IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.522 OF 2016

The Pr. Commissioner of Income Tax-4
Pune ..Appellant

Vs.

M/s TIBCO Software (India) Pvt Ltd
Pune ..Respondent

Mr. Suresh Kumar, for the Appellant.
Mr. Ashwani Taneja a/w Mr. A. K. Jasani, for the Respondent.

CORAM:-**S. C. DHARMADHIKARI &**
B. P. COLABAWALLA, JJ.
DATE :- **SEPTEMBER 24, 2018.**

ORAL JUDGMENT.:(PER S. C. Dharmadhikari, J.)

By this Appeal the order of the Pune Bench of the Income Tax Appellate Tribunal dated 10th April, 2015 for the Assessment Year 2009-2010 is challenged by the Revenue.

2 The Revenue says that the question at paragraph 4.1 is not just a question of law but a substantial question of law.

3 The Assessee disagrees and says that the Tribunal's order is rendered on a mixed question or issue, namely on fact and law. The findings are purely factual and consistent with the material placed on record. Hence, in the submission of the Assesee the Appeal deserves to be dismissed.

4 We have heard Mr. Suresh Kumar appearing on behalf of the Revenue in support of this Appeal and Mr. Taneja and Mr. Jasani appearing on behalf of the Respondent.

5 With their assistance we have perused the Appeal paper book.

6 There are also some additional questions proposed and the draft of that additional questions has been handed over by Mr. Suresh Kumar during the course of argument.

7 The Tribunal had before it an Appeal which challenges the order of the Assessing Officer dated 10th December, 2013.

8 The Assessee says that it is a company providing

support to a USA based establishment which is in the business of software development. The support services were rendered by the Indian Arm of this US establishment. A return of income was filed for the above assessment year declaring total income of Rs. 85,91,335/-. The assessment was completed under Section 143 (3) read with Section 144 C(1) of the Income Tax Act, 1961 (for short "I. T. Act"). It is stated that the transaction is covered by Section 92 CA(3) of the I. T. Act. The Transfer Pricing Officer in this case did not accept the benchmarking of international transactions done by the Respondent-assessee with its associated enterprise and made an upward adjustment of Rs. 3,61,96,665/-. That was added to the total income after the receipt of the directions under Section 144C of the I.T. Act.

9 Upon receipt of the Transfer Pricing Officer's draft order, the Respondent-Assessee approached the dispute resolution panel. The dispute resolution panel made an order on 9th December, 2013 based on which the impugned assessment was made.

10 The aggrieved Assessee approached the Tribunal and

argued that in its own case similar questions have been dealt with and the facts are no different for the assessment year under consideration. Thus, before the Tribunal heavy reliance was placed on the earlier order of the Tribunal.

11 In paragraph 5 of the order under Appeal the Tribunal proceeds on the footing that it was a common ground that the substantive issues in the assessment year concerned are similar to those considered by the Tribunal in the Assessee's own case for the immediately preceding assessment year 2008-2009. A detailed order was made on 11th February, 2015. The Tribunal found that the record in relation to the grounds of the Assessee are identical. The Tribunal, therefore, had no hesitation in following its own order for the prior assessment year and reversing the view of the Assessing Officer. Thus, the Tribunal came to the conclusion that the activities on account of the Infrastructure Management Services and E-learning and Digital Consulting constitute 17% and 35% respectively of the total revenue. These are IT enabled services. These are not akin to software design and development services being rendered by the Assessee and therefore benchmarking was improper. The

comparables relied upon by the Transfer Pricing Officer were thus not comparable at all. The Assessee rendered services such as software design and development. These are mere services which have been rendered in prior assessment year 2008-2009. If those services enable the Tribunal to take a view in favour of the Assessee for the prior assessment year, then, even for the following assessment year, the Tribunal found it safe to rely upon its own findings and conclusions for the prior assessment year.

12 Very detailed reasons have been assigned but essentially on the above lines in the order under appeal. We have found that these are factual matters.

13 We are unable to find any substantial question of law resulting from such an exercise.

14 In fact, in the case of **Principal Commissioner of Income Tax-1 v/s Barclays Technology Centre India Private Limited (Income Tax Appeal No. 1384 of 2015 decided on 26th June, 2018)** a Division Bench of this Court had an occasion to consider somewhat similar questions and it found that the

Tribunal's view deserves to be upheld. In upholding that view, it found that these are essentially matters of fact.

15 This Court was rather surprised as to why the Revenue brings such Appeals to this court and regularly. The Courts in India seem to be taking a view that the Revenue has routinely brought such matters before this Court knowing fully well that the Transfer Pricing particularly with regard to exclusion and inclusion of certain comparables to determine Arm's Length Price (ALP) would not necessarily give rise to purely legal questions or substantial questions of law. In paragraph 6 of the order passed in the case of **M/s Barclays (supra)**, the Division Bench held as under:-

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

"10. 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."

16 After a careful perusal of this material, we are unable to agree with Mr. Suresh Kumar that the present Appeal raises any substantial questions of law. The matters have been resolved purely in the backdrop of facts. These peculiar facts and in relation to the Assessee before us year-after-year therefore, do not raise any substantial questions of law. The findings and conclusions cannot be termed as perverse or vitiated by error of law apparent on the face of the record. In fact, in our limited jurisdiction, we cannot re-appreciate and reappraise the same factual findings to arrive at a different conclusion. Resultantly, the Appeal fails and it is dismissed but without any order as to costs.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)