

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI I.C. SUDHIR, JM

ITA No.4291/Del/2009
Assessment Year : 2004-05

ACIT,
Circle 3(1),
CR Building,
New Delhi.

Vs. Convergys India Service (P)
Ltd.,
P-22, 1st Floor,
South Extn Part II,
New Delhi.

PAN : AABCC5056G

CO No.14/Del/2014
(ITA No.4291/Del/2009)
Assessment Year : 2004-05

Convergys India Service (P)
Ltd.,
Bestech Business Towers,
Sohna Road, Sector 48,
Gurgaon.

Vs. ACIT,
Circle 3(1),
CR Building,
New Delhi.

PAN : AABCC5056G

(Appellant)

(Respondent)

Assessee By : Shri Pawan Kumar &
Shri Rohit Tiwari, CAs

Department By : Shri Piyush Jain, CIT, DR

ORDER

PER R.S. SYAL, AM:

This appeal filed by the Revenue and the Cross Objections by the assessee are directed against the order passed by the CIT(A) on 14.9.2009 in relation to the assessment year 2004-05.

2. The first ground of the Revenue's appeal is against the rejection of comparables on the ground of related party transactions. Here, it is relevant to mention that the Revenue has also taken an additional ground which is relevant for both its grounds, reading as under:-

“The Id. CIT(A) has erred on facts and in law in deleting the addition on account of Arm's Length Price by entertaining additional evidences filed by the assessee without referring the same to the AO for verification in contravention of provisions of sub-section (3) of Rule 46A.”

3. Briefly stated, the facts of the case are that the assessee is a wholly owned subsidiary of Convergys Customer Management Group Inc., USA (CMG). It is engaged in providing IT enabled back office support services only to CMG. Certain international transactions were reported by the assessee. The Transactional Net Margin Method (TNMM) was applied to benchmark the international transactions with profit level indicator (PLI) of OP/TC. Certain

companies were chosen as comparable. The TPO excluded some companies and eventually proposed addition on account of transfer pricing adjustment to the tune of ₹27,58,30,556/-. The Id. CIT(A) made certain alterations by ordering to exclude some companies from the list of comparables. The Department in its ground is aggrieved only qua the exclusion of three companies from the list of comparables because of their related party transactions (RPTs), being in excess of 25%. These three companies are Datamatics Technologies Ltd. (with RPTs 34%), Hinduja TMT Ltd. (RPTs 39%) and Mukand Engineers Ltd. (RPT 45%). The grievance of the Revenue is confined only against the exclusion of these three companies from the list of comparables on the basis of related party transactions and also against the acceptance of additional evidence by the Id. CIT(A) without confronting it to the TPO as per Rule 46A of IT Rules, 1962.

4. We have heard the rival submissions and perused the relevant material on record. The principal question about the exclusion of companies with more than 25% RPTs from the list of comparables on account of these becoming controlled transactions, has been fairly decided by various benches of the Tribunal. It has been held by the

Delhi Bench of the Tribunal in *Agilent Technologies International Pvt. Ltd. Vs. ACIT (2013) 36 CCH 187 (Del) (Trib.)* that a potential comparable having more than 25% of the related party transactions is to be ignored. Similar view has been taken in *Actis Advisors Pvt. Ltd. Vs. DCIT (2012) 20 ITR (Trib.) 138 (Del)*. Recently, the same view has been reiterated in *Nokia India Pvt. Ltd. Vs. DCIT (2013)-TIL-224-ITAT-DEL-TP*. In view of the above decisions, we do not find any infirmity in the reasoning given by the Id. CIT(A) for the exclusion of companies on the basis of related party transactions of more than 25%.

5. The Id. DR contended that the Id. CIT(A) accepted the above percentage of related party transactions in respect of these three companies without confronting it to the TPO. It can be seen from the assessee's letter dated 26.10.2006 addressed to the TPO, a copy of which is available at pages 205 onwards of the paper book, that the assessee submitted computation of related party transactions at more than 25% in respect of Datamatics Technologies Ltd. and Hinduja TMT Ltd. Since the details about the computation of RPTs being more than 25%, in these two companies were filed by the assessee before the TPO, which have not been adversely

commented, we do not find any reason on the part of the Id. CIT(A) in not accepting such calculation which was made before the TPO himself. We, therefore, uphold the exclusion of these two companies.

6. As regards the third company, namely, Mukand Engineers Ltd., in respect of which the Id. CIT(A) accepted the RPTs at 45%, the Id. AR candidly accepted that the calculation of such percentage of RPT was not before the TPO and the same was filed before the Id. CIT(A) for the first time. This calculation, on the basis of the Annual accounts of Mukand Engineers Ltd., in our considered opinion, constitutes an additional evidence. The Id. CIT(A) was required to seek the comments of the TPO before accepting the correctness of the percentage of related party transactions as calculated by the assessee. We, therefore, set aside the impugned order on this issue and send the matter to the AO/TPO for verifying the correctness of the percentage of the RPTs of this company as per law after allowing a reasonable opportunity of being heard to the assessee. If such computation shows RPTs at less than 25%, then, this company should be included in the list of comparables. In the otherwise situation, the view taken by the Id. CIT(A) in excluding it from the list of comparables, be upheld.

7. The second ground taken by the Department is against the inclusion of Weal Infotech Ltd. by the Id. CIT(A) in the list of comparables. On this score, we find that the assessee included this company in the list of comparables, but, due to the absence of the relevant annual accounts, the working of OP/TC of this company was not calculated. Accordingly, this case was included in the list of comparables with the remarks 'NA' against the column OP/TC margin. The assessee submitted the data in respect of this company before the Id. CIT(A), which came in public domain later on. Such data was considered by the Id. CIT(A) for the purposes of calculation of arithmetic mean of the comparable companies. On this score, we find that the Revenue is aggrieved against the acceptance of additional evidence in respect of this company in violation of Rule 46A.

8. There are two aspects of this issue. First is the question of the very inclusion of this company in the list of comparables and the second is about the calculation of its profit margin. As regards the first issue, we do not find any reason to disturb the view of the Id. CIT(A) because the assessee included it in the list of comparables in its Transfer pricing study. The very comparability of this company

was not disputed by the TPO. In that view of the matter, the Id. CIT(A) cannot be faulted with for directing to include the data of a company in the list of comparables, which was originally included by the assessee and not objected to by the TPO. As regards the second aspect of the computation of the profit margin of this company, we find that the Id. CIT(A) accepted the data furnished by the assessee of this company and proceeded to include the same in the list of comparables without affording any opportunity to the TPO for examining the same. We, therefore, find that there is violation of rule 46A to this extent. Accordingly, we set aside the impugned order on this score and send the matter back to the AO/TPO for verifying the correctness of the calculation of OP/TC of this company for the purposes of calculating arithmetic mean of PLI of the comparable companies.

9. The only issue raised by the assessee in its cross objection is about the exclusion of Tricom India Ltd., from the list of comparables. No other issue taken in the cross objection, was pressed by the Id. AR.

10. As regards Tricom India Ltd., it is seen that the assessee included this company in the list of comparables. The stated-inadvertent inclusion of this company was neither challenged before the TPO nor before the Id. CIT(A). It is for the first time that the assessee has challenged the inclusion of this company before us on account of high abnormal profit. The Id. DR objected to the action of the assessee in now contending before the Tribunal for the first time to exclude this company from the list of comparables, which was voluntarily included. In our considered opinion, this contention deserves to be rejected. Just like a situation in which the assessee chooses a company as comparable which can be excluded by the TPO on finding it as incomparable, there can be no fetters on the assessee requesting for the exclusion of a company originally considered by it as comparable by inadvertence. After all, it is for the TPO to examine and evaluate such contention and decide about its comparability on merits. To foreclose the raising of such a contention by the assessee for further appraisal at the TPO's end, is impermissible. The Special Bench of the Tribunal in the case of *DCIT vs. Quark Systems Pvt. Ltd. (2010) 132 TTJ (Chd) (SB)* has allowed the assessee to claim exclusion of certain companies from the list of

comparables, which were inadvertently included by it in its Transfer pricing study. We, therefore, reject this foundational argument raised on behalf of the assessee.

11. On the merits, we remit the matter to the file of TPO/AO for examining the assessee's contention that the high profit of this company was due to abnormal circumstances. Here, we want to make it clear that a potential comparable cannot be excluded simply on the ground of high profit rate, unless it is conclusively shown that such higher profit was the result of some abnormal conditions prevailing in that case alone. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in this regard.

12. In the result, both the appeals are partly allowed for statistical purposes.

The order pronounced in the open court on 28.11.2014.

Sd/-

[I.C. SUDHIR]
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 28th November, 2014.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.