

IN THE INCOME TAX APPELLATE TRIBUNNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI C.N.PRASAD (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A.No.2251/Mum/2014
(Assessment Year: 2009-10)

M/s Tevapharm India Pvt Ltd (Formerly known as Ratio Pharm India Pvt Ltd)402, Omega, Hiranandani Gardens, Powai, Mumbai-76		Dy.CIT 10(3), Mumbai
PAN : AABCR7561F		
Appellant		Respondent

I.T.A.No.2085/Mum/2014
(Assessment year : 2009-10)

Dy.CIT 10(3), Mumbai		M/s Tevapharm India Pvt Ltd (Formerly known as Ratio Pharm India Pvt Ltd)402, Omega, Hiranandani Gardens, Powai, Mumbai-76
Appellant		Respondent

Assessee by	Shri Dhanesh Bafna Ms Chandni Shah Shri Harish Arora
Revenue by	Shr Saurabh Deshpande

Date of hearing	25.04.2017
Date of order	.05.2017

ORDER

Per Ashwani Taneja, AM:-

These cross appeals have been filed against the order of Dispute Resolution Panel-II, Mumbai dated 19-11-2013 u/s 144(C) of the Act for A.Y. 2009-10.

2. First, we shall take up the appeal filed by the revenue in ITA No. 2085/Mum/2014 on the following grounds:-

1. *"On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in rejecting the comparable as adopted by TPO in determining the TP adjustment as valid comparables"*

3. During the course of hearing, the Ld. DR appearing on behalf of the revenue clarified that revenue is aggrieved with only two comparables which have been excluded by the DRP, viz. (1) Pfizer Ltd; and (2) Celestial Labs Ltd.

4. With regard to Pfizer Ltd, it was submitted by the Ld. DR that DRP has applied RPT filter and it was found that related party transactions were more than 90%, therefore, this comparable was directed to be excluded. It was submitted that in the earlier years also, the same comparable was selected and it was not objected to by the assessee, therefore, in this year merely because related party transactions are more than 25%, the same cannot be allowed to be excluded. Further, the said comparable was excluded by the DRP also for the reason that it had a different accounting period and, therefore, cannot be included in the list of comparables. In this regard, it was submitted that merely because accounting year of the said company was ending on 30th November, the same cannot be excluded for this reason alone. Reliance was placed by him on the decision of the Tribunal in the case of Pangea3 & Legal Database

Systems Pvt Ltd vs ITO (ITA No. 2128/M/2014 order dated 06-03-2017). It was submitted that though a comparable company may follow a different financial year but if financial data is available for all the quarters including January to March, then the same cannot be excluded from the list of comparables merely because the comparable is following different financial year. In view of these submissions, he requested for reversing the order of DRP and requested for including this company as part of comparables.

5. Similarly, with regard to the other company, viz. Celestial Labs Ltd, it was submitted that the DRP has wrongly directed for its exclusion on the ground that the said company was engaged in providing host of IT related services. Reliance was placed on the following decisions of the Tribunal wherein it was held that the said company was not comparable to a company engaged in providing IT related services:-

- i. Hewlett Packard (India) Software Operation (P) Ltd vs DCIT 67 Taxmann.com 309
- ii. Core Objects India (P.) Ltd vs ITO 72 taxmann.com 53 (Bang.Trib)
- iii. Interwoven Software Services India (P) Ltd vs DCIT 67 taxmann.com 361 (Bang Trib)
- iv. Textron India (P.) Ltd vs DCIT 72 taxmann.com 307 (Bang Trib)

It was thus submitted that the said company is very much comparable to the assessee company, and therefore, it should not have been directed to be excluded.

6. Per contra, Ld. Counsel of the assessee vehemently supported the order passed by the DRP.

7. With regard to the exclusion of Pfizer Ltd, it was submitted that the records would clearly show that related party transactions were more than 90%. Our attention was drawn on the financial statement of the said company. Our attention was also drawn on the order passed by the Tribunal in assessee's own case for AYs 2007-08 & 2008-09. It was submitted that it was directed to

be excluded by the DRP on its own. With regard to the exclusion of the said company on the ground of different accounting period, reliance was placed on the judgment of Hon'ble Bombay High Court in the case of CIT vs PTC Software (I) Pvt Ltd (ITA No.732 of 2014 dated 26-09-2016). It was submitted that the judgment of jurisdictional High Court is binding. It was also submitted that the view taken by the Tribunal in the case of Pangea3 & Legal Database Systems Pvt Ltd vs ITO (supra) cannot be applied in generalized manner. The said view was given by the Tribunal subject to the condition of availability of data of last quarter of both years. Thus, in absence of availability of quarterly data, that too, for the relevant segment; the said company cannot be taken as part of comparables. Further, the other handicap was that Pfizer Ltd's financial year ends on 30th November and not on 31st December and thus, availability of data of last quarter will not be sufficient. Thus, keeping in view all these difficulties, the DRP has rightly directed for exclusion of the same.

8. With regard to Celestial Labs Ltd. it was submitted by the Id. Counsel that the Tribunal in assesses own case for AY 2007-08 & 2008-09 has already taken a view in favour of the assessee and the same view should be applied. Our attention was drawn on the annual report of the said company to show that it was engaged in sales of products also and its primary business segments were software development and services. Further, the TPO has mentioned that functional profile of the assessee and the comparables are same as in early years. Thus, the view taken by the Tribunal in assessee's own case for AY 2007-08 & 2008-09 should be followed in this year also. Thus, the order of the DRP should be upheld.

9. We have considered the submissions made by both the sides and also gone through the orders passed by the lower authorities and by the Tribunal for earlier years. We shall deal with both the comparables hereunder:

Pfizer Ltd:

10. In the case of Pfizer Ltd., it has been held by the DRP that related party transactions of the service segment of the said company are approximately to the tune of 95.30%. Ld. DR was not able to dispute this factual submission when the financial statements of the said company were shown to him. Therefore, we find that DRPs decision should be upheld on this reason, itself.

10. However, we shall also deal with other argument taken by the DRP, i.e. different accounting period followed by the said company. In this regard, we shall first take support from the judgment of Hon'ble Bombay High Court in the case of **CIT v. PTC Software (I) Pvt. Ltd.** (supra), wherein with regard to the issue of acceptability of a company as part of list of comparables which is following different accounting period, it was observed by the Hon'ble Bombay High Court as under:-

"11. Re. Question (iii)

(a) The Assessing Officer on the basis of the order of the TPO included M/s. Transwordks Information Services Ltd. (Transworks Ltd.) in his comparability analysis. The grievance of the respondent assessee before the Tribunal was that Transworks Ltd. cannot be a comparable as the respondent assessee's financial period is from ^{1st} April, 2006 to 31st March, 2007 while the financial period in respect of the comparable is from 1st July 2006 to 30th June, 2007. This grievance based on fact was not disputed by the Revenue before the Tribunal or even before us. In the terms of Rule 10B (4) of the Income Tax Rules, 1962, the analysis for comparison shall be on the data relating to the financial year in which the international transaction has been entered into. In the above view, the Tribunal held that as the financial period during which the international transaction was entered into is different, M/s. Transwork Ltd. could not be treated as comparable and thus not includable.

(b) We find that the provisions of Section 10B(4) of the Rules are clear in as much as it obliges that the data to be used for comparability analysis should be of the same financial year in which the international transactions were entered into by the tested party.

In fact, this principle/mandate was applied by the TPO while considering M/s. Power Soft Global Services Ltd. as a comparable because it had a financial year ending in September, 2006 and not 31st March, 2007 as in the case of respondent assessee. The same yardstick ought to have comparable. The submission on behalf of the Revenue that the mandate of Rule 10B of the Rules can be ignored as the difference is only of three months is without any basis. No such liberty is granted in terms of Rule 10B (4) of the Rules.

(c) The findings of the Tribunal being on the basis of the unambiguous mandate of Rule 10B(4) of the Rules, question (iii) as proposed does not give rise to any substantial question of law. Thus, not entertained.”

Thus from the above it is clear that Hon'ble High Court has clearly laid down that in view of provisions of rules 10B(4) of Income Tax Rules, 1962, the accounting period of the comparable company should be same with that of the assessee company. There is no need to mention that the judgment of the Hon'ble Jurisdictional High Court is binding upon us. However, Ld. DR has relied upon the decision in the case of Pangea3 & Legal Database Systems Pvt Ltd (supra) wherein it is claimed that the company having different accounting period can be included in the list of comparables. Perusal of the said decision clarifies that understanding of the Ld. DR is not complete and correct. It is noted that the bench has given its view in a highly qualified and restricted manner. It was clarified that a company can be taken as part of comparables only when quarterly data is also available. In the facts of the case before us, it is noted that accounting period of Pfizer Ltd. is ending on 30th November. Therefore, there should be availability of data from 1st December, 2008 to 31st March, 2009 and also from 1. 12. 2007 to 31.3. 2008. The adjustment is required to be made in such a manner that last quarter's transactions would be added and the first quarter's transaction would be reduced. Further, the data

should be available on segmental basis and not as a whole. In our considered view, this kind of exercise is neither feasible nor desirable. It will add to lot of confusions in an area which is otherwise also highly subjective and vague. Therefore, in our considered view, the view adopted by the Hon'ble High Court in the case of PTC India Pvt. Ltd. (supra) is absolutely perfect and is in accordance with the rules prescribed in this regard. We do not find any need or justification or any kind of deviation in this regard. It may otherwise lead to confusions and chaos. Further, when the higher wisdom is available, then the lower wisdom must yield before it. Thus, taking into account totality of facts and circumstances of the case, we find no infirmity in the decision taken by the DRP. Therefore, the same is upheld.

Celestial Labs Ltd.:

11. This company has been directed to be excluded on the ground that its functional profile is different. It is noted that Tribunal for AYs 2007-08 and 2008-09 as held under:-

“5. Celestial Labs Limited (Celestial Labs): According to assessee Celestial Labs as a comparable has been cheery picked by the TPO. Celestial Labs is a diversified company operating in varied fields such as rendering IT services encompassing application development and maintenance, production support, EERP, data warehousing, SAP implementation. Celestial Labs also is into manufacturing and trading of products such as ERP package for manufacturing and has a product 'Sanjivani' which is a portal for live ayurvedic consultation. The company is also engaged in the distribution of herbal ayurvedic products.

SAP Services: Celestial delivers SAP consulting, SAP implementation and post-SAP implementation services for its customers. Celestial is engaged in implementing SAP for customers from initial planning, design and implementation to maintenance and ongoing

optimization. Celestial helps the company align IT Solutions with business strategies.

CelSanjivani Products: CelSanjivani is a part of Celestial Labs Ltd. an ISO 9001-2000 company working in this space of Bio-informatics and Bio-Technology. The goal is to become a primary market place for the herbal products providing quality products to the customers and industrial community. This is an Ayurvedic portal dedicated to B2B&C market with online live consulting with our Ayurvedic consultants. It provides excellent platform for trading of herbal products, with identification of raw herbs, scientific data, market & trade data, monographs, policy, laws, good manufacturing practices, DNA finger printing etc. It facilitates contacts with suppliers, manufacturers and dealers of herbal Pharma industry.

The activities undertaken Celestial Labs are in the nature of providing host of IT related services and some trading activity which is not comparable to the Assessee. Hence it is clear that it is not comparable to the functional profile of the Company and accordingly ought not to be considered a comparable.

The learned D.R. however drew our attention to page-389 of the paper book which is an extract from the Directors report which reads as follows:

"The Company as developed a de novo drug design tool "CELSUITE" to drug discovery in, finding the lead molecules for drug discovery and protected the IPR by filing under the copy if right/patent act. (Apprised and funded by Department of Science and Technology New Delhi)

Based on our in silico expertise (applying bio-informatics tools). The Company has developed a molecule to treat Leucoderma and multiple cancer and protected the IPR by filing the patent. The patent details have been discussed with Patent officials and the response is very favourable.

The cloning and purification under wet lab procedures are under progress with our collaborative Institute, Department of Microbiology, Osmania University, Hyderabad.

In the industrial biotechnology area, the company has signed the Technology transfer agreement with IMTECH CHANDIGARH (a very

reputed CSIR organization) to manufacture and market initially two Enzymes, Alpha Amylase and Alkaline Protease in India and overseas.

The company is planning to set up a biotechnology facility to manufacture industrial enzymes. This facility would also include the research laboratories for carrying out further R&D activities to develop new candidates' drug molecules and license them to Interested Pharma and Bio Companies across the GLOBE. The proposed Facility will be set up in Genome Valley at Hyderabad in Andhra Pradesh."

According to the learned D.R. celestial labs is also in the field of research in pharmaceutical products and should be considered as comparable. As rightly submitted by the learned counsel for the Assessee, the discover^y is in relation to a software for discovery of new drugs. Moreover the company also is owner of the IPR. There is however a reference to development of a molecule to treat cancer using bio-informatics tools for which patenting process was also being pursued. As explained earlier it is a diversified company and therefore cannot be considered as comparable functionally with that of the Assessee. There has been no attempt made to identify and eliminate and make adjustment of the profit margins so that the difference in functional comparability can be eliminated. By not resorting to such a process of making adjustment, the TPO has rendered this company as not qualifying for comparability. We therefore accept the plea of the Assessee in this regard."

12. Our attention was also drawn on the order passed by the TPO wherein it has been mentioned that functional profile of the assessee as well as comparable companies are same as was there in the earlier years. Further, our attention was drawn on the financial statements of the said company wherein it has been mentioned in its P & L Account that it derives income from its sale of products and services. Further, Note No.12 of Notes to Accounts mentions that the said company's primary business segment is software development & services. No other contradictory evidence is in the possession of the Ld. DR to contradict these facts. Therefore, we have no option but to follow the view taken by the Tribunal for AYs 2007-08 & 2008-09. Thus, we find

that no interference is called for in the order of the DRP and, therefore, the same is upheld. Therefore, appeal filed by the revenue is hereby dismissed.

13. Now we shall take up assessee's appeal in ITA No.2251/M/2014, filed on the following grounds:-

"1. On the facts and circumstances of the case and in law, the Deputy Commissioner of Income Tax (Assessing Officer 'AO')/ Additional Commissioner of Income Tax (the Transfer Pricing Officer 'TPO') erred in giving effect to the directions of the Dispute Resolution Panel ('DRP') by erroneously including Celestial Labs in the final set of comparables thereby making a transfer pricing adjustment of Rs.1,88,26,768 to the Appellant's international transaction of contract research and testing services; and

On the facts and circumstances of the case and in law, it be held that Celestial Labs is not functionally comparable to the assessee and therefore the AO be directed to follow the directions of the DRP to exclude the said comparable.

3 *On the facts and circumstances of the case and in law the Dispute Resolution Panel (DRP) did not give any directions to the Assessing Officer, after hearing the Appellant's Authorised Representative (AR) on the specific Ground of Objection; being the Direct Tax Grounds.*

4 On the facts and circumstances of the case and in law, the AO, disregarded the claim of the Appellant of Rs 35,52,789/- towards software licence fees as revenue expenditure and capitalised the same under the head Computers and granted depreciation thereon, which resulted in the addition to the Total Income by Rs 14,16,116/-."

14. In grounds 1 & 2, the assessee has requested for issuing suitable direction to AO for following the directions of the DRP. During the course of hearing, it was submitted that the AO has not followed the directions of the DRP fully and, therefore, a direction should be given to AO to strictly follow the direction of the AO. No objection was raised by the DR in this regard.

Therefore, we direct the AO to strictly follow the directions issued by the DRP.

15. In grounds 3 & 4, the assessee is aggrieved in disregarding the claim of the assessee with regard to the software licence fee claimed as revenue expenditure. In this regard it was submitted that the DRP has omitted to adjudicate this issue despite the fact that objection was raised by the assessee in this regard. During the course of hearing both the parties jointly stated that this issue should go back to the DRP for its proper adjudication.

16. It is noted by us that though objection was raised by the assessee in this regard, however, DRP has not adjudicated this issue inadvertently. Therefore, we send ground 3 & 4 back to the file of the DRP for its adjudication afresh. It was submitted by the Ld. Counsel that identical issue has already been decided by the Tribunal in AY 2008-09. The assessee is permitted to raise all the legal and factual issues before the DRP and may also submit the order of the Tribunal before the DRP for its consideration. The DRP shall decide this issue afresh after taking into account the entire material as may be placed on record by the assessee. These grounds may be treated as allowed, for statistical purpose.

17. As a result, appeal filed by the assessee is treated as allowed, for statistical purpose.

18. In the result, appeal of the revenue is dismissed and that of the assessee is treated as allowed, for statistical purpose.

Order was pronounced in the open court at the conclusion of the hearing in the presence of representatives of both the parties.

Sd/-

sd/-

(C.N. PRASAD)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 03.05.2017

pk/-

Copy to :

1. The appellant
 2. The respondent
 3. The CIT(A)
 4. The CIT
 5. The Ld. Departmental Representative for the Revenue, "K", Bench
- (True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES