

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री चंद्र पूजारी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 174/Mds/2016

निर्धारण वर्ष / Assessment Year : 2011-12

M/s Foxteq Services India Pvt. Ltd.,  
No.28 (NP), Thiru Vi Ka Industrial  
Estate, Guindy, Chennai - 600 032.

v. The Assistant Commissioner  
of Income Tax,  
Corporate Circle 2(1),  
Chennai - 600 034.

PAN : AAACF 9033 B  
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Deepak Chopra, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri K. Parashiraiah, CIT

सुनवाई की तारीख/Date of Hearing : 28.06.2016

घोषणा की तारीख/Date of Pronouncement : 01.09.2016

### **आदेश /ORDER**

**PER N.R.S. GANESAN, JUDICIAL MEMBER:**

This appeal of the assessee is directed against the order of the Assessing Officer dated 26.12.2015, consequent to the directions of the Dispute Resolution Panel.

2. When the appeal was taken up for hearing, Shri Deepak Chopra, the Ld. counsel for the assessee, submitted that he is

pressing grounds No.5, 6 & 7 raised in the grounds of appeal. In respect of other grounds, the Ld. counsel fairly submitted that he is not pressing. The Ld. counsel has also made an endorsement to that effect on the appeal folder.

3. Referring to the ground No.5, the Ld. counsel for the assessee submitted that the Transfer Pricing Officer and Dispute Resolution Panel have not made any adjustment on account of difference in working capital position of the assessee vis-à-vis the comparable companies. According to the Ld. counsel, the Dispute Resolution Panel has to make proper adjustment with regard to working capital employed by the assessee as well as the comparable cases. Referring to the order of the Dispute Resolution Panel, more particularly at para 8, the Ld. counsel submitted that the DRP admitted that the assessee has submitted a detailed argument with regard to working capital adjustment for difference in working capital between the assessee and comparable. The DRP has also admitted that the details of working capital adjusted profit margin were also submitted. However, the same was not considered on the ground that the same was not verifiable as supporting documents for the source material was not provided. The working capital employed by the assessee and comparable

companies could be one of the relevant factors for the purpose of determining the arm's length price. Since such an exercise was not done, according to the Ld. counsel, the matter needs to be reconsidered.

4. Referring to ground Nos.6 and 7 with regard to selection / picking up of comparables, the Ld. counsel for the assessee submitted that the DRP has not adjudicated the same. The Ld. counsel further submitted that the Transfer Pricing Officer has taken some other comparable companies, which are not functionally comparable to the assessee. With regard to M/s Beetel Teletel Ltd. the Ld. counsel submitted that even though TPO excluded M/s Mobile Telecommunications Ltd. from the list of comparables, in respect of Asnchal Computers Ltd., the TPO has taken the same as comparable one. The DRP without considering the objection of the assessee on its merit, simply rejected the same. Therefore, according to the Ld. counsel, the matter needs to be reconsidered and the DRP is expected to pass a speaking order.

5. On the contrary, Shri Parashiraiah, the Ld. Departmental Representative, submitted that the assessee has not provided any source material so as to enable the TPO or DRP to verify the

working capital employed by the assessee and comparable companies. Since the source material was not produced by the assessee, the DRP has rightly confirmed the order of the Transfer Pricing Officer.

6. Referring to the ground Nos.6 and 7 with regard to selection of comparables and objection with regard to comparables selected by the TPO and DRP, the Ld. D.R. submitted that the Transfer Pricing Officer examined the matter and found that M/s Mobile Telecommunications Ltd. is not a comparable company, therefore, the same was excluded. However, M/s Aanchal Computers Ltd. was included in the comparable as requested by the assessee. Therefore, according to the Ld. D.R., the DRP found that the material filed by the assessee was considered by the TPO, hence, the same was confirmed.

7. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee objected to the adjustment made by the Transfer Pricing Officer. With regard to working capital adjustment, the assessee claims that the difference in working capital between the assessee and the comparable companies would materially affect the profit

determined. Therefore, certain adjustment needs to be made to bring them on equal footing. The assessee also brought to the notice of the DRP that the working capital adjustment, which was to ensure the profit derived by the comparable companies, can be compared with the profit of the assessee. This Tribunal is of the considered opinion that the capital employed on the assessee, including working capital, is one of the relevant factors for the purpose of determining the arm's length price. Therefore, the capital employed by the assessee, including the working capital, and that of comparable companies needs to be taken into consideration. Without comparing the working capital employed by the comparable companies and that of the assessee, this Tribunal is of the considered opinion that there cannot be any transfer pricing adjustment.

8. Moreover, the picking up of comparables or selection of comparable companies was objected by the assessee. Transfer Pricing Officer considered the claim of the assessee and excluded M/s Mobil Telecommunications Ltd. and included M/s Aanchal Computers Ltd. The Dispute Resolution Panel simply rejected the objection of the assessee without any further discussion in the order. This Tribunal is of the considered opinion that the DRP,

being the fact finding authority with regard to international transaction, is expected to dispose each and every aspect with regard to functional similarity, capital employed by the assessee, etc. for the purpose of determining the arm's length price. Since the DRP has not discussed anything on material facts, this Tribunal is of the considered opinion that the matter needs to be reconsidered. Accordingly, the orders of the authorities below are set aside and the issue with regard to selection of comparables, working capital adjustment and objections raised by the assessee with regard to comparables selected by the TPO, are remitted back to the file of the Assessing Officer. The Assessing Officer shall refer the matter once again to the Transfer Pricing Officer. The Transfer Pricing Officer shall re-examine the matter afresh in the light of the objections that may be filed by the assessee and thereafter decide the same in accordance with law. If the assessee has any grievance over the decision of TPO, it is open to the assessee to file objections against the order of the TPO and if such an objection is filed, the Assessing Officer shall refer the matter to DRP for disposal of the objections raised by the assessee. It is made very clear that the TPO and DRP shall dispose each and every aspect raised by the assessee and dispose of the objections filed by the assessee by

a speaking order. The order of the DRP shall contain the reasons for conclusion reached in the order.

9. With the above observation, the matter is remitted back to the file of the Assessing Officer.

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

Order pronounced on 1<sup>st</sup> September, 2016 at Chennai.

sd/-  
(चंद्र पूजारी)  
(Chandra Poojari)  
लेखा सदस्य/Accountant Member

sd/-  
(एन.आर.एस. गणेशन)  
(N.R.S. Ganesan)  
न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,  
दिनांक/Dated, the 1<sup>st</sup> September, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. ACIT & Secretary, DRP-2, Bangalore.
4. आयकर आयुक्त /CIT(TP), Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.