

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI  
**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER  
AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

I.T.A. No.731/M/2015  
(Assessment Year: **2010-2011**)

M/s. Tevapharm India Private Limited (Formerly known as ratiopharm India Private Limited), 402, Omega, Hiranandani Gardens, Powai, Mumbai – 400 076.	बनाम/ Vs.	DCIT-15(3)(1), Aayakar Bhavan, M.K. Road, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AABCR7561F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Dhanesh Bafna & Shri Harish Arora
प्रत्यर्थी की ओर से/ Respondent by	:	Ms. Rupinder Brar, DR

सुनवाई की तारीख / Date of Hearing : 27.10.2015

घोषणा की तारीख /Date of Pronouncement : 31.12.2015

**आदेश / O R D E R**

**PER D. KARUNAKARA RAO, AM:**

This appeal filed by the assessee against the order of the AO / TPO / DRP for the AY 2010-2011. In this appeal, assessee raised 5 grounds in toto and the said grounds read as under:

- "1. *On the facts and circumstances of the case and in law, the assessment order passed in pursuance to the directions issued by the Dispute Resolution Panel (DRP) is a vitiated order, as the DRP erred in both facts and in law in confirming the addition made by the AO to the appellant's income.*
2. *The DRP erred in confirming the addition of Rs. 12,87,378/- to the income of the appellant by holding that its international transactions pertaining to provision of business development and procurement services do not satisfy the arm's length principle envisaged under the Act. In doing so, the Hon'ble DRP has grossly erred in agreeing with the Transfer Pricing Officer's action of disregarding the arm's length price and the methodical benchmarking process carried out by the appellant in the Transfer Pricing documentation maintained by it in terms of section 92D of the IT Act, 1961 read with Rule 10D of the IT Rules, 1962 and*
  - 2.1. *not including two comparable companies / segment ie Hansa Vision India Limited and Entertainment Network India Limited – events segment selected by the appellant in its TP Study on the ground that they are functionally not comparable to the activity performed by the appellant;*
  - 2.2. *not including two comparable companies / segment ie Hansa Vision India Limited and Entertainment Network India Limited – events segment selected by the appellant in its TP Study on the ground that they are functionally not comparable to the activity performed by the appellant;*
3. *The DRP erred in confirming the addition of Rs. 1,29,25,849/- to the income of the appellant by holding that its international transactions pertaining to*

*provision of contract manufacturing services do not satisfy the arm's length principle envisaged under the Act. In doing so the Hon'ble DRP has grossly erred in agreeing with the TPO action of;*

- 3.1 *disregarding the ALP and the methodical benchmarking process carried out by the appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Rules;*
- 3.2 *not including two comparable company / segment ie Smruti Organics Limited and Natural Capsules Limited – Formulation segment selected by the appellant in its TP study on the ground that they are functionally not comparable to the activity performed by the appellant; and*
- 3.3 *incorrectly applying the filter of rejecting companies having significant related party transactions (more than 25%) and rejecting Sharon Bio-Medicine Ltd*
- 4 *The Ld AO be directed to grant (+ / -) 5% benefit as available under proviso to section 92C(2) of the Act.*
- 5 *On the facts and circumstances of the case and in law, the AO disregarded the claim of the appellant of Rs. 45,02,944/- towards software licence fees as revenue expenditure and capitalised the same under the head computers and granted depreciation thereon, which resulted in the addition to the total income by Rs. 18,01,178/-."*

2. At the outset, Ld Counsel for the assessee, bringing our attention to the above mentioned grounds, submitted that **Ground no.1** is general in nature and the same needs to be dismissed as general. After hearing the Ld DR for the Revenue in this regard, the said Ground no.1 is **dismissed as general**. Referring to Ground no.3, Ld Counsel for the assessee submitted that the said ground no. 3 becomes infructuous considering the rectification order u/s 154 of the Act dated 9.2.2015 passed by the AO giving relief to the assessee by complying with the directions of the DRP. Accordingly, the **Ground no.3 is dismissed as infructuous**. Bringing our attention to Ground nos. 2 and 4, Ld Counsel for the assessee submitted that the assessee filed an additional ground, which questions the DRP's / TPO's decision in not excluding the comparable by naming M/s. Asian Business Exhibition & Conference Ltd (Asian), which is functionally similar to couple of comparables by naming (i) Hansa Vision Pvt Ltd (Hansa) and (ii) Entertainment Network India Ltd (Events Segments). Further, Ld Counsel for the assessee submitted that if the additional ground being legal in nature, is admitted and Asian is also excluded, because of functional similarity, in addition to the said two comparables already rejected by the TPO, the assessee's PLI is within the margin of plus or minus (+ / -) 5%. If the additional ground is admitted and decided in favour of the assessee, the adjudication of Ground no.2 becomes an academic exercise and the same need not be pressed. Accordingly, Ground no.4 becomes an academic. Therefore, after hearing both the parties on the preliminary issue relation to the additional ground,

we proceed to adjudicate the additional ground in the succeeding paragraphs of this order. The said additional ground reads as under:

*"6. The Ld AO / TPO erred in retaining Asian Business Exhibition & Conference Limited in the Comparability analysis which is functionally dissimilar to the business development & procurement services segment of the appellant."*

3. Briefly stated relevant facts of this issue are that the assessee entered into an international transaction with its Associated Enterprises (AE) abroad to the tune of rs. 2,04,30,138/- and the same are related to business development and procurement services. Assessee's PLI (OP / OC) on account of these services is 9.55%. Assessee conducted the TP study for determining the ALP and identified six comparables. The details of which are available on page 5 of the DRP's order dated 18.12.2014. The average mean of the PLI of the said six comparables is 11.60%/. The details of the said six comparables are as under:

S.No.	Name of the Comparable company	PLI
1.	Asian Business Exhibition & Conference Ltd	20.97%
2.	IDC India Ltd	12.79%
3.	Hansa Vision Pvt Ltd	03.62%
4.	Empire Industries Ltd – Trading and Indenting Segment	11.60%
5.	Entertainment Network India Ltd – Events Segment	0.22%
6.	Priya International Ltd – Indenting Segment	20.39%
	<b>Arithmetic Mean</b>	<b>11.60%</b>

4. In the TP proceedings, on finding that the assessee's comparables include Entertainment Network India Ltd (Events Segment) (in short 'Entertainment') and Hansa (supra), indenting segments, TPO rejected the same. However, he retained the comparable Asian (supra) which is also having event segment. Referring to the additional ground, Ld Counsel for the assessee submitted that although this comparable was relied upon by the assessee in their TP study, in view of the TPO's cherry picking approach by rejecting Hansa (supra) and Entertainment (supra), it is the requirement of the assessee that following the principle of consistency, the comparable Asian, with event segment, should also be excluded from the list of comparables. In support of such exclusion of assessee's comparable, Ld Counsel for the assessee relied on the Special Bench decision in the case of DCIT vs. Quark Systems (P) Ltd [2010] 38 SOT 307 (Chd.) (SB), which is relevant for the proposition that the assessee is allowed to plea for exclusion of a comparable from the list of comparables. The said Special Bench decision has answered the question ie *whether even if the assessee had taken 'D' as comparable in its TP study, still it was entitled*

*to point out to Tribunal that said enterprise had wrongly been taken as a comparable. Held, 'yes'.* In this regard, he brought our attention to page 214 of the paper book, the Financial Statements of the said Asian (supra) and demonstrated that the only segment this comparable has is the event segment and the said comparable is engaged in the business of sale of stall space in exhibition and events. Referring to page 218 of the paper book, Ld Counsel for the assessee read out the item no.4 and the same reads as under:-

*"4. The company's business activities fall within a single segment, viz., income from exhibitions and events and operate only in domestic market. Hence, segment reporting as defined in Accounting Standard (AS-17) is not given."*

5. Whereas, the "business development and procurement services" is the segment which is now being benchmarked by the TPO and which is the subject matter of adjudication before us. *Prima facie*, we find differences in the business activities of the assessee and the comparable. It is not understood as to why the Asian (supra) was included by the TPO / DRP when the same is functionally not similar to that of the assessee and more so, when couple of comparables ie Hansa and Entertainment (supra) were rejected by the TPO / DRP. The Financial Statements of all the six comparables are on records. Adjudication of the additional ground does not require any investigation into the facts. Further, Ld Counsel for the assessee fairly mentioned that this additional ground can be remanded to the file of the TPO / AO for a finding why the said Asian (supra) should also not be excluded on par with Hansa and Entertainment (supra).

6. On the other hand, Ld DR for the Revenue relied heavily on the order of the TPO and the DRP / AO and submitted that the assessee should have raised this issue before the lower authorities.

7. On hearing both the parties, we find that there is a requirement of remanding this issue to the file of the TPO / AO for comments as to why this Asian (supra) should not be excluded from the list of the comparables in line with the Hansa (supra), which is also not having business development and procurement segment. They also have event segment / indenting segments. With these directions, we remand the additional ground to the file of the AO. Accordingly, additional ground no.6 is admitted and allowed for statistical purposes.

8. Considering out decision on the additional ground (Ground no.6), we find the adjudication of Ground nos. 2 and 4 becomes an academic exercise. Accordingly, we dismiss the said two grounds (Ground no.2 & 4) as academic.

**Corporate Issues**

9. **Ground no.5** relates to the corporate issue. In this regard, Ld Counsel for the assessee made the following written submissions and the same is extracted as under:-

*"This is with reference to the hearing before your Honours today ie 27<sup>th</sup> October, 2015 for the captioned assessment year, wherein one of the grounds of appeal (Ground no.5) pertains to taxability of Software License Fees paid. Your Honours are aware that, similar grounds wo fappel are pending before the Hon'ble 'K'Bench for AY 2008-2009 (ITA No.7854/Mum/2012) and AY 2009-2010 (ITA No.2251/Mum/2014).*

*In this regard, we wish to submit that, the appeals for AY 2008-2009 and 2009-2010 are scheduled before the Hon'ble 'K' Bench on 25<sup>th</sup> February, 2016 and 4<sup>th</sup> November, 2015 respectively. Further, the stay for the captioned appeal which was granted in the month of September has only been extended till the month of February, 2016. Accordingly, the appellant will be highly jeopardised if the captioned appeal is kept pending on account of the fact that the hearing for earlier years is pending and they be heard first.*

*The appellant would further like to mention that, the Hon'ble 'K' Bench in the case of M/s. Pfizer Limited vs. Addl. CIT Range 8(2) in S.A. Nos. 201 & 202/Mum/2015 has clearly held that, "the stay granted matters should be heard on priority basis and need not be kept pending till the earlier years appeals are disposed of and the Bench can taken into consideration the material considered in earlier years, if need be, while disposing of the appeals wherein the stay was granted rather than granting adjournments from time to time. A copy of the said order is attached herewith for your Honours ready reference.*

*Considering the above, it is our humble request to your Honours to remand the said direct tax issue back to the AO with a direction to follow the orders of the Hon'ble Tribunal for the AY 2008-2009 and / or 2009-2010."*

10. Considering the above written submissions of the assessee, we are of the opinion that the this issue should be remanded to the file of the AO with a direction to apply the said decision of the Tribunal in the case of M/s. Pfizer Ltd (supra) to the facts of the present case and decide the issue afresh after affording a reasonable opportunity of being heard to the assessee. We order accordingly. Thus, **Ground no.5, raised by the assessee is allowed for statistical purposes.**

11. In the result, **appeal of the assessee is allowed for statistical purposes.**

Order pronounced in the open court on 31<sup>st</sup> December, 2015.

Sd/-

**(PAWAN SINGH)**  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31/12/2015

Sd/-

**(D. KARUNAKARA RAO)**  
ACCOUNTANT MEMBER

व.नि.स./ OKK, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**