

आयकर अपीलीय अधिकरण
मुंबई पीठ "जे", मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

आअसं. 6397/मुं/2006 (नि.व.2003-04)
ITA NO.6397/MUM/2006 (A.Y.2003-04)
आअसं. 1548/मुं/2009 (नि.व.2004-05)
ITA NO.1548/MUM/2009 (A.Y.2004-05)

The Assistant Commissioner of Income Tax-
Circle 10(2)(2),
Aaykar Bhavan, M.K. Road,
Mumbai 400 020

..... अपीलार्थी /Appellant

बनाम Vs.

M/s. MOL Maritime (India) Pvt. Ltd.
(Formerly known as Mitsui OSK Lines-
Maritime (India) Pvt. Ltd.)
Kalpataru Square, Unit No.52, 5th Floor,
Kondivita Lane, Off Andheri Kurla Road,
Andheri (E), Mumbai – 400 059
PAN AAACN3767G

..... प्रतिवादी/Respondent

C.O.No.171/Mum/2009
(Arising out of ITA No.1548/Mum/2009, A.Y.2004-05)

M/s. MOL Maritime (India) Pvt. Ltd.
Mumbai
PAN AAACN3767G

.... Cross Objector/Assessee

बनाम Vs.

The Deputy Commissioner of Income Tax-
Circle 8(2),
Mumbai

..... Appellant

ITA NO.6397/MUM/2006 (A.Y.2003-04)
ITA NO.1548/MUM/2009 (A.Y.2004-05)
C.O.No.171/Mum/2009 (A.Y. 2204-05)

अपीलार्थी द्वारा/ Appellant by : Shri Uodhal Raj Singh
प्रतिवादी द्वारा/Respondent by : Shri Dhanesh Bafna &
Ms. Hirali Desai

सुनवाई की तिथि/ Date of hearing : 22/07/2020
घोषणा की तिथि/ Date of pronouncement : 31/07/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These appeals by the Revenue are for the assessment year 2003-04 and 2004-05. The assessee has filed Cross Objections in the appeal by Revenue for assessment year 2004-05. We will first take-up the appeal of Revenue for AY 2003-04.

ITA NO.6397/MUM/2006 - A.Y.2003-04:

2. This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)–VIII, Mumbai (in short ‘the CIT (A)) dated 27/09/2006 for the assessment year 2003-04. The Revenue in appeal has raised solitary ground, the same reads as under:-

“1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs.1,41,06,903/- made on account of adjustment to the Arm’s Length Price of the assessee’s international transaction.”

2. Sh. Dhanesh Bafna appearing on behalf of the assessee, narrating the facts in the case submitted that this appeal is in second round before the Tribunal. The appeal was earlier decided by the Tribunal vide order dated 27/07/2011. The Tribunal vide aforesaid order restored the matter to the

Assessing Officer for fresh adjudication. Aggrieved against remanding of matter, the assessee filed appeal before the Hon'ble Bombay High Court in Income Tax Appeal No.426 of 2012. The Hon'ble High Court vide order dated 17/07/2012 allowed the appeal of assessee and set-aside the order of Tribunal dated 27/07/2011 with a direction to decide the appeal of assessee afresh.

3. The Id. Authorized Representative of the assessee submitted that the short issue in appeal by the Revenue is selection of comparables. The Id. Authorized Representative of the assessee contended that the assessee during the period relevant to assessment year under appeal had entered into International Transactions with its Associated Enterprises (AEs). The assessee is engaged in providing manning support services to its principal AEs. The assessee applied Transaction Net Margin Method (TNMM) as the most appropriate method to benchmark its international transactions. The same was accepted by the Transfer Pricing Officer (TPO). The PLI of the assessee i.e. OP/TC was 9.32%. The TPO raised no dispute on the margins declared by the assessee. The assessee had selected nine comparables to benchmark its international transactions. The comparables selected by the assessee are engaged in administrative back office support services. The arithmetic mean of the comparables was computed at 5.35%. Out of 9 companies selected by the assessee, the TPO excluded 2 companies on the ground that the companies are consistent loss-making and functionally not comparable. The TPO further excluded 3 companies i.e. AMI Computer (I) Ltd., Mercury Travels Ltd. and Nucleus Netsoft & GIS India Ltd. on the ground that these companies have incurred losses during the year under consideration. After excluding above 5

companies the TPO computed mean of remaining 4 comparable companies at 34.96% and made upward adjustment of Rs.1,41,06,903/-.

3.1. The assessee assailed the adjustment before the CIT (A). The CIT(A) vide impugned order accepted the contentions of assessee with regard to three companies i.e. AMI Computer (I) Ltd., Mercury Travels Ltd. and Nucleus Netsoft & Gis India Ltd. and directed the Assessing Officer to include the same in the final set of comparables. With the inclusion of aforesaid three companies in the final list of comparables, the margin of the assessee is within +/- 5% range and hence, TP adjustment did not survive.

3.2. The Id. Authorized Representative of the assessee submitted that AMI Computer (I) Ltd., Mercury Travels Ltd. and Nucleus Netsoft & GIS India Ltd. are not consistent loss making companies. He referred to Para-7 of the TPO's order, wherein Vans Information Ltd. was excluded from the list of comparables being continuous loss making company and the assessee has not disputed exclusion of same. He further furnished financials of the three companies to show that they are not continuous loss making companies. The Id. Authorised Representative of the assessee fervently supported the findings of CIT (A) and prayed for dismissing the appeal by Revenue. To reinforce his contentions, the Id. AR placed reliance on following decisions:

- i. CIT vs. Goldman Sachs (India) Securities P. Ltd., 240 Taxman 736 (Bom);
- ii. Joy Alukkas India P. Ltd. vs. ACIT, 228 Taxman 35 (Kerala); and
- iii. Chryscapital Investment Advisors (India) P. Ltd. vs. DCIT, 376 ITR 183 (Delhi).

4. Per contra, Shri Uodhal Raj Singh representing the Department vehemently defended the assessment order and the order of TPO. The Id. Departmental Representative submitted that the TPO has rightly excluded loss making companies from the list of comparables.

5. We have heard the submissions made by Rival sides and have perused the orders of authorities below. This appeal by the Revenue was decided by the Tribunal vide order dated 27/07/2011. The Co-ordinate Bench by placing reliance on the decision of Special Bench, in the case of Quark Systems Pvt. Ltd. reported as 132 TTJ 1 (Chd.)(SB) restored the issue back to the file of Assessing Officer for fresh adjudication. For the sake of completeness, operating part of the Tribunal order is reproduced herein below:-

“13.4 The decision of the Special Bench cited above relates to A.Y 2004-05, whereas the assessment year in the impugned case is assessment year 2003-04. Thus, in the light of the decision of the Special Bench, T.P issue was in the initial stages in this year and, therefore, a liberal approach should be taken. Considering the totality of the facts of the case, we are of the opinion that the matter should go back to the file of the A.O for fresh adjudication with a direction to given sufficient opportunity to the assessee to file fresh comparables of the financial year 2002-03 and make out its case properly and place all relevant facts before tax authorities so that proper ALP can be determined in accordance with the law. We hold and direct accordingly. The ground raised by the Revenue is accordingly allowed for statistical purpose.”

The assessee assailed the findings of Tribunal in remanding the matter to the Assessing Officer for fresh adjudication, before the Hon'ble Bombay High Court in Income Tax Appeal No.426 of 2012. The substantial question of law before the Hon'ble High Court for adjudication was:

“Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in setting aside the order of the CIT (A) and remanding the matter to the AO for fresh adjudication?”

Answering the substantial question in negative, the Hon'ble High Court vide order dated 17-7-2012 set-aside the impugned order and directed the Tribunal to decide the appeal afresh. The relevant extract of the directions by Hon'ble Bombay High Court are reproduced herein below:-

“9. In view of the statement on behalf of the assessee, the question of law is decided in favour of the assessee. The appeal is therefore, allowed in terms of prayer (b) which reads as under:-

“b) This Hon’ble Court may be pleased to set aside the impugned order and direct the Tribunal to decide appeal afresh after hearing both parties”.

This appeal in second round before the Tribunal is taken-up for adjudication in pursuance to the above directions of the Hon'ble Bombay High Court.

6. From the submissions made by rival sides it emerges that the sole dispute in the present appeal is selection of comparables. The assessee in transfer pricing study selected following 9 companies as comparables:

Comparable Companies	Adjusted OP/TC
Star Estates Management Ltd.	- 13.27%
International Travel House Ltd.	3.58%
Mercury Travels Ltd.	- 3.87%
Vans Information Ltd.	- 36.78%
AMI Computers (I) Ltd.	-7.69%
Ace Software Exports Ltd.	22.63%
Hinduja TMT Ltd.	76.43%
MCS Ltd.	7.52%
Nucleus Netsoft & GIS India Ltd.	0.37%
Mean	5.35%

The TPO excluded 5 companies including AMI Computer (I) Ltd., Mercury Travels Ltd. and Nucleus Netsoft & GIS India Ltd. from the list of comparables. The aforementioned 3 companies were excluded as they had suffered losses. No other reason for rejecting the said companies has been given by the TPO.

7. The Hon'ble Jurisdictional High Court in the case of CIT vs. Goldman Sachs (India) Securities P. Ltd. (supra) has upheld the findings of Tribunal in accepting a company as good comparable, where it has not suffered persistent losses. The Tribunal in several cases has held that it is only persistent/continuous loss making companies that are not to be considered as comparables. In other words, a company can be accepted as comparable if it has not suffered persistent losses. The expression '*persistent loss*' is not defined under the Act or the Rules framed thereunder. The expression has evolved in judicial rulings. One of the initial decisions of Tribunal supporting this principle is Bobst India (P.) Ltd. vs. Dy. CIT, 63 taxmann.com 339 (Pune-Trib). 'Persistent loss' means losses in three consecutive financial years including the Financial Year corresponding to the Assessment Year under dispute and immediately two preceding Financial Years. The thumb rule of excluding persistent loss making company has been accepted in various judicial precedents over the period of time.

8. The assessee has furnished financial statements of the aforesaid three companies for the relevant period. Summary of profits/losses of the said companies in the relevant three financial years is tabulated as under:-

Sr.No.	Name of the Company	Financial year	Net Profit/(Loss) (amount in Rs.)
1.	AMI Computes (I) Ltd.	2000-01	58,21,187
		2001-02	2,98,372
		2002-03	(3,48,22,572)
2.	Mercury Travels Ltd.	2000-01	59,47,110
		2001-02	(1,96,38,797)
		2002-03	(2,82,76,139)
3.	Nucleus Netsoft & GIS India Ltd.	2000-01	9,70,946
		2001-02	(32,64,757)
		2002-03	(40,07,218)

From perusal of the above table it is evident that the company at Sr.No.1 has suffered losses in only one year and the companies at Sr. No.2 & 3 have incurred losses in two financial years. Thus, none of the above said three companies fall within the ambit of *persistent loss* making companies. The CIT (A) has directed the TPO to include AMI Computer (I) Ltd., Mercury Travels Ltd. and Nucleus Netsoft & GIS India Ltd. as these are not continuous loss making companies. We concur with the findings of CIT (A). **The impugned order is upheld, ergo, the appeal of revenue is dismissed sans merit.**

ITA No.1548/Mum/2009 & C.O.No.171/Mum/2009 - A.Y.2004-05

9. This appeal by the Revenue is directed against the order of CIT (A) XXXII Mumbai, dated 19/9/2008 for AY 2004-05. The assessee has filed cross objections in support of the order impugned by the Department.

10. The Id. Authorised Representative of the assessee submitted at the outset that in view of CBDT Circular No.17/2019 dated 08/08/2019 appeal of

the Revenue in ITA No.1548/Mum/2009 for assessment year 2004-05 is liable to be dismissed on account of low tax effect. He further submitted that if the said appeal of Revenue is dismissed, the cross objections filed by the assessee would become infructuous.

11. The Id. Departmental Representative fairly admitted that the tax effect involved in the appeal is less than Rs.50.00 lacs.

12. Both sides heard. After examining the grounds of appeal, we find that the Revenue has raised solitary ground assailing the findings of CIT (A) in deleting transfer pricing adjustment of Rs.40,60,358/-. Undisputedly, tax effect involved in this appeal is less than the monetary limit of Rs.50 Lakhs prescribed by CBDT Circular No. 17/2019 (supra.) for filing of appeals by the Department before the Tribunal. Thus, without going into merits of the issue raised in the appeal, the present appeal by the Revenue is dismissed on account of low tax effect.

13. Before parting, we clarify here that the Revenue shall be at liberty to approach the Tribunal for restoration of appeal, with the requisite material to show that the appeal is protected by the exceptions prescribed in Para 10 of Circular dated 11-07-2018 and its subsequent amendment dated 20/08/2018.

14. In the result, appeal by the Revenue is dismissed on account of low tax effect and cross objections of the assessee are dismissed as having become infructuous.

ITA NO.6397/MUM/2006 (A.Y.2003-04)
ITA NO.1548/MUM/2009 (A.Y.2004-05)
C.O.No.171/Mum/2009 (A.Y. 2204-05)

15. **To sum up, both the appeals by the Revenue and cross objections of the assessee are dismissed.**

Order pronounced in the open court on Friday the 31st day of July, 2020.

Sd/-

(S.RIFAUH RAHMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 31/07/2020
Vm, Sr. PS (O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)

ITAT, Mumbai