

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : I-2 : NEW DELHI

BEFORE SHRI R.S. SYAL, AM & SHRI KULDIP SINGH, JM

ITA No.1382/Del/2012  
Assessment Year : 2005-06

ITO,  
Ward-5(2),  
Room No.234B, CR  
Building,  
New Delhi.

Vs. NTT Data Global Delivery  
Services Ltd.,  
(formerly known as Keane  
Worldzen (I) Pvt. Ltd.),  
6<sup>th</sup> Floor, Unitech Trade Centre,  
Sector 43, Sushant Lok Phase I,  
Gurgaon.  
PAN: AABCW3622M

(Appellant)

(Respondent)

Assessee By : Shri S.D. Kapila, Advocate  
Department By : Dr. B.R.R. Kumar, Sr. DR

Date of Hearing : 11.05.2016  
Date of Pronouncement : 16.05.2016

ORDER

PER R.S. SYAL, AM:

This appeal by the Revenue is directed against the order passed by  
the CIT(A) on 23.12.2011 in relation to the assessment year 2005-06.

2. The only issue raised through two grounds is against the deletion of addition of Rs.2,86,92,601/- made by the Assessing Officer (AO) on account of transfer pricing adjustment.

3. Succinctly, the facts of the case are that the assessee is a subsidiary of Keane Worldzen Inc. The assessee is engaged in rendering business process services in the chosen field of insurance, healthcare, collection and financial services. The assessee filed its return declaring income of Rs.93,784/- accompanied by an audit report in Form No. 3CEB, indicating four international transactions, including BPO and Support services. The assessee selected Transactional Net Margin Method (TNMM) as the most appropriate method with the Profit level indicator (PLI) of Operating Profit to Total Cost (OP/TC). Its own profit margin was calculated at 15.62%. The assessee selected certain companies as comparable. Considering the multiple year data, the average profit margin of those companies was worked out at 10.25%. That is how, the assessee declared that all of its international transactions were at arm's length price (ALP) on entity level. The AO referred the matter of

determination of ALP of the international transactions to the Transfer Pricing Officer (TPO), who accepted the application of TNMM as the most appropriate method without disputing the PLI of OP/TC. However, the TPO re-determined the profit margin of the comparable companies chosen by the assessee for the current year alone by discarding the use of multiple year data by the assessee. It was thereafter noticed that the ratio of the assessee's Personnel expenses to Total expenses was 52.11% and that of Depreciation to Total expenses was 14.36%. He adopted filter of Personnel cost to Total cost in the range of 48% to 58.3% for selection of comparables. Similarly, filter of Depreciation to Total costs was also applied. In applying such filters, the TPO reduced the final set of comparables to three, namely, Allsec Technologies Ltd., Saffron Global and Airline Financial Support Services (I) Ltd. Such three companies were chosen out of the assessee's list of 11 companies with the current year data alone. Average OP/TC of these three companies was worked out at 27.31%. By applying this profit rate of 27.31% as benchmark on the assessee's total costs, the TPO proposed transfer pricing adjustment amounting to

Rs.2,86,92,601/-. The AO made the above addition and computed total income of the assessee at Rs.2.87 crore. The assessee challenged the assessment order before the Id. CIT(A), who deleted the transfer pricing addition by excluding Airline Financial Support Services (I) Ltd. from the final list of three comparables drawn by the TPO and treating two more companies as comparable, namely, CS Software Enterprises Ltd. and Spanco Telesystems and Solutions Ltd. The Revenue is aggrieved against the above alterations made by the Id. CIT(A) in the list of comparables leading to the deletion of addition.

4. We have heard the rival submissions and perused the relevant material on record. The only grievance of the Revenue is against the exclusion of Airlines Financial Support Services (I) Ltd. from the final set of comparables drawn by the TPO and including two companies in the list, namely, CS Software Enterprises Ltd. and Spanco Telesystems and Solutions Ltd.

5.1. Before embarking upon the comparability or otherwise of the above referred three companies, we consider it expedient to discuss the

functional profile of the assessee, as has been given in the Transfer pricing study report, as under:-

- Insurance Industry
  - Property & Casualty and Life Insurance-Client Administration Services;
  - Agency Administration Services;
  - Claims Processing;
  - New Business Processing;
  - New Product Launch and End-to-end annuity processing – closed/passive block processing;
  - Application service provider;
- Healthcare Industry
  - Payer
    - Claim Entry Form;
    - Simple Claim Adjudication;
    - Member Enrollment;
    - Policy Holder Services;
    - Fulfillment
    - Correspondence – Voice;
    - Correspondence-Written/Web.
  - Provider
    - Medical Collection;

- Eligibility Verification;
- Medical coding and billing.
- Financial Services Industry
- Back Office
- Account Reconciliation;
- Security Processing;
- Mutual Fund Accounting/Portfolio Valuation;
- Client Reporting
- Middle Office
  - New Account Set-up;
  - Client Administration-Cash receipts;
  - Trade entry.
- Collections and Recovery
  - Portfolio Recovery Analysis & Valuation
  - Lettering;
  - Campaign Design & Management
  - Pre charge-off through Recovery Contact Calls
    - Reminder Calls;
    - Automated & Manual Skip Tracing
  - Payment Plan Arrangement & Settlements
    - Payment Processing;
    - Put-back Management;
    - Proprietary Scoring;

- Litigation Tracking
  - Financial Reporting:
  - Customized Processes to meet client's portfolio goals.”

5.2. An overview of the functional profile of the assessee, seen in the context of the overall group activities, it becomes vivid that the customers in the US enter into contracts with KWZ Inc. and KWZ Inc. outsources the services to the assessee, which, ultimately, executes the project. In doing so, the assessee serves the crucial role of making available services with matching skill sets. It also undertakes providing alternative resources and manages timely replacements to ensure successful completion of the work outsourced to it within the contract time schedule. The assessee also conducts personnel management, including the development of job descriptions, salary levels, fringe benefits, vacation policies and similar human resource functions. With the above understanding of the functional profile of the assessee, we now espouse the three companies as discussed *supra* for considering their comparability or otherwise.

(i) Airline Financial Support Services (I) Ltd.

6.1. Since this company was chosen by the assessee itself as a comparable, there was no occasion for the TPO to discuss the functional profile of this company because it was added by him in the list of comparables, whose nature of work was admitted by the assessee itself as comparable. However, the assessee assailed the inclusion of this company in the set of comparables before the Id. CIT(A) by arguing that its related party transactions were 37.38% of its sales. The Id. CIT(A) concurred with the submissions advanced on behalf of the assessee and ordered for the elimination of this company from the list of comparables. The Revenue is aggrieved against the exclusion of this company.

6.2. We have heard the rival submissions and perused the relevant material on record. We are disinclined to sustain the preliminary objection taken by the Id. DR that the assessee should have restrained from challenging the inclusion of this company in the list of comparables before the Id. CIT(A) as it was its own comparable and further no objection was taken about the inclusion of this company in the

list of comparables during the course of proceedings before the TPO. It goes without saying that the object of an assessment is to determine the income in respect of which the assessee is rightly chargeable to tax. As the income not originally offered for taxation, if otherwise chargeable, is required to be included in the total income, in the same breath, any income wrongly included in the total income, which is otherwise not chargeable, should also be excluded. There can be no estoppel against the provisions of the Act. Extending this proposition further to the context of the transfer pricing, we find that if an assessee fails to report an otherwise comparable company, then the TPO is obliged to include it in the list of comparables, and in the same manner, if an assessee wrongly reports an incomparable case as comparable in its TP study and then later on claims that it should be excluded, then, there should be nothing to forbid the assessee from claiming so, provided the Authority is satisfied that the company so originally reported as comparable is, in fact, not comparable. The Special Bench of the Tribunal in *DCIT vs. Quark Systems Pvt. Ltd. (2010) 132 TTJ (Chd) (SB) 1* has also held that a company which was included by the assessee and also by the TPO in

the list of comparables at the time of computing ALP, can be excluded by the Tribunal, if the assessee proves that the same was wrongly included. We, therefore, see no embargo on the power of the Id. CIT(A) in entertaining this objection of the assessee.

6.3. Now we turn to the merits of exclusion of Airline Financial Support Services (I) Ltd. from the list of comparables. Rule 10B(1)(e)(ii) and (iii) talk of comparing the net profit margin realized by the enterprise from international transaction with the similar net profit margin realized by the enterprise or by an unrelated enterprise from a comparable *uncontrolled transaction*. An uncontrolled transaction has been defined in Rule 10A(a) to mean: ‘*a transaction between enterprises other than associated enterprises, whether resident or non-resident.*’ On going through the mandate of Rule 10B(1)(e) in juxtaposition to Rule 10A(a), it is manifested that the controlled transactions are not contemplated for comparison with the international transaction undertaken by an enterprise. In a case where a company has entered into controlled as well as uncontrolled transactions, we apply RPT filter for

considering whether on totality, such a company should be considered as comparable or not. When 25% RPT filter is applied, it means that if the related party transactions of such company are more than 25%, then, it should be considered as a controlled transaction and the company should be excluded from the list of comparables. If, however, the related party transactions are less than 25%, then, notwithstanding the fact that there are certain related party transactions, but, on the overall scenario, such a company can be considered as comparable.

6.4. Adverting to the facts of this company, we find that the Id. CIT(A) has excluded it by finding the ratio of its RPTs at more than 37%. The predominant view of the Tribunal across the country laid down in several cases is that the transactions of a company having more than 25% Related Party Transactions is considered as controlled, thereby failing the test of comparability. This view has been taken in several decisions including by the Delhi Bench in *Toluna India Pvt. Ltd. (supra)* and *Actis Advisers Pvt. Ltd. Vs. DCIT, (2012) 20 ITR 138 (Del.)(Trib.)* and Mumbai Bench in *Stream International Services Pvt. Ltd. Vs. ACIT*

*(IT) (2013) 141 ITD 492 (Mum.)*. Even though the TPO has not expressly applied any RPT filter, but, the fact of the matter remains that the very inclusion of a company in the list of comparables depends upon the fact that it should be a comparable uncontrolled transaction.

6.5. Reverting to our point, we find from the Annual report of this company, which is available on page 107 onwards of the paper book, that as against its gross revenue from service fees amounting to Rs.29.32 crore, there is receipt of revenue from its associated enterprises to the tune of Rs.9.31 crore. This shows that the percentage of RPT is 32% (approx.), thereby failing the RPT filter of 25% as held in several cases discussed above. In view of the fact that the RPTs of this company are more than 25%, it becomes a controlled transaction and disqualifies from being considered as a comparable uncontrolled transaction, so as to find a place in the list of comparables. Ergo, we uphold the action of the Id. CIT(A) in excluding Airline Financial Support Services (I) Ltd. from the list of comparables. The impugned order is upheld on this issue.

(ii) & (iii) CS Software Enterprises Ltd. and Spanco Telesystems and Solutions Ltd.

7.1. The assessee considered these two companies as comparables. However, the TPO rejected the same impliedly on the basis of two filters applied by him, namely, Personnel cost to Total cost in the range of 48% to 53.5% and Depreciation to Total cost. There is no specific discussion about the reasons for the exclusion of these two companies, but, it appears, as was conceded by the Id. AR as well, that the same were eliminated on the strength of the above referred two filters. The assessee challenged the exclusion of these two companies before the Id. CIT(A) who ordered for their inclusion on the ground that in subsequent assessment year these two companies were taken by the TPO as comparable. The Revenue is aggrieved against the inclusion of these two companies.

7.2. We have heard the rival submissions and perused the relevant material on record. It is manifest that the Id. CIT(A) has ordered for the inclusion of these two companies simply on the ground that these were considered as comparable in subsequent year. This fact, in our

considered opinion, is not decisive in deciding the comparability for the year under consideration. There can be change in the functional profile of a company from one year to another. What is always relevant is to see comparability for the year under consideration and not earlier or later years. The impugned order is conspicuously silent on this aspect of the matter. Apart from devoting only one line in para 5.3 to the effect that: “these two companies are in the similar line of business and qualifying the filters employed by the TPO and the assessee”, there is no discussion whatsoever about the nature of business carried out by these two companies and how it is similar with that of the assessee.

7.3. At the same time, we note that the TPO has noted on page 14 of his order that the ratio of the assessee’s Personnel expenses to Total expenses is 52.11% and that appears to be the reason for his applying filter of 48% to 53.5%. On a careful perusal of the assessee’s Profit & Loss Account, which is available on page 176 of the paper book, it is vivid that the assessee incurred Personnel expenses to the tune of Rs.10,97,53,391/- and Total expenses stand at Rs.24,21,37,190/-. When

we compute the percentage of Personnel cost to Total cost on the basis of these two figures, there emerges figure of 45%. If we go ahead with the correct ratio of the assessee's Personnel cost to total cost at 45%, even the filter applied by the TPO between 48% to 53.5% becomes erroneous because that was based on the TPO's calculation of the assessee's ratio of Personnel expenses to total expenses at 52.11%, which itself is wanting. Under the given circumstances, we are of the considered opinion that the impugned order treating these two companies as comparable cannot be upheld on the assigned reasoning and, at the same time, the action of the TPO in excluding these two companies on the basis of incorrect calculation of the assessee's percentage of Personnel cost to Total expenses and the consequential wrong filter also cannot be countenanced. In our considered opinion, the ends of justice would meet adequately if the impugned order on this score is set aside and the matter is remitted to the AO/TPO for a fresh determination of the comparability or otherwise of CS Software Enterprises Ltd. and Spanco Telesystems and Solutions Ltd.

8. To sum up, we set aside the impugned order on the issue of addition towards transfer pricing adjustment and remit the matter to the file of AO/TPO for fresh determination of the ALP of the international transaction in consonance with our above directions. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings.

9. In the result, the appeal is allowed for statistical purposes.

The order pronounced in the open court on 16.05.2016.

Sd/-

[KULDIP SINGH]  
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]  
ACCOUNTANT MEMBER

Dated, 16<sup>th</sup> May, 2016.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.