this case, the TPO made an upward adjustment of Rs.19,55,13,736.73 on

account of performance fees and investment advisory fees, vide order dated 30th January 2014 passed under Section 92CA(3). The Assessing Officer based on the order of TPO passed a draft assessment order dated 28th February 2014 under Section 144C(1) of the Act. Respondent filed its objections before the Dispute Resolution Panel (DRP) against the draft assessment order. The DRP after considering objections filed by respondent, by an order dated 13th November 2014 partly allowed the objections. The Assessing Officer, as per directions of DRP passed the assessment order dated 29th December 2014 under Section 143(3) read with Section 144C(13) of the Act.

3 Aggrieved by this order, respondent filed an appeal before ITAT and ITAT was pleased to allow the appeal by an order dated 16th September 2016. It is this order, which is impugned in the appeal and the following 7 substantial questions of law have been proposed:

> *(a) Whether the Ld. ITAT is right holding the activity of the assessee to be mere investment Advisory activity ignoring the PAR analysis done by the TPO ?*
>
> *(b) Whether the Ld ITAT is right in accepting the internal nomenclature of the assessee and thereby ignoring the definitions of "investment advisory" as provided in the SHIM Regulations and also ignoring the functions and risks/liabilities associated with directorship of a company which has been relied upon by the IPO in the FAR analytic ?*
>
> *(c) Whether the Ld. ITAT is right in holding that no comparable has been provided for the CUP analysis ignoring the fact that the uncontrolled rates for such activity has been mentioned by the TPO in the order ?*
>
> *(d) Whether the Ld. ITAT is right in not considering the uncontrolled rates for the PMS activity of the assessee which have been submitted by the assessee before it and stated to be having sanction of the Hon'ble High Court of Bombay ?*

(e) Whether the Ld. ITAT is right in relying on the APA signed by the assessee with CBDT for subsequent years when the same are clearly not applicable for the relevant year, ignoring the fact that the assessee had the option of including the relevant year for APA as Ivell and has not opted for the same ?

(f) Whether the Ld ITAT is right in directing the inclusion of 3 comparables in the TNMM analysis relying solely on a decision of the Ld. ITAT in a completely different ease without examining the applicability of the same to the facts of the assessee's case.
Whether the Ld. ITAT is right in directing inclusion of the comparable M/s Kinetic Trust Ltd. ignoring the huge turnover difference between the assessee and the comparable ?

(g) Whether the Ld. ITAT is right in directing inclusion of the comparable M/s. IDC India Ltd. and M/s Future Capital Investment Advisors Ltd even though the assessee has considered the same to be non comparable for the year (AY.2010-2011) in its Transfer Pricing Study Report for subsequent years, which include analysis for the AY.2010-2011 as well ?

These 7 questions of law can be split into two parts, namely (a) to (e) in Part-1 and (f) and (g) in Part-2.

4 We have heard Mr. Suresh Kumar and Mr. Joshi and with their assistance considered the order of ITAT.

5 As regards first part, i.e., (a) to (e) are on the basis that respondent, in addition to investment advisory services, had also rendered portfolio management services (PMS). The ITAT in the impugned judgment, has come to a finding of fact that there was no evidence of respondent rendering any such additional services. The ITAT has further held that no separate PMS services needs to be benchmarked as the same is part and parcel of rendering of investment advisory services which is evident from the functions performed in terms of the "Investment Advisory Agreement" entered between respondent and its AE. Therefore, the said 5 questions (a) to (e) cannot be entertained.

6 As regards second part, i.e., (f) and (g) are concerned, the finding of the ITAT is entirely one of fact and the revenue has failed to show as to how the finding arrived at by the ITAT is perverse in any manner. The revenue has also not been able to demonstrate that the analysis done by the ITAT while excluding the companies suggested by the revenue from the list of comparables, was in any manner contrary to the settled position in law.

7 The entire exercise of making transfer price adjustment on the basis of comparables is nothing but a matter of estimate of a broad and fair guess-work of the authorities based on factual relevant material brought before the authorities, i.e., TPO, DRP and the Tribunal which are the fact finding authorities. It will be useful to reproduce paragraph 12 of judgment of this court in ***Pr. Commissioner of Income Tax-6 Vs. M/s Eight Roads Investment Advisors Pvt Ltd.*** [1]

> *"12. In view of the above detailed reproduction of the reasonings given by the Tribunal we find that, <u>while undertaking the exercise to arrive at the arm's length price which is essentially a matter of estimate of the fair value which the Indian Company had paid or had received from its Associate Enterprise (A.E.), such exercise is required to be undertaken by the TPO on the basis of the facts and figures relating to comparable cases of other similarly placed entities, whose relevant data is available in the public domain.</u> As per the provisions of the Act and the Rules, the assessee company is required to furnish its own Transfer Pricing Analysis and the list of chosen comparables which may or may not be agreed to by the Revenue Authorities and they would introduce some more comparables rejecting the comparables given by the assessee company by applying certain filters like Related Party Transactions (RPT) filter, turnover filter, export earnings filter, employee cost filter, etc to bring them within the comparable range of the cases of such comparables and generally there would be a tug of war between the assessee and the revenue in such a situation. We would state that the assessee company would normally choose comparables, whose operating profit margins are less or only little more than the assessee, but the revenue would bring in comparables with higher profit margins. The TPO, may in the case of*

1 Dated 27th February 2020-ITXA No.1125 of 2017

an assessee introduce and suggest comparables whose operating margins are higher than the assessee company so as to make transfer pricing adjustments in the declared income of the assessee, resulting in fetching of more revenue. From the aforesaid quoted paragraphs from the Tribunal's order, it is evident that, individual cases of such comparables have been juxtaposed with the functionality of the assessee considered, analyzed and discussed by the Tribunal in respect of comparables which were excluded by the TPO as also in the case of those comparables which were included by the TPO. It is quite common to note that, while some comparables are found to be appropriate and really comparable to the facts of the assessee company, some are not and it would ultimately result in whether the correct filters have been properly applied or not or whether the most appropriate method of determination of arm's length price has been adopted or not to make fair and reasonable transfer pricing adjustments in the hands of the assessee. However, the entire exercise of making transfer pricing adjustments on the basis of comparables is nothing but a matter of estimate of a broad and fair guess-work of the authorities based on factual relevant materials brought before the authorities i.e. the TPO, the DRP and the Tribunal, which are the fact finding authorities."

(emphasis supplied)

8 It would be apposite to reproduce paragraphs 5, 6 and 7 of an unreported judgment of this court in ***The Pr. Commissioner of Income Tax-1 Vs. Barclays Technology Centre India Pvt Ltd.***[2] which read as under:

"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

2 Dated 26th June 2018 – ITXA No.1384 of 2015

IncomeTax9 v. WSP Consultants India (P) Ltd.253 Taxman 58 (Delhi) wherein it has been observed:

> *"10. <u>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."</u>*

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. <u>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."</u>

(emphasis supplied)

9 In our view, the ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions as pressed raises any substantial questions of law.

10 The appeal is devoid of merit and is dismissed with no order as to costs.

11 We have to note that this is one more appeal filed in a ritualistic manner which has unnecessarily taken up the scarce time of this court. The Commissioner of Income Tax and CIT(Judicial) would do well to review all appeals filed and withdraw the same, in case the only challenge therein is to finding of facts and there is no evidence of perversity or in the fact of settled legal position. The Counsel of Revenue is directed to serve a copy of this

order on the Law Secretary (Government of India), Central Board of Direct Taxes, Principal Chief Commissioner of Income Tax (Maharashtra) and CIT (Judicial) for necessary action.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**