

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI**

श्री संजय अरोड़ा, लेखासदस्य एवं
श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष
**BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER AND
SHRI GEORGE MATHAN, JUDICIAL MEMBER**

आयकर अपील सं./ITA No.1540/Mds/2017
निर्धारण वर्ष /Assessment Year: 2010-11

M/s.Vestas Technology R&D –
Chennai Pvt. Ltd.,
Block A, 8th Floor, TECCI Park, 173,
Rajiv Gandhi Salai (OMR),
Shollinganallur, Chennai-600 119.

Vs. The Asst. Commissioner-
of Income Tax,
Company Circle III (4),
Chennai-34.

[PAN: AACCV 4768 P]

(अपीलार्थी/ Appellant)

अपीलार्थी की ओर से/ Appellant by

प्रत्यर्थी की ओर से /Respondent by

सुनवाई की तारीख/Date of Hearing

घोषणा की तारीख /Date of Pronouncement

(प्रत्यर्थी/ Respondent)

Mr.Vikram Vijayaraghavan,
Adv.

Mrs.T.H.Vijayalakshmi, CIT

23.08.2017

01.09.2017

आदेश / O R D E R

PER GEORGE MATHAN, JUDICIAL MEMBER:

ITA No.1540/Mds/2017 is an appeal filed by the assessee against the Order of Commissioner of Income Tax (Appeals)-13, Chennai, in ITA No.305/CIT(A)-13/2010-11 dated 27.03.2017 for the AY 2010-11.

2. Mrs.T.H.Vijayalakshmi, CIT represented on behalf of the Revenue and Mr.Vikram Vijayaraghavan, Adv. represented on behalf of the assessee.

3. In the assessee's appeal, the assessee raised the following grounds:

Ground No.1

On the facts and circumstances of the case, learned ("Ld.") Commissioner of Income Tax (Appeals)-13 ["CIT (A)"] erred in law and in facts, by confirming the order of Ld. Transfer Pricing Officer ("TPO") proposing an adjustment of INR.2,95,22,365/- to the transfer price of the Appellant in respect of provision of software development support services to its Associated Enterprise ("AE").

Ground No.2

The Ld. CIT (A) and the Ld. TPO erred by not sharing the accept/reject matrix of comparables from the fresh search conducted by the Ld. TPO and thereby erred in not granting sufficient opportunity of being heard to the Appellant.

Ground No.3

The Ld. CIT(A) erred by upholding the Ld. TPO's approach of identifying comparable companies without providing due consideration to the Appellant's contentions on the search and the comparable companies chosen to determine the arm's length price.

Ground No.4

The Ld. CIT (A) erred in law and on facts by not taking cognizance of the submissions filed by the Appellant and thereby not passing a speaking order in respect of such submissions.

Ground No.5

5.1. The Ld. Assessing Officer ("Ld. AO") and the Ld. CIT(A) erred in facts and in law by excluding foreign travel expenditure amounting to INR.1,49,45,517/- from the export turnover for the purpose of computation of deduction under section 10A of the Act.

5.2. Without prejudice to the above, having made the above exclusion, the Ld.AO and the Ld. CIT(A) erred in not making corresponding exclusion of the above foreign travel expenditure from the total turnover while computing the above deduction.

Ground No.6

The Ld. AO and the Ld. CIT(A) erred in facts and in law by excluding disallowance made under section 40(a)(ia) amounting to INR.536,800/- while computing deduction under section 10A of the Act.

4. Ground Nos.1 & 4 are general in nature. Ground Nos.2 & 3 are related to transfer pricing issues. Ground Nos.5 & 6 are related to regular additions in respect of the corporate tax.

5. It was a submission that the assessee is a company which is providing software related services to associate enterprise. It was a submission that the assessee's company was established in April, 2007 as

100% own subsidiary of Vestas Wind Systems. It was a submission that the assessee provided the engineering design services for wind systems software development for controlling wind turbines and documentation support services to the Vestas group. It was a submission that the assessee had in its transfer pricing study shown a PLI of 10%. It was a submission that as per the assessee's transfer pricing study in respect of comparables, PLI determined was 13% and the assessee had submitted that 13 comparables before the TPO whose average PLI came 14.14%. It was a submission that the Transfer Pricing Officer (in short "TPO") in the Transfer Pricing Order had taken 12 comparables and had computed the average PLI at 20.99%. It was a submission that in Ground Nos.2 & 3 of the assessee's appeal, the assessee had challenged the comparables taken by the TPO. It was a submission that the comparables are found at Page No.23 of the TPO's order dated 22.01.2014, which is extracted below:

SI.No.	Name of the comparable	Op/OC (after adjustment on working capital)
1	Akshay Software Technologies Ltd.	-1.79%
2	Kals Information Systems Limited	27.75%
3	Spry Resources India Pvt. Ltd.	22.58%
4	ICRA Techno Analytics Ltd.	26.00%
5	CTIL Ltd (Compulink Tech India Limited)	9.05%
6	Taksheel solutions Ltd.	30.93%
7	Thinksoft Global Services Ltd.	15.21%
8	Acropetal technologies ltd.	30.65%
9	Persistent Systems & Solutions Ltd.	12.85%
10	Vrinchi Technologies Ltd.	18.91%
11	FCS Software solutions Ltd.	41.85%
12	Nucleus Software Exports Ltd.	17.89%
Mean		20.99%

6. It was a submission that the assessee is challenging the comparables at Sl.No.2 M/s.Kals Information Systems Ltd., Sl.No.4 M/s.ICRA Techno Analytics Ltd., and Sl.No.8 M/s.Acropetal Technologies Ltd. It was a submission that these companies were not comparable with the assessee company. It was a submission that in respect of M/s.Kals Information Systems Ltd., the same was involved in software products development and no segmentation was available and it has been held as not comparable by various decisions of the Co-ordinate Bench of this Tribunal such as in M/s.Wabco TVS Ltd., in ITA No.883/Mds/2015 dated 23.09.2016 as also in the case of M/s.Sella Synergy India Pvt. Ltd., in ITA Nos.398, 417 & 557/Mds/2015 & CO No.45/Mds/2015 dated 15.09.2016, etc. It was a submission that M/s.ICRA Techno Analytics Ltd., could not be considered as a comparable in so far as it was involved in plethora of services and segmentation was not available for each type of services. For which, the Ld.AR relied upon by the decision in the case of M/s.Sella Synergy India Pvt. Ltd., referred to supra as also decision in the case of M/s.Ikanos Communication India Pvt. Ltd., in ITA No.137/Bang/2015, Bangalore Benches dated 10.11.2015. In respect of M/s.Taksheel Solutions Ltd., it was a submission that the employee cost to turnover is 2.8% and that is not representative of software Service Company whereas in the assessee's case the proportion is 40.37% for which preposition, the Ld.AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of M/s.Wabco TVS Ltd., referred to supra. Similarly, it was a submission that in the case of M/s.Spry Resources India Pvt. Ltd.,

the said company was involved in product development with no segmentation available between the software services and products in respect of the said company. The Ld.AR relied upon by the decision of the Co-ordinate Bench of this Tribunal in the case of M/s.Wabco TVS Ltd., and M/s.Sella Synergy India Pvt. Ltd. At this point, it was put to the assessee that the 12 companies which have been selected as comparables was after discussion with the assessee, and the said companies, were also some of the companies selected by the assessee itself as comparable. It was a submission that during the course of the proceedings before the Ld.TPO, the assessee was unable to properly consider the comparables. It was a submission that the assessee was fully entitled to challenge the comparables before the Tribunal as the Tribunal is the highest fact finding body.

7. In reply, the Ld.DR vehemently supported the order of the TPO and the DRP. Further, the Ld.DR filed written submissions as follows:

The written submission on the Transfer Pricing issues in the above Case is submitted as under for A.Y.2010-11.

2. General

2.1. The assessee was provided with sufficient opportunity to comment on the correctness or otherwise of the comparable companies chosen by the TPO. It is not the case of the assessee that the TPO's order was passed without affording any opportunity. The assessee's main point of contention is not the correctness of the comparable, but the non-sharing of the accept reject matrix. However, it can be seen from the TPO's order that he has dwelt on the subject of Comparable and the filters used in the search process extensively.

From the TPO's order, it is clear that some of the filters adopted by the assessee were not found acceptable and these were suitably modified (Para 6.3 & 6.4 of the order) by the TPO. The TPO has also discussed in detail the comparable selected by the assessee (Para 6.5) and has rejected them based on functional dissimilarities and on other criteria. He has then adopted the revised filters as discussed in Para 6.4 and has found certain new companies which are functionally similar (Para 6.6). It is clear therefore that the TPO has only attempted to find functionally similar companies. The assessee has not rebutted the

correctness of these comparables before the Hon'ble tribunal as the appeal is only on the technical issue of perceived non-sharing of accept reject matrix.

The assessee has raised this issue before the TPO which was dealt by him in detail in his order (Para 9-12). Further, the assessee had responded to the show cause notice issued by the TPO and had also furnished additional comparables which issue is discussed by the TPO in Para 14. The appropriateness of the assessee's own filters are also discussed in detail in Para 11 of the Order. In conclusion, the assessee was given sufficient opportunities to put forth its case and which was also utilized by the assessee to make detail submissions. These submissions were considered by the TPO and his views thereon are also discussed in detail in his order u/s.92CA (3). The plea regarding sufficient opportunity not being given is not correct and the issue of non-furnishing of accept reject matrix appears to be only an afterthought.

As seen in the preceding paragraphs, the TPO has analyzed the filters used by the assessee and has given detailed reasons for modifying the same. The inappropriateness of the comparable chosen by the assessee and the reason for choosing different comparable have also been discussed elaborately by the TPO in his order. In the circumstances, the CIT(A) has rightly upheld the actions of the TPO.

8. It was put to the Ld.AR that if the assessee is challenging the comparables then it was the duty of the Tribunal to examine each of the comparables to identify if they were actually comparable at all. To this, the Ld.AR raised substantial objection. It was a submission that the comparables having been selected after discussion between the TPO and the assessee, the Tribunal should not enter into the verification of the comparables any further other than removal of such comparables as are specifically identified. Admittedly, the Tribunal being the fact finding body, the assessee having challenged before it, certain comparables which have been selected after discussion between TPO and the assessee as not really comparables and are to be excluded on account of omission or defects, then the Tribunal has a duty to examine all the comparables for various defects. The Tribunal is handicapped in regard to the selecting the comparables as the requisite data in the form of the software is not available before it. In these circumstances, we proceed to examine each

of the 12 comparables which have been selected in the assessee's case for its transfer pricing study and determination of the PLI.

9. The first of the 12 comparables, is M/s.Akshay Software Technologies Ltd. A perusal of the Page No.385 of the assessee's Paper Book shows that as per the companies profile, the company is providing software services predominantly onsite. It is a global technology corporation providing IT Consulting Services and Solutions for the Financial Services Sector. The said company cannot be treated as comparable at all in so far as the assessee is in the business of providing engineering design services for wind systems & software development for controlling wind turbines. These two businesses are in no way comparable at all. It was strongly objected to by the Ld.AR that M/s.Akshay Software Technologies Ltd., should not be removed from the comparable list in so far as that was the only single negative operating profit company and the removal of the same would affect the TP calculation in the assessee's case disastrously. We have considered the objections of the Ld.AR. For TP study what is comparable is similarly placed companies. What is comparable is apples with apples, here under the guise of using the TNMM method what is being attempted is to compare apples with water melons after making various adjustments. This is just not permissible. Just because, assessee is having some software activity, it does not mean that the assessee's TP study can be done by comparing all software companies. Software activities have very specific areas such as software development

for financial sector, insurance sector, software development for engineering design, software development for specific products so on and so forth. What is to be understood is that for engineering design software developers case a regular financial software development companies cannot be treated as a comparable. This is because the requirement of the skill in respect of the software development for engineering design is very specific and it requires additional qualification. It is not similar for developing or modifying software for the common uses. It would be worthwhile to look into the number of employees and the qualifications of those core employees would do the development of the said programme when making the comparison. Coming to the 2nd comparable - M/s.Kals Information Systems Limited, Page No.24 of the Paper Book shows that Kals consisting of STPI Unit engaged in development of software and software products and Training Centre engaged in training of software professionals on on-line projects. Admittedly, this is also not in any way comparable with the line of the business of the assessee. The 3rd comparable is M/s.Spry Resources India Pvt. Ltd. - as per Annual Report is providing software development projects to the Government of Goa and basically engaged into application development, providing solutions internet/intranet, clients/server and main frame and wire. This is again admittedly no way similar to the activity of engineering design as has been done by the assessee more specifically for captive clients. The 4th comparable is M/s.ICRA Techno Analytics Ltd. - which is a software development company providing services like data warehousing, software

development, data mining, etc., again an un-comparable. The 5th comparable is M/s.CTIL Ltd (Compulink Tech India Limited) - the same is into domain of e-learning, ERP/SAP Projects and CRM Solutions, again an un-comparable. The 6th comparable is M/s.Taksheel Solutions Ltd. - it is a company providing software development services for enterprises engaged in financial service industry, again an un-comparable. The 7th comparable is M/s.Thinksoft Global Services Ltd. - it is again a company which is in the business of assurance and testing, catering needs to the banking and financial sector, again functionally not comparable. The 8th comparable is M/s.Acropetal technologies Ltd. - this is a company which is engaged in engineering design and software development functions and hence, it can be considered as comparable. The 9th comparable is M/s.Persistent Systems & Solutions Ltd. - the details of the same have not been placed before us. The 10th comparable is M/s.Vrinchi Technologies Ltd. - which is an IT Products Solutions Service Company focusing on financial services and hence an un-comparable. The 11th comparable is M/s.FCS Software Solutions Ltd. - which is engaged into providing valid services in the domain of e-learning and digital content services which is also no way connected with engineering design and hence an un-comparable. The last being Nucleus software, again in the business of software solutions and financial services in the area of cash management again an un-comparable. Thus, 12 comparables which have been in the TP study, it is noticed that only one is in any manner comparable, the rest are all in no way connected with any engineering design or engineering solutions. This

being so, we are left with no other alternative but to remove all those comparables which have been taken into consideration as comparables and which are found to be un-comparable or in the alternative, restore the issue of the TP study and determination of the ALP back to the file of the TPO for re-adjudication. If we remove all the un-comparables as has been identified by us, then we would be left only one out of 12, obviously this would be absolutely unfair. This being so, in the interest of natural justice and fair play, the issue of the determination of the ALP in the assessee's case is restored to the file of the TPO for re-adjudication after granting the assessee adequate opportunity to substantiate his case. During the re-adjudication, it is specifically directed that what is to be considered for comparison are such companies which are in the business that is similar to the assessee's business being providing engineering design services and software development for controlling specified engineering products. In these circumstances, Ground Nos.2 & 3 of the assessee's appeal are partly allowed for statistical purposes.

10. In regard to Ground No.5.1 which is against the action of the Ld.CIT(A) and AO in excluding the foreign travel expenditure from the export turn over for the purpose of computation of deduction u/s.10A of the Act. The Ld.AR submitted that the same not to be excluded.

11 In reply, the Ld.DR submitted that in view of the Explanation-2(iv) to Section 10A of the Act, the AO was right in excluding the foreign travel

expenditure as the same was attributable to the delivery of the computer software outside India and also expenses incurred in foreign exchange in providing the technical services outside India.

12. We have considered the rival submissions. Admittedly, as has been rightly pointed out by the Ld.DR, the foreign travel expenditure relate to providing technical services outside India is not liable to be treated as part of the export turnover in view of the Explanation-2(iv) to Section 10A of the Act. Consequently, Ground No.5.1 of the assessee's appeal stands dismissed.

13. In regard to Ground No.5.2 which is the alternative argument to submit that if the said foreign travel expenditure is to be excluded from the export turnover then the same needs to be excluded from the total turnover also. For this proposition, the Ld.AR placed reliance on the decision of the Special Bench of this Tribunal in the case of M/s.Sak Soft Ltd., reported in 30 SOT 55 (Chennai (SB)). The Ld.DR vehemently supported the order of the AO & the Ld.CIT(A).

14. We have considered the rival submissions. It is noticed that the issue is squarely covered by the decision of the Special Bench of this Tribunal in the case of M/s.Sak Soft Ltd., wherein the Special Bench has held the principle that the expenses which are being held has not part of the export turnover as has been provided for exclusion in Explanation-2(iv)

to Section 10A of the Act, is to be excluded both from the export turnover and from the total turnover which are numerator and the denominator respectively in the formula. In these circumstances, respectfully following principle laid down in the decision of the Hon'ble Special Bench in the case of M/s.Sak Soft Ltd., referred to supra, it is held that the foreign travel expenditure which has been reduced from the export turnover is also to be reduced from the total turnover. In these circumstances, Ground No.5.2 of the assessee's appeal stands allowed.

15. In regard to Ground No.6 of the assessee's appeal it was submitted by the Ld.AR that the issue was against the reduction on the claim of Sec.10A consequent to the exclusion of the disallowance u/s.40(a)(ia) of the Act. It was a submission that the disallowance on account of Sec.40(a)(ia) of the Act resulted in the total income of the assessee being increased was eligible to be included for the purpose of computing the deduction u/s.10A of the Act.

16. In reply, the Ld.DR submitted that the disallowance made by invoking the provisions of Sec.40(a)(ia) of the Act was a notional disallowance in so far as the disallowance was on account of the non-deduction of TDS. It was a submission that it did not go to affect the profits and gains as are derived by the undertaking.

17. We have considered the rival submissions. A perusal of the Sec.40(a)(ia) shows that the opening words are "notwithstanding anything to the contrary in Sec.30 to 38, it shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession"". Thus, any adjustment that is made on account of the disallowance u/s.40(a)(ia) is adjustment to the income chargeable under the head "profits and gains of business or profession". In these circumstances, the disallowances made by the AO by invoking the provisions of Sec.40(a)(ia) of the Act would have the effect to increase the profits eligible for deduction u/s.10A. In these circumstances, the AO is directed to grant the assessee the benefit of increased deduction u/s.10A in respect of the disallowance made by invoking the provisions of Sec.40(a)(ia) of the Act. In these circumstances, Ground No.6 of the assessee's appeal stands allowed.

18. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the Open Court on September 01, 2017, at Chennai.

Sd/-
(संजय अरोड़ा)

(SANJAY ARORA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: September 01, 2017.

TLN

Sd/-
(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF