

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

श्री अब्राहम पी. जॉर्ज, लेखासदस्य एवं
श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष

BEFORE SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER AND
SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं./ITA No.753/Mds/2015
निर्धारण वर्ष /Assessment Year: 2010-11

M/s.ICON Clinical Research India-
Pvt. Ltd.,
RMZ Millenia Business Park, Building
3A, 2nd Floor, No.143, Dr.MGR Road,
Kandanchavady, Chennai – 600 096.

[PAN: AABCI 2834 E]
(अपीलार्थी/ Appellant)

Vs. The Dy. Commissioner of-
Income Tax,
Company Circle-II(3),
Room No.513, Wanapathy
Block, 121, M.G.Road,
Chennai.

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mr.Ashik Shah, CA

प्रत्यर्थी की ओर से /Respondent by

: Mr.Vijayakumar Punna,
St. Counsel

सुनवाई की तारीख/Date of Hearing

: 31.01.2018

घोषणा की तारीख /Date of Pronouncement

: 31.01.2018

आदेश / ORDER

PER GEORGE MATHAN, JUDICIAL MEMBER:

ITA No.753/Mds/2015 is an appeal filed by the assessee, order passed u/s.92CA(3) in F.No.DRP/CHE/55/2014-15 dated 19.12.2014 for the AY 2010-11.

2. Shri Vijayakumar Punna, St. Counsel, represented on behalf of the Revenue and Shri Ashik Shah, CA represented on behalf of the assessee.

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

1. The Ld. TPO and Ld. DRP has erred in finalizing an order of assessment which is against the principles of natural justice, violative of provisions of the Act, devoid of merits, without appreciating the fact involved, without appreciating the documents submitted in proper light, without conducting adequate inquiries and as such is without jurisdiction.

2. The Ld. TPO has incorrectly made TP adjustment and has erred in adding a sum of INR 3,34,86,637 to the returned income of the appellant, which was erroneously upheld by the Ld. DRP.

3. The Ld. TPO has finalized his order with improper adjustments, as a result of misapplying the law pertaining to TP and by adopting faulty processes/methodologies to finalize the adjustment, such as but not limited to, applying filters, functional analysis, selection of comparable companies, computation of profit margins of appellant and comparable companies and undertaking economic adjustments.

4. The Ld. TPO and DRP erred in law and facts by undertaking a fresh comparability analysis without rejecting the TP documentation, maintained by the appellant, as required under section 92C(3) of the Income Tax Act, 1961.

5. The Ld. TPO erred in law and facts by finalizing the set of comparable companies despite certain companies failing the comparability parameters such as functional dissimilarity, significant related party transactions, non-availability of data and such other factors.

6. The Ld. TPO erred in law and facts by rejecting certain companies, selected by the appellant in its TP documentation, due to non-availability of data which are otherwise comparable to the appellant to arrive at the final set of comparable companies.

7. The Ld. TPO have erred in computation of operating profit mark-up of comparable companies and the arm's length mark-up.
For these and such other grounds that may be urged at the time of hearing, the Appellant prays that the appeal may be allowed.

4. The assessee has also raised the following additional grounds:

ICON Clinical Research India Private Limited ("the Appellant" or "the Company") had filed an appeal before this Hon'ble Bench on April 09, 2015, which is fixed for hearing on November 1, 2016.

The Appellant submits the following ground of Appeal:

"The Ld. TPO / DRP ought to have considered the cash operating profit as the appropriate Profit Level Indicator ("PLI") for computing the ALP"

In this regard, the Appellant wishes to bring to your Honors kind attention that this Bench has adjudicated the Appellant's own case for the earlier assessment year 2009-10 bearing Appeal No.ITA 1034/Mds/2014 recently and the order was pronounced on September 21, 2016. The said order directed the Transfer Pricing Officer to rework the PLI of the appellant and the comparable companies after excluding the depreciation cost, as it would give better results in the comparability analysis and thus remanded the matter back to the Transfer Pricing Officer/Assessing Officer.

In the light of the abovementioned order, the Appellant would like to raise a specific additional ground for the disputed assessment year 2010-11. The additional Ground of Appeal is enclosed herewith, in triplicate.

The appellant humbly pleads that the additional ground raised is a principal issue which was allowed by this Hon'ble Bench in appellant's own case. The plea is purely a legal ground which does not require investigation of additional facts.

It is prayed that this additional ground may be admitted and decided on merits. The Appellant relies on the following decisions on admissibility of additional grounds of appeal:

- *Jute Corporation of India [1991] 187 ITR 688 (SC)*
- *National Thermal Power Co Ltd (229 ITR 383 (SC)*
- *Pruthvi Brokers & Shareholders [TS-463-HC-2012(BOM)]*

5. The Revenue has not raised any objection to the additional grounds filed by the assessee and consequently, stands admitted. At the time of hearing, it was fairly agreed by both the sides that the issue in respect of the additional grounds was squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the assessee's own case in ITA No.1034/Mds/2014 dated 21.09.2016 wherein it has been held as follows:

17. We have considered the rival contentions and perused the orders of the authorities below. It is not disputed that three of the comparables selected by the TPO viz. M/s Cosmic Global Ltd, M/s Informed Technologies India Ltd and M/s R Systems International Ltd. had applied depreciation rate prescribed in Schedule XIV of Companies Act while arriving its net margin. Pleading of the assessee was that it had applied higher rate of depreciation while arriving at the net profit. Guidance note issued by the ICAI (August 2013) specifically mentions at 6.30 (c) as under:

"(c) Assets employed – There may be difference in assets employed and the method of providing depreciation. In order that such difference does not impact the net profit, the operating margin on operating cost before depreciation is taken as profit level indicator."

18. One of the primary requisite of the comparative study is that margin arrived at for the comparables as well as that of the assessee, shall always be adjusted for dissimilarities in treatment of various expenditure including notional expenditure like depreciation, when such dissimilarities can be measured and quantified. Otherwise, it could erode the comparability. The Panaji Bench of the Tribunal in the case of M/s Pentair Water India Pvt. Ltd (supra) had held as under:

"The common contention in respect of computation of TNMM i.e. operating profit taken by the Id. AR in respect of the comparables is that while computing the profit ratio, profit prior to depreciation should be computed as it will give true and fair profit ratio without being affected by the depreciation charged by each of the companies. We noted that different companies have adopted different method of depreciation. In fact, for charging depreciation to the Profit & Loss account there are different prevalent recognized methods of depreciation. Some Assessee opt for

Straight Line method, some opt for Written Down method and some opt for Sum of Digit method or even Replacement Cost method. Selection of each method will affect the rate and quantum of depreciation even if the nature of the asset is the same and ultimately, the net profit derived by the company will vary. For determining the fair and true profit, in our opinion, it is appropriate that the effect of the depreciation must be excluded out of the operating profit for determining the operating profit ratio. Therefore, the best way of computing the operating profit, in our opinion, will be to compute the profit before depreciation in respect of each of the company. This will take out the inconformity or the variation in the profit level of the comparables arising due to adoption of different method of charging depreciation. We have gone through the order of the Bombay Bench of this Tribunal in the case of DCIT vs. Reuters India 24 ITR (Trib) 231 (Mum) as has been relied on by the Id. AR. We noted that the Tribunal in this case has adopted the cash profit/operating cost as the correct profit level indicator under the TNMM method."

19. We are, therefore, of the opinion that the profit level indicator considering the margins prior to depreciation would give better results in the comparable analysis and benchmarking of the transactions of the assessee in the given facts and circumstances. We direct the Assessing Officer/TPO to rework the PLI of the comparables after excluding the depreciation cost and benchmark the PLI of the assessee also excluding the depreciation cost. Ordered accordingly. Ground Nos. 6 and 7 of the assessee are allowed for statistical purposes.

20. In the result, the appeal of the assessee is partly allowed for statistical purposes.

6. It was submitted by the Ld.AR that the additional grounds raised, being a covered issue, none of the other issues raised in the original grounds of appeal would survive.

7. In reply, the Ld.DR vehemently supported the order of the AO.

8. We have considered the rival submissions.

9. As it is noticed that the issue raised in the additional grounds is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the assessee's own case where one of us is a party to the decision, respectfully following the decision of the Co-ordinate Bench of this Tribunal in the assessee's own case for the AY 2009-10 referred to supra, the additional ground stands allowed and the issues are restored to the

file of the AO on identical lines as has been directed in Para No.19 of the order in ITA No.1034/Mds/2014 for the AY 2009-10 dated 21.09.2016.

10. As the other grounds have not been argued, the same are dismissed.

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

Order pronounced in the Open Court on January 31, 2018, at Chennai.

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P.GEORGE)

लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: January 31, 2018.

TLN

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