

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 18 OF 2015

Commissioner of Income Tax
"Aaykar Bhavan",
Patto, Panaji, Goa.

... Appellant

V e r s u s

M/s. Pentair Water India Pvt. Ltd.,
L-55, Verna Industrial Estate,
Verna, Salcete, Goa 403722.
PAN: AABCS8856L

... Respondent

Ms. Asha Desai, Advocate for the Appellant.

Mr. Jitendra Jain, Advocate with Ms. Sumedha Joshi, Advocate for the Respondent.

Coram :- **F. M. REIS,**
K. L. WADANE, JJ.

Date of Reserving Order : **7th July, 2015.**

Date of Pronouncement of Order : **16th September 2015.**

ORAL ORDER *(Per F. M. Reis, J.)*

Heard Ms. Asha Desai, learned Counsel appearing for the Appellant and Mr. Jitendra Jain, learned Counsel appearing for the Respondent.

2. Briefly, it is the contention of the Appellant that the Assessee-Respondent is engaged in the business of manufacture of fibre glass pressure vessel used for water treatment, swimming pool equipments and that the Respondent-Company is making three kinds of vessels namely (I) Code Line, (ii) Composite pressure vessels and (iii) FRP pressure vessels and set up an in-house

facility for catering to its needs on the area of engineering, designing & product development. It is further their case that the Company has rendered such services in the relevant assessment year 2007-2008 to some of its group companies abroad and that the Respondent is the subsidiary to Pentair INC, USA and is involved in the same business. The said Respondent-Company has a unit at Verna Industrial Estate where the said manufacturing activity is taking place. It is further their case that the Respondent-Assessee has filed returns of Income on 30.10.2007 disclosing total income of Rs.5,28,09,795/- on which total tax was Rs.1,81,13,280/-. An Order under Section 92CA was passed on 27.10.2010 by the TPO and the AO on 21.12.2010 added an amount of Rs.1,68,60,877/- in the Order passed under Section 143 (3) of the said Act. It is further the contention of the Appellant that being aggrieved by the said Order, the Respondent-Assessee preferred an Appeal before the Commissioner Income Tax Appeal and by its Order dated 16.11.2012, directed the AO to compute the TP adjustment by taking the operating margin at the comparable rate of 22.92%. Being aggrieved by the said Order, both the Respondent as well as the Appellant filed Appeals before the Income Tax Appellate Tribunal which came to be disposed of by Order dated 23.05.2014. Being aggrieved by the said Order, the Appellant has preferred the present Appeal.

3. Ms. Asha Desai, learned Counsel appearing for the Appellant, has pressed for only two substantial questions of law framed at para 5A and 5B of the Appeal Memo. Learned Counsel has further pointed out that the Income Tax Appellate Tribunal has erred in holding that the profits on costs of five comparable companies as abnormal without giving reasons how the functions discharged, assets deployed and risks assumed of such companies were different from the

Respondent-Company. Learned Counsel further pointed out that the Tribunal has also erred in holding that the size and turnover of the company are deciding factors for treating a company as comparable and accordingly erred in excluding M/s. HCL Comnet Systems & Services Ltd., M/s Infosys BPO Limited and M/s. Wipro Ltd., as comparables.

4. On the other hand, Shri Jain, learned Counsel appearing for the Respondent, has pointed out that both the Authorities have concurrently come to the conclusion that the said Companies are not comparable to the Respondent-Assessee Company and, as such, this Court cannot re-appreciate the evidence on record to come to any concurrent finding. Learned Counsel further submits that these concurrent findings of facts based on the material on record cannot be re-appreciated by this Court in the present Appeal as there is no substantial question of law which arise therein. Learned Counsel further pointed out that to answer the said two substantial questions of law, this Court would have to re-appreciate the material on record which is not at all permissible. Learned Counsel further submits that the bifurcation intended to be affected by the learned Counsel appearing for the Appellant was not even raised before the Tribunal and, consequently, the above Appeal deserves to be rejected.

5. On perusal of the impugned Order passed by the Tribunal dated 23.05.2014, we find that the Tribunal has recorded the reasons for not accepting the said three companies are comparable by stating as follows :

(I) HCL Comnet Systems & Services Ltd :- We find force in the submission of the Id. AR that this

company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the Assessee, the turnover is around Rs.11 crores only. While making the selection of comparables, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of Rs.11 crores cannot be compared with a company which is having turnover of Rs.260 crores which is more than 23 times the turnover of the Assessee. This company cannot be regarded to be in equal size to the Assessee. We, accordingly, direct the AO to exclude this company out of the comparables.

(ii) Infosys BPO Ltd. :- In this case also we noted the turnover in respect of this Company is Rs.649.56 crores while the turnover of the Assessee company is around Rs. 11 crores which is much more than 65 times of the Assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT(A) in excluding this Company out of the comparables. Accordingly, we confirm the order of the CIT(A).

(iii) Wipro Ltd. :- After hearing the rival submissions, we noted that the CIT(A) applying the turnover filter has excluded this company out of the comparables. The turnover reported in the case of Wipro Ltd. is Rs.939.78 crores while in the case of the Assessee the turnover is around Rs. 11 crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the Assessee company and accordingly, we do not find any infirmity in the finding of CIT(A) while he excluded this company on the turnover criteria

following the decision of this tribunal in :

Sony India (P) Ltd. vs. DCIT, 114 ITD 448
Delhi,
E-Gain Communication, 2008 TIOL 282
ITAT (Pune)
Deloittee Consulting India Pvt. Ltd. vs.
DCIT, ITA No. 1082/Hyd/2010
Genisys Integrating System (India)(P.) Ltd.
vs DCIT,, 53 Sot 159 (Bang)”

6. The said findings of the Tribunal in respect of the said three Companies are on the basis of appreciation of evidence on record. We find no infirmity in the said findings of the Tribunal on that count. In fact, the Tribunal has endorsed the views of the CIT Appeals whilst coming to such conclusions. The concurrent findings of facts arrived at by the Authorities below, cannot be re-appreciated by this Court in the present Appeal.

7. In this connection, the Apex Court in the Judgment reported in **2011(1) SCC 673** in the case of **Vijay Kumar Talwar vs. CIT**, has observed at Para 23 thus :

“23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See *Madan Lal v. Gopi, Narendra Gopal Vidyarthi v. Rajat Vidyarthi, Commr. of Customs v. Vijay Dasharath Patel, Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v.*

CESC Ltd)"

8. In the present Appeal, the Appellant-Revenue has not been able to controvert or deny the data relied upon by the Authorities below to come to such conclusion. The said Companies are no doubt large and distinct companies where the area of development of subject services are different and as such the profit earned therefrom cannot be a bench-marked or equated with the Respondent-Company.

9. Shri Jain, learned Counsel has rightly relied upon the Judgment of the Delhi High Court reported in **(2013) 36 taxmann.com 289(Delhi)** in the case of ***Commissioner of Income-tax vs. Agnity India Technologies (P.) Ltd.*** Learned Counsel has also brought to our notice the Order of the Income Tax Appellate Tribunal whilst examining similar circumstances for the assessment year 2005-06. He has taken us through the findings therein to point out that the conclusions arrived at are based on a comparison that the condition in any uncontrolled transaction between an independent enterprises for the purpose of such comparison, economically relevant characteristics must be sufficiently comparable if two parties are to be placed in a similar situation. Learned Counsel as such submitted that it is not open for the appellant to now contend a different criteria to ascertain the comparability. In fact the Tribunal whilst passing the impugned Order has considered the said principles whilst coming to the conclusion that the said three Companies cannot be treated to be comparable to the Respondent-Assessee Company. The turn over is obviously a relevant factor to consider the comparability.

10. In view of the above, we find that the said two substantial questions of law proposed by the learned Counsel appearing for the Appellant do not arise in the present Appeal taking note of the concurrent findings of fact arrived at by the Authorities below. The Appeal stands accordingly rejected.

K. L. WADANE, J.

F. M. REIS, J.

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