

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 1711/Mum./2015
(Assessment Year : 2010-11)

Dy. Commissioner of Income Tax
Circle-15(2)(1), Mumbai

..... Appellant

v/s

M/s. Nomura Structured Finance Services
Private Limited, 9th Floor, Nomura
Hiranandani Business Park, Powai
Mumbai 400 076 PAN – AABCL4233E

..... Respondent

Cross Objection no.69
Arising out of ITA No. 1711/Mum./2015
(Assessment Year : 2010-11)

M/s. Nomura Structured Finance Services
Private Limited, 9th Floor, Nomura
Hiranandani Business Park, Powai
Mumbai 400 076 PAN – AABCL4233E

..... Cross Objector
(Original Respondent)

v/s

Dy. Commissioner of Income Tax
Circle-15(2)(1), Mumbai

..... Respondent
(Original Appellant)

Assessee by : Shri Farrokh Irani
Revenue by : Smt. Vatsalya Jha

Date of Hearing – 09.02.2022

Date of Order – 03/03/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The appeal by the Revenue and cross objection by the assessee are against the final assessment order dated 29.01.2015, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ("*the Act*") by the Assessing Officer for the assessment year 2010-11.

ITA no.1711/Mum./2015 **Revenue's Appeal – A.Y. 2010-11**

2. The Revenue has raised following grounds in its appeal:–

"1. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in deleting the addition of Rs. 7,78,15,295/- by reinstating comparable namely M/s C G Vak Software & Exports Ltd. on the ground that it was not a loss making company for the past three consecutive years although the TPO has given factual finding in the order that it was a loss making company since F.Y. 2007-08 till 2009-10.

2. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

3. The appellant prays that the direction of the DRP, Mumbai on the above directions be set-aside and that of the assessing officer be restored. The appellant prays that the direction of the DRP, Mumbai on the above directions be set-aside and that of the assessing officer be restored."

3. In this appeal, Revenue has challenged the inclusion of M/s. CG VAK Software and Exports Ltd. as a comparable for benchmarking the international transactions entered into by the assessee with its associated enterprises.

4. The brief facts of the case pertaining to the issue as emanating from the record are: The assessee is a subsidiary of Nomura Asia Investment (India Powai) Pte Ltd. and Nomura Asia Holding N.V. The assessee is primarily engaged in providing Information Technology Enabled Services ('ITeS') which, inter-alia, include providing investment / securities research services and capital market services to its associated enterprises. The assessee, an Indian Company, entered into following international transactions with its associated enterprises.

- (i) Provision of ITeS Services
- (ii) Provision of Research Support Services
- (iii) Reimbursement of expenses charged to assessee by its associated enterprises

5. In respect of 'Provision of ITeS Services', the assessee used Transactional Net Margin Method ('TNMM') as the most appropriate method with Profit Level Indicator ('PLI') of Operating Profit to Operating Cost ('OP/OC'). The assessee computed its own PLI at 14.21% as against that of comparables at 10.68% and claimed that the international transaction of 'Provision of ITeS Services' was at arm's length price ('ALP'). Further, in respect of 'Provision of Research Support Services', the assessee similarly adopted TNMM as most appropriate method with OP/OC as PLI. The assessee computed its own PLI at 26.17% as against that of comparables at 23.21% and claimed that the international transaction of 'Provision of ITeS Services' was at ALP.

6. The Assessing Officer made reference to Transfer Pricing Officer ('TPO') for the determination of ALP of the aforesaid international transactions. The TPO vide order dated 02.01.2014 passed under section 92CA(3) of the Act, arrived at set of 6 comparables, for benchmarking the international transaction pertaining to 'Provision of ITeS Services' after applying certain filters and, inter-alia, excluding M/s CG VAK Software & Exports Ltd.(segmental) on the basis of persistent loss making company. The average OP/OC of these comparables was computed at 26.30%. By applying this arm's length margin, the TPO proposed an upward adjustment of Rs. 4,57,98,922 in respect of international transaction of 'Provision of ITeS Services'. Similarly, in respect of 'Provision of Research Support Services', the TPO arrived at set of 3 comparables, for benchmarking the international transaction after applying certain filters and, inter-alia, excluding CG VAK Software & Exports Ltd. (segmental) for similar reason as aforesaid. The average OP/OC of these comparables was computed at 36.21%. By applying this arm's length margin, the TPO proposed an upward adjustment of Rs. 3,20,16,373 in respect of international transaction of 'Provision of Research Support Services'. As a result, TPO proposed a total adjustment of Rs. 7,78,15,295 to the international transactions entered into by the assessee.

7. The Assessing Officer passed the draft assessment order dated 18.02.2014, inter-alia, on the basis of adjustment proposed by the TPO.

8. The Dispute Resolution Panel ('DRP'), vide direction dated 13.11.2014 issued under section 144C(5) of the Act, inter-alia, accepting the objections filed by the assessee directed inclusion of M/s CG VAK Software & Exports Ltd. (segmental) as a comparable for the purpose of benchmarking the international transactions pertaining to 'Provision of ITeS Services' and 'Provision of Research Support Services'. Accordingly, the DRP directed deletion of total transfer pricing adjustment of Rs. 7,78,15,295 proposed by the TPO.

9. Being aggrieved by the directions issued by DRP, the revenue is in appeal before us. During the course of hearing, Smt. Vatsalya Jha, learned Departmental Representative ("learned DR"), appearing for the Revenue, vehemently relied upon the order passed by the TPO and submitted that M/s CG VAK Software & Exports Ltd.(segmental) be excluded being a persistent loss making company while benchmarking both the international transactions. On the other hand, Shri Farrokh Irani, learned counsel appearing for the assessee submitted that M/s CG VAK Software & Exports Ltd. earned profit in financial years 2008-09 and 2009-10 in the relevant BPO segment and therefore cannot be excluded by applying filter of persistent loss making company.

10. We have considered the rival submissions and perused the relevant material on record. In the present case, the assessee conducted its transfer pricing study analysis by comparing the relevant segment, i.e. BPO, of M/s CG VAK Software & Exports Ltd. with the assessee. The TPO also did not

dispute the fact that BPO segment of M/s CG VAK Software & Exports Ltd. is functional comparable to the assessee. The TPO excluded the said comparable only on the basis that it is persistent loss making company. It is pertinent to note that in the financial year 2008-09 and 2009-10 M/s CG VAK Software & Exports Ltd. had operated in two segments: (i) Software Services and (2) BPO Services. While in financial year 2007-08, the company had operated in three segments: (i) Software Services and (2) BPO Services and (iii) Training. Upon examination of the annual reports for financial years 2007-08, 2008-09 and 2009-10 of M/s CG VAK Software & Exports Ltd., which are forming part of the paper book, we find that the company had earned profit of 3.81% in financial year 2008-09 and profit of 0.29% in financial year 2009-10 in the BPO segment. Thus, M/s CG VAK Software & Exports Ltd. (segmental) does not satisfy the criteria of being a persistent loss making company, as in 2 out of 3 past consecutive financial years the company was earning profit. Accordingly, we are of the view that the DRP has rightly directed inclusion of M/s CG VAK Software & Exports Ltd. (segmental) as a comparable for benchmarking the international transactions pertaining to 'Provision of ITeS Services' and 'Provision of Research Support Services'. As a result, ground no. 1 raised in Revenue's appeal is dismissed.

11. Ground No. 2 and 3 raised by the Revenue are general in nature and are also dismissed in view of our aforesaid findings in Revenue's appeal.

12. The Revenue had also filed an application dated 26.07.2017 seeking admission of following additional grounds of appeal:

"1. The Hon'ble DRP have erred in law and on facts, by failing to note that the reinstated comparable namely; M/s. C.G. VAK Software & Exports Ltd. is functionally not comparable having regard to the turnover".

2. The Hon'ble DRP have erred in law and on facts, without appreciating the fact that its turnover is less than Rs. 1 Crore as against the assessee's turnover Rs. 74.83 Cr."

"The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time of hearing of appeal."

3. The appellant prays that the directions of DRP on the above ground be set-aside and that of the assessing officer be restored."

13. As the additional issue raised by the Revenue by way of additional grounds of appeal is purely legal issue which can be decided on the basis of material available on record, we are of the view that same can be admitted for consideration and adjudication in view of the ratio laid down by Hon'ble Supreme Court in NTPC Ltd. V. CIT : 229 ITR 338.

14. By way of additional ground of appeal, the Revenue has sought exclusion of M/s CG VAK Software & Exports Ltd. on the basis that its turnover is less than Rs. 1 Crore and thus is much less than the assessee's turnover. From the entire order passed by the TPO, it is evident that the functional similarity of relevant segment of M/s CG VAK Software & Exports Ltd. with the assessee has not been doubted. The Revenue now seeks exclusion of the comparable on quantitative basis. While reckoning the comparability analysis under TNMM, the main emphasis is on net margin

realized on the transactions undertaken and not the price of the product or services. The transfer pricing rules under Rule 10B and Rule 10C also contemplate for eliminating the material effects and to make reasonably accurate adjustment for eliminating the differences on account of such material effects. Mere circumstance of a company, which otherwise confirm to the comparability analysis in terms of Rule 10B(2) and (3), having huge profit or huge turnover *ipso facto* does not lead to its exclusion unless and of course it is shown that turnover or huge profit is on account of factor leading to a different results in function, asset and risk analysis. We find that Hon'ble Delhi High Court in Chrys Capital Investment Advisors India Pvt. Ltd. Vs. DCIT: [2015] 376 ITR 183 held that if the company is functionally comparable then same cannot be rejected on the basis of turnover. Thus, respectfully following the ratio laid down by the Hon'ble Delhi High Court, we hold that M/s CG VAK Software & Exports Ltd. cannot be held to be incomparable simply on the ground of low turnover, unless it is demonstrated that the functions, assets and risk are completely different and are incomparable. Accordingly, the additional grounds raised by the Revenue are dismissed.

15. In the result, the appeal by the Revenue is dismissed in terms of our aforesaid findings.

16. As we have dismissed the appeal filed by the Revenue, the cross-objection filed by the assessee becomes infructuous and is accordingly dismissed.

17. In the result, the cross-objection by the assessee is dismissed as infructuous.

Order pronounced in the open court on 03/03/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 03/03/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai