

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No. 391/Bang/2015
Assessment year : 2010 – 11

The Income Tax Officer, Ward – 1 (1) (1), Bangalore.	Vs.	M/s. Alcon laboratories Pvt. Ltd., 3 rd Floor, Crescent – 4, Prestige Shantiniketan, Whitefield, Bangalore – 560 048. PAN: AACCA3430F
APPELLANT		RESPONDENT

C.O. No. 2/Bang/2016
(in IT(TP)A No. 391/Bang/2015)
Assessment year : 2010 – 11

M/s. Alcon laboratories Pvt. Ltd., 3 rd Floor, Crescent – 4, Prestige Shantiniketan, Whitefield, Bangalore – 560 048. PAN: AACCA3430F	Vs.	The Income Tax Officer, Ward – 1 (1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Narendra Jain, CA
Revenue by	:	Shri Biswaranjan Sasmal, CIT (DR)

Date of hearing	:	16.11.2017
Date of Pronouncement	:	21.11.2017

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue and the Cross Objection is filed by the assessee and these are directed against the Assessment Order dated 29.01.2015 passed by the A.O. u/s 143 (3) r.w.s. 144C for Assessment Year 2010 – 11.

2. The grounds raised by the revenue in its appeal are as under:

“1. The order of the Dispute Resolution Panel is opposed to law and the facts and circumstances of the case.

2. The DRP erred in directing the TPO to exclude M/s. HCCA Business services Pvt ltd., M/s. Killick Agencies & marketing Ltd from the list of final comparables being functionally uncomparable without appreciating the fact that these companies qualify all the qualitative and quantitative filters applied by the TPO.

3. The DRP erred in directing the TPO to exclude M/s. Hindustan Housing Co. Ltd from the list of final comparables being functionally uncomparable and related party transaction exceeds 25% without appreciating the fact that these companies qualify all the qualitative and quantitative filters applied by the TPO.

4. The DRP erred in directing the AO to carry out the working capital adjustment as per the actual figures worked out by the assessee without putting any cap on the ground that there is time value of money without appreciating the fact that the TPO had put a cap on the basis of the average cost of working capital of the comparables selected by the TPO and that the accurate details of debtors and creditors of the assessee and the comparables were not available.

5. The DRP erred in directing the AO to delete the addition made u/s 40A(7) by relying on the decision of the Hyderabad tribunal in the case of Capital IQ Information Systems (India) P. Ltd without appreciating the fact that the assessee company had incorporated certain changes for which no approval from the CIT was acquired and the contribution to fund is only a provision not an actual expense under the purview of section 37(1) of the Att.

6. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.

7. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.”

3. The grounds raised by the assessee in its C. O. are as under:

“General Grounds

1. The Order of the learned Assessing Officer pursuant to the directions of the Dispute Resolution Panel, Bangalore to the extent prejudicial to the respondent is bad in law.

2. *The Assessing officer has erred in recomputing TP adjustment at Rs.34,75,946/- without giving the basis of computation of TP adjustment in the final assessment order. The Order is therefore bad in law.*

3. *The Dispute Resolution Panel, Bangalore has erred in confirming the action of the Transfer Pricing Officer in:*

- a. Computing the arm's length price based on the data for the Financial Year 2009-10 of the comparables, which was not available when the assessee undertook transfer pricing documentation and reporting obligations;*
- b. Rejecting the comparables selected by the Respondent on unjustifiable grounds;*
- c. Rejecting the transfer pricing analysis undertaken by the Respondent on unjustifiable grounds.*
- d. Conducting a fresh transfer pricing analysis despite absence of any defects in the transfer pricing analysis submitted by the Respondent;*
- e. Adopting inappropriate filters in the process of selecting comparables;*
- f. Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, assets utilized, size, turnover, unusual circumstances etc; and*
- g. Not recognizing that the Respondent was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account.*

4. *The Dispute Resolution Panel, Bangalore has erred in confirming the selection of Asian Business Exhibitions and Conferences Ltd as a comparable, even though it is functionally different from the Respondent and has unusual circumstances during the year under consideration.*

5. *The Dispute Resolution Panel, Bangalore has erred in:*

- a. Rejecting H T Music and Entertainment Company Ltd & Tourism Development Corporation Ltd as comparables without appreciating that they are similar to Asian Business Exhibitions and Conferences Ltd, which is accepted to be comparable by the DRP; and*

b. Rejecting ICRA Management Consulting services Ltd. as a comparable on the ground that it is functionally different from the Respondent.

6. The Dispute Resolution Panel, Bangalore has erred in confirming the action of the Assessing officer in making a reference to Transfer Pricing Officer for determining the arm's length price without demonstrating as to how or why it was necessary and expedient to do so.

7. The Dispute Resolution Panel, Bangalore has erred in confirming the action of the Assessing officer and Transfer Pricing Officer in:

a. Passing the order without demonstrating that the Respondent had motive of tax evasion; and

b. Not appreciating that the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X and therefore the addition made under Chapter X is bad in law.

Ground relating to gratuity payment

8. The Lower Authorities have erred in:

a. Disallowing provision made for contribution to gratuity fund without appreciating facts and circumstances of the case.

b. Not appreciating that the withdrawal of approval by the Commissioner is bad in law.

Other Grounds

9. The Assessing officer has erred in giving credit for TDS at Rs.5,62,469/- as against Rs.5,97,736/- as claimed by the Respondent in the return of income despite directions by the Dispute Resolution Panel, Bangalore.

10. Levying a sum of Rs 31,96,701/- as interest under section 234B. On the facts and in the circumstances of the case, interest under section 234B is excessive. The Respondent denies its liability to pay the excessive interest.”

4. It was submitted by the learned AR of the assessee that in the C.O. filed by the assessee, the only grievance of the assessee is regarding one Comparable i.e. Asian Business Exhibition & Conferences Ltd. As per the assessee, this is not a good comparable and it should be excluded. In

support of this contention, he placed reliance on a tribunal order rendered in the case of DCIT vs. Electronics for imaging India Pvt. Ltd. in IT (TP) A No. 212/Bang/2015 dated 24.02.2016 for the same assessment year, copy available on pages 349 to 381 of the paper book. In particular, our attention was drawn to Para 52 to 55 of this tribunal order on page 372 to 375 of the paper book. It was also pointed out that the tribunal has followed another tribunal order of Mumbai Bench rendered in the case of RGA Services India Pvt. Ltd. vide order dated 20.11.2015 in ITA No. 22/Mum/2015. The bench wanted to the assessment year involved in this order of the Mumbai Bench of the tribunal. In reply, he submitted that a copy of this tribunal order is available on pages 483 to 490 of the paper book and from the same, it can be seen that the assessment year involved in that order is same i.e. 2010 – 11. Learned DR of the revenue supported the orders of TPO, AO & DRP.

5. We have considered the rival submissions. We find that the issue in dispute is squarely covered in favour of the assessee by these two tribunal orders cited by the learned AR of the assessee for same assessment year. We find that in Para 8 of the tribunal order rendered in the case of DCIT vs. Electronics for imaging India Pvt. Ltd. (Supra), the profile of that assessee was noted and as per the same, that assessee was engaged in Software Development services and sales & Marketing Support Services. Both were benchmarked separately and the paras of the tribunal order referred to before us are in respect of Marketing Support Services. In the present case also, the dispute is regarding Marketing Support Services provided by the assessee. Hence, the profile of the present assessee and Electronics for imaging India Pvt. Ltd. is same. Hence, we respectfully follow this tribunal order and hold that in the present case also, this comparable i.e. Asian Business Exhibition & Conferences Ltd. should be excluded from the final list of comparable.
6. In the result, C.O. filed by the assessee is allowed.

7. Regarding the appeal of the revenue, Learned DR of the revenue supported the draft assessment order passed by the AO and the order of TPO. Learned AR of the assessee supported the order of DRP. He also submitted that in the appeal of the revenue, the grievance of the revenue is regarding direction of DRP to exclude three comparables i.e. 1) HCCA Business Services Pvt. Ltd., 2) Hindustan Hosing Co. Ltd. and 3) Killick Agencies & Mktg. Ltd. He submitted that as per the same tribunal order rendered in the case of DCIT vs. Electronics for imaging India Pvt. Ltd. (Supra), it was held that these comparables are also not good comparables and in this regard, our attention was drawn to pages 369, 379 & 371 of the paper book. At this juncture, the bench pointed out that as per the tribunal order on page 379, the decision is this that since, the availability of comparables is not an issue and therefore, RPT percentage at 15% is approved. The bench pointed out that in the present case, there are only 6 comparables as per TPO and out of that 3 are already excluded by DRP and for 1 comparable, the assessee is in appeal before us and therefore, in the facts of the present case, it cannot be said that the availability of comparables is not an issue and hence, RPT percentage in the present case cannot be 15% and it has to be 25%. In reply, learned AR of the assessee submitted that the assessee is requesting to exclude only one comparable by applying RPT filter i.e. Hindustan Hosing Co. Ltd. where RPT % is 26.97%. The bench wanted to know as to whether RPT % of this comparable company is commented upon by any of the authorities below. In reply, he submitted that there is no such comment in the orders of the lower authorities and therefore, regarding this comparable, the matter may be restored to AO/TPO for a fresh decision after examining the RPT % of that company.
8. We have considered the rival submissions. We find that in respect of all these three comparables, the DRP excluded them on this basis that these are functionally different. Before us, in respect of Hindustan Hosing Co. Ltd., the argument of the learned AR of the assessee is this that it should be excluded by applying RPT filter of 25% but since, actual RPT % of this

company is not examined and commented upon by any of the lower authorities, we feel it proper to restore the matter back to AO/TPO for a fresh decision in respect of inclusion/exclusion of this comparable by applying 25% RPT filter. We order accordingly.

9. In respect of remaining two comparables i.e. 1) HCCA Business Services Pvt. Ltd. and 2) Killick Agencies & Mktg. Ltd., we find that as per the tribunal order rendered in the case of DCIT vs. Electronics for imaging India Pvt. Ltd. (Supra), it was held that these two are not good comparables because these are functionally different. We have already noted that this tribunal order is applicable in the present case. Hence, Hence, we respectfully follow this tribunal order and hold that in the present case also, these two comparables i.e. 1) HCCA Business Services Pvt. Ltd. and 2) Killick Agencies & Mktg. Ltd., are rightly excluded by DRP from the final list of comparable.
10. The next TP issue in the appeal of the revenue is regarding the direction of DRP that Working Capital Adjustment should be granted on actual basis without any cap.
11. In respect of this issue, Learned DR of the revenue supported the draft assessment order passed by the AO and the order of TPO. Learned AR of the assessee supported the order of DRP. He also submitted that this issue is covered in favour of the assessee by the tribunal order rendered in the case of ARM Embedded Technologies (P) Ltd. vs. DCIT in IT (TP) A No. 1659/bang/2014 dated 31.08.2015, copy on pages 453to 471 of the paper book and our attention was drawn to Para 25 of this tribunal order on page 470.
12. We have considered the rival submissions and by respectfully following the tribunal order rendered in the case of ARM Embedded Technologies (P) Ltd. vs. DCIT (Supra), we decline to interfere in the order of DRP on this issue.

13. Regarding the corporate tax issue as per ground no. 5 of the appeal of revenue, Learned DR of the revenue supported the draft assessment order passed by the AO. Learned AR of the assessee supported the order of DRP. He also submitted that after passing of the order by DRP, on 17.05.2016, CBDT has passed an order u/s 119, copy on pages 437 to 439 of the paper book and as per the same, delay committed by the assessee's trust in filing the relevant information with jurisdictional CCIT/CIT was condoned and thereafter, as per order dated 27.10.2016, copy on pages 440 & 441 of the paper book, approval was granted to M/s Alcom laboratories (India) Private Limited Employees Gratuity Fund Trust w.e.f. 01.01.2006 and therefore, now the relevant trust stands approved and therefore, the order of DRP is proper.
14. In this regard, we find that although the basis of the order of DRP is different but in view of this subsequent development, the objection of the AO for which, he made this disallowance does not survive and therefore, we decline to interfere in the order of DRP on this issue also.
15. In the result, appeal filed by the revenue is partly allowed for statistical purposes.
16. In the combined result, C.O. filed by the assessee is allowed and the appeal filed by the revenue is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(LALIET KUMAR)
Judicial Member

Sd/-
(A.K. GARODIA)
Accountant Member

Bangalore,
Dated, the 21st November, 2017.
/ MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.