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**[2022] 140 taxmann.com 239 (Mumbai - Trib.)[24-05-2022]**

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**TRANSFER PRICING :** Where a company was accepted as good comparable on ground of functional similarities by TPO in earlier assessment years in assessee's own case, there being no change in facts, same was to be accepted as comparable in relevant year as well

**TRANSFER PRICING :** Where after including foreign exchange gain as part of operating revenue, a comparable company had only earned profit, same could not be categorized as persistently loss making company and, thus, said company was to be included as comparable in final list of comparables

**TRANSFER PRICING :** Where assessee was engaged in providing information technology enabled services (ITES) to its Associated Enterprise, a company engaged in KPO services was to be excluded from final list of comparables

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**[2022] 140 taxmann.com 239 (Mumbai - Trib.)**

**IN THE ITAT MUMBAI BENCH 'J'**

**ACIT**

**v.**

**Morgan Stanley Advantage Services (P.) Ltd.\***

**M. BALAGANESH, ACCOUNTANT MEMBER  
AND MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**IT APPEAL NO. 1215 (MUM.) OF 2016**

**CO NO. 55 (MUM.) OF 2016**

**[ASSESSMENT YEAR 2011-12]**

**MAY 24, 2022**

**I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Information technology enabled services (ITESs)) - Assessment year 2011-12 - Assessee-company was engaged in providing information technology enabled services (ITES) to its Associated Enterprise - Whether where a company was accepted as good comparable on ground of functional similarities by TPO in earlier assessment years in assessee's**

own case, there being no change in facts, same was to be accepted as comparable in impugned year as well - Held, yes [Paras 4.4 and 4.4.1] [In favour of assessee]

**II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Loss making company) - Assessment year 2011-12 - Whether where after including foreign exchange gain as part of operating revenue, a comparable company had only earned profit, same could not be categorized as persistently loss making company and, thus, was to be included as comparable in final list of comparables - Held, yes [Para 4.5] [In favour of assessee]**

**III. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Information technology enabled services (ITESs)) - Assessment year 2011-12 - Assessee-company was engaged in providing information technology enabled services (ITES) to its Associated Enterprise - Whether a company engaged in KPO services was to be excluded from final list of comparables - Held, yes [Paras 4.8 and 4.8.1] [In favour of assessee]**

#### **CASE REVIEW-I**

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*Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2020] 118 taxmann.com 112 (Mum. - Trib.) (para 4.4.1) followed.

#### **CASE REVIEW-III**

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*CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93 (Bom.) (para 4.8); *Pr. CIT v. Visteon Engineering Centre (India) (P.) Ltd.* [2020] 113 taxmann.com 161 (Bom.) (para 4.8) and *Dy. CIT v. Morgan Stanley Advantage Services (P.) Ltd.* [2019] 109 taxmann.com 101 (Mum.) (para 4.8.1) followed.

*Mckinsey Knowledge Centre India (P) Ltd. v. Pr. CIT* [2019] 106 taxmann.com 248/264 Taxman 24 (Delhi) (para 4.9) distinguished.

#### **CASES REFERRED TO**

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*Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2020] 118 taxmann.com 112 (Mum. - Trib.) (para 4.4), *Morgan Stanley Solutions India (P.) Ltd. v. Dy. CIT* [IT Appeal No. 6522 (Mum.) of 2014, dated 12-8-2021] (para 4.4), *Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2021] 133 taxmann.com 488 (Mum. - Trib.) (para 4.8), *CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93 (Bom.) (para 4.8), *Pr. CIT v. Visteon Engineering Centre (India) (P.) Ltd.* [2020] 113 taxmann.com 161 (Bom.) (para 4.8), *Pr. CIT v. Lionbridge Technologies (P.) Ltd.* [IT Appeal No. 1815 of 2016, dated 18-3-2019] (para 4.8), *Dy. CIT v. Morgan Stanley Advantage Services (P.) Ltd.* [2019] 109 taxmann.com 101 (Mum.) (para 4.8.1), *Rampgreen Solutions (P.) Ltd. v. CIT* [2015] 60 taxmann.com 355/234 Taxman 573/377 ITR 533 (Delhi) (para 4.8.1) and *Mckinsey Knowledge Centre India (P) Ltd. v. Pr. CIT* [2019] 106

**Ms. Vatsalaa Jha** for the Appellant. **Sunil Lala** for the Respondent.

## ORDER

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**M. Balaganesh, Accountant Member.** - This appeal in ITA No. 1215/Mum/2016 & CO No. 55/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 29-1-2016 u/s.143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as 'Act'), pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 27-11-2015 for the A.Y.2011-12.

**1.1** Let us take up assessee's Cross Objection No. 55/Mum/2016 (A.Y.2011-12).

**2.** In the assessee's Cross Objection, the assessee had sought for inclusion of the following comparables:-

- a. R. Systems International Ltd.,
- b. CG-VAK Software and Exports Pvt. Ltd.,
- c. Jindal Intellicom Pvt. Ltd.,
- d. E4E Healthcare Services Ltd.,

**3.** We find that assessee has also filed an additional ground in its Cross Objection *vide* letter dated 17-11-2021 for seeking exclusion of E- Clerx Services Ltd.

**4.** The arguments were advanced by the Id. AR only in respect of the aforesaid inclusion and exclusion of comparables before us. According to the Id. AR, if the aforesaid four comparables are included and E-Clerx Services Ltd is excluded from the final list of comparables chosen by the Id. TPO/Id. AO, then the assessee's margin would be through and would be well within the tolerance band of +/-5% and no TP adjustment would be required to be made and in that scenario, the adjudication of Revenue appeal itself would become infructuous.

**4.1** Accordingly, we first proceed to address the inclusion of aforesaid four comparable and exclusion of aforesaid one comparable.

**4.2** We find that assessee is a global financial services firm that maintains leading market position in each of its business, securities, investment management and wealth management services. The assessee combines leadership in investment banking (including underwriting public offers of securities, mergers and acquisitions advice) and institutional sales and trading, with strengths in global asset and wealth management. The assessee is operating in India for over 20 years providing full range of investment banking, capital markets, equities, fixed income and derivative products as well as research services to domestic and international clients. The assessee is set up by the Morgan Stanley Group to support its front office and back office units in their operations globally. The assessee had provided Information Technology Enabled Services (ITES) to its Associated Enterprises (AE) to the tune of Rs. 355,22,04,230/- during the year under consideration and the said international transaction has been benchmarked by the assessee using

Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). The Profit Level Indicator (PLI) used by the assessee is Operating Profit to Total Operating Cost (OP/TC). The assessee's margin is 32.01%. The assessee has been taken as the tested party.

**4.3** With the aforesaid background of the functional profile of the assessee and the margins earned by it, let us now proceed to address the inclusion and exclusion of the aforesaid comparables.

#### **4.4 Inclusion of R. Systems International Ltd.,**

We find that R. Systems International Ltd., was subject matter of consideration by the order of this Tribunal in assessee's own case A.Y.2008-09 in *Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2020] 118 taxmann.com 112 (Mum. - Trib.). It has been held that assessee is merely engaged in back office support functions which has been accepted by the Tribunal in earlier assessment years and accordingly, the comparables dealing with Knowledge Process Outsourcing (KPO) activity could not be made comparable with the assessee company. However, we find that the Id. TPO had characterized the assessee's functions as KPO as against the BPO activity carried out by the assessee. We find that R Systems International Ltd., was held to be a good comparable with that of the assessee company on functional similarities by this Tribunal for A.Y.2008-09 in its order dated 23-7-2020 referred to *supra* on the ground that the said comparable was treated by the Id. TPO himself as a good comparable in earlier years in the case of the assessee herein. We further find that in the case of assessee company (as a successor to *Morgan Stanley Solutions India (P.) Ltd. v. Dy. CIT* [IT Appeal No. 6522 (Mum.) of 2014, dated 12-8-2021] had included R Systems International Ltd as a good comparable in para 12 of its order by addressing as under:-

"12.... As far as R Systems International Ltd is concerned, the only reason for exclusion is it has a different financial year ending. The departmental authorities have not examined whether contemporaneous data of the company relating to the financial year corresponding to the financial year of the assessee is available or not. In the aforesaid factual positions, we do not find any strong reason to uphold the decision of the departmental authorities in excluding the aforesaid three companies selected by the assessee."

**4.4.1** In view of the aforesaid decisions, we hold that R Systems International Ltd., to be a good comparable with that of the assessee and accordingly, the same is to be included in the final list of comparables.

#### **4.5 Inclusion of CG VAK Software and Exports Ltd.,**

We find that CG VAK Software and Exports Ltd., was subject matter of consideration by the order of this Tribunal in assessee's own case *Morgan Stanley Advantage Services (P.) Ltd. (supra)*. We find that in earlier years CG VAK Software and Exports Ltd., was not included as a comparable due to persistent losses incurred by it. However, we find that during the year also the said comparable company had incurred loss but if the foreign exchange gain is considered as part of operating revenue, then it results in profit. The law now is very well settled that foreign exchange fluctuation gain should form part of operating revenue. Hence, after including foreign exchange gain as part of operating revenue, this company has only earned a profit and accordingly, this company cannot be categorized as persistently loss making company as erroneously pointed out by Id. DRP. Otherwise, we find that the functions performed by this comparable company are

similar to the functions performed by the assessee company. Hence, we direct the Id. AO/Id. TPO to include this comparable as a good comparable in the final list of comparables.

#### **4.6 Inclusion of Jindal Intellicom Pvt. Ltd.,**

We find that this company has passed all the filters adopted by the Id. TPO in his order. In fact, the Id. TPO in page 10 of his order had categorically stated that this company had passed all the filters laid by him and accordingly, to be accepted as a good comparable. However, in pages 12 & 13 of his order, he rejects the same as functionally dissimilar to the assessee company by stating that the said comparable is a low end ITES whereas, assessee is high end ITES provider. But, we find that this Tribunal in A.Y.2008-09 in assessee's own case *Morgan Stanley Advantage Services (P.) Ltd. (supra)* had held that assessee is merely providing back office support functions to its Associated Enterprises and hence, assessee also is only a low end ITES provider. In fact, the Id. TPO himself while addressing the rejection of E-Clerx Services Ltd., in A.Y.2009-10 had stated that E-Clerx Services Ltd is a high end ITES provider whereas assessee is low end ITES provider. Hence, it is conclusively proved that assessee is only a low end ITES provider. In view of the aforesaid observations, we hold that Jindal Intellicom Pvt. Ltd., is to be included as a good comparable with that of the assessee company, in the final list of comparables.

#### **4.7 Inclusion E4E Healthcare Services Ltd., -**

The inclusion of this comparable is stated to be not pressed by the Id. AR at the time of hearing, hence, we are not adjudicating the same.

#### **4.8 Exclusion of E-clerx Services Ltd.,**

At the outset, we find that the assessee has raised an additional ground seeking exclusion of this comparable. The facts relating to adjudication of this comparable are already on record and hence, the additional ground raised by the assessee is admitted. It is not in dispute that E-Clerx services Ltd., is a KPO service provider. In fact, in assessee's own case for A. Yrs. 2008-09 and 2009-10, this Tribunal *vide* orders dated 23-7-2020 & 20-5-2021 had held this comparable as a KPO service provider and hence, not comparable with functions performed by the assessee company. However, we find that this comparable was actually chosen by the assessee itself in the list of comparables while benchmarking the international transaction. That is the reason why additional ground is filed by the assessee now seeking for its exclusion. In this regard, we find in A.Y.2009-10, this Tribunal in assessee's own case in *Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2021] 133 taxmann.com 488 (Mum. - Trib.) had addressed the very same issue of assessee seeking exclusion of E-Clerx Services Ltd., At the outset, a question arises as to whether an assessee could seek exclusion of a comparable when the same has been included by assessee itself in the TP study report. In this regard, the Hon'ble Jurisdictional High Court in the case *CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93 (Bom.), *Pr. CIT v. Visteon Engineering Centre (India) (P.) Ltd.* [2020] 113 taxmann.com 161 (Bom.) and *Pr. CIT v. Lionbridge Technologies (P.) Ltd.* [IT Appeal No. 1815 of 2016, dated 18-3-2019] had held that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistake as on facts, as it is not comparable. Respectfully following the aforesaid decisions of Hon'ble Jurisdictional High Court we hold that the assessee's

primary entitlement to seek exclusion of E-Clerx Services Ltd., even though the same has been included in the final list of comparables in its TP study report, is accepted.

**4.8.1** We find that this Tribunal in assessee's own case for A.Y.2007-08 *Dy. CIT v. Morgan Stanley Advantage Services (P.) Ltd.* [2019] 109 taxmann.com 101 (Mum.) had excluded E-Clerx Services Ltd., as functionally not comparable by placing reliance on the decision of Hon'ble Delhi High Court in the case of *Rampgreen Solutions (P.) Ltd. v. CIT* [2015] 60 taxmann.com 355/234 Taxman 573/377 ITR 533. The functions performed by the assessee during the year under consideration are similar to the functions performed in A.Y. 2007-08. Hence, reliance could be placed on the Tribunal decision for A.Y.2007-08 in this regard. Accordingly, we hold that E-clerx Services Ltd., should be excluded from the final list of comparables.

**4.9** We find that the Id. DR placed heavy reliance on the decision of Hon'ble Delhi High Court in the case of *Mckinsey Knowledge Centre India (P) Ltd. v. Pr. CIT* [2019] 106 taxmann.com 248/264 Taxman 24 to counter the arguments advanced by the Id. AR. But, we find that this order of the Hon'ble Delhi High Court has been clarified subsequently by Hon'ble Delhi High Court in the case of *Mckinsey Knowledge Centre India (P) Ltd. (supra)* stating categorically as under:-

1. 'These are two appeals by the Assessee against the order of the ITAT dated 15th December, 2016 in ITA No. 154/Del/2016 for the Assessment Year (AY) 2011-2012 and order dated 11th May, 2017 passed by the ITAT in ITA No. 6648/Del/2016 for AY 2012-2013.

2. While admitting these appeals on 7th February, 2018 the following question of law was framed for consideration.

"Did the ITAT commit an error in law in holding that the assessee was engaged in knowledge management systems and international transactions/activities in respect of one of the services rendered to its associated enterprises *i.e.* (AE)."

3. This Court has heard the submissions of Mr. Porus Kaka, learned Senior counsel for the Appellant and Mr. Ruchir Bhatia, learned counsel appearing for the Respondent.

4. The grievance of the Appellant is that the ITAT erred in concluding that for the AYs in question, the Assessee had rendered Knowledge Process Outsourcing (KPO) services to its Associated Enterprises which according to the Assessee was contrary to the documents on record.

5. Learned counsel for the Revenue on the other hand points out that for these very AYs, on the question of exclusion of comparables, the Revenue's appeals against the impugned order of the ITAT have been dismissed by this Court. As such the Appellant's grievance on the above finding of the ITAT as far as the present AYs are concerned is academic.

6. In view of the above submission, it is considered appropriate to direct that the impugned order of the ITAT returning the above finding *qua* the activity of the Assessee for the AYs in question will not constitute a precedent if such issue were to arise in future in the Assessee's cases.

7. In other words, the question framed by the Court for consideration in these appeals is left

open for decision in an appropriate case.

The appeals are disposed of in the above terms.'

**4.9.1** Hence, in view of the above, the reliance placed by the Id. DR on the decision of Hon'ble Delhi High Court in *Mckinsey Knowledge Centre India (P) Ltd* referred to *supra*. does not advance the case of the Revenue.

**4.10** To conclude, we direct the Id. TPO to include R. Systems International Ltd., CG-VAK Software and Exports Pvt. Ltd., and Jindal Intellicom Pvt. Ltd. and exclude E-Clerx Services Ltd., in the final list of comparables. When this is done, according to Id. AR, the assessee would be well within the tolerance band of +/-5% statutorily provided in the Act and hence, its pricing with AE would be at arm's length.

**4.11** In view of the aforesaid observations, the cross objections raised by the assessee by way of original grounds, in respect of aforesaid comparables are partly allowed and additional ground raised by the assessee is allowed. In view of this decision on Cross Objections, adjudication of Revenue appeal becomes academic in nature and hence, dismissed as infructuous.

**5.** In the result, appeal of the Revenue is dismissed and Cross Objections of the assessee is partly allowed.

POOJA

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\*In favour of assessee.