

# INTERNATIONAL TAXATION

## Case Law Update



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### A. High Court

1

***PCIT vs. Eight Roads Investment Advisors (P.) Ltd.***

*[2020] 115 taxmann.com 30 (Bombay)*

**Entire exercise of making transfer pricing adjustments on the basis of comparables is a matter of estimate of a broad and fair guess-work of the authorities based on factual relevant materials, and hence High Courts could not disturb findings of fact under section 260A unless such findings are shown to be ex-facie perverse and unsustainable and exhibit a total non-application of mind.**

**An assessee engaged in rendition of non-binding investment advisory services could not be compared with companies engaged in portfolio management services; KPO services; investment banking activities, however, the same could be comparable with companies engaged in consultancy services in diverse areas; companies engaged in market research and data management services to financial sectors.**

#### **Facts**

- i) The assessee, an Indian company, entered into an international transaction

of provision of non-binding investment advisory services with its AE during AY 2010-11. The assessee for the purpose of benchmarking the transaction adopted TNMM as the most appropriate method for benchmarking the said international transaction under section 92C of the IT Act and identified seven comparable companies as comparables and claimed that the international transactions were at arm's length. During the course of assessment proceedings, the TPO rejected six out of seven comparables selected by the assessee and further added five new comparables to the final list of the comparables. The action of the TPO was upheld by the DRP.

- ii) On appeal, the Tribunal with respect to the comparability held as follows:
- a. Comparables included by the TPO by undertaking fresh search
1. IDFC Investment advisors (P.) Ltd. – The Tribunal excluded this company on the ground that it was engaged in providing portfolio management services and such services were fee-based and the said company had

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earned revenue from different segments such as portfolio management fee, performance fee, advisory fee etc.

2. ICRA Online Limited (Segmental) – The Tribunal perused the information submitted in the annual report of this company and held that functions undertaken by this company were in nature of Knowledge Process Outsourcing (KPO) and Information Service and Technology Solutions which are totally different from that of the assessee company.
3. Motilal Oswal Investment Advisors (P.) Ltd. - The Tribunal excluded this company since this company advised Indian Corporates on cross border acquisitions and this company was a SEBI regulated merchant Banker which provided investment banking services in the nature of acquisition equity placements, IPOs, syndication, etc. and hence not comparable with the assessee.
4. Kshitij Investment Advisory Company Limited – The Tribunal excluded this company by relying on decision of ***Carlyle India Advisors (P.) Ltd. vs. Asstt. CIT [2016] 66 taxmann.com 14*** and ***AGM India Advisors (P.) Ltd. vs. Dy. CIT [2016] 70 taxmann.com 219 (Mum.)*** wherein it was held that this company could not be considered as

a comparable, because its investment advisory business had undergone a restructuring/realignment during the year under consideration.

- b. Comparables included by the assessee, but rejected by the TPO
  1. ICRA Management Consulting Service (P.) Ltd. – The Tribunal held that this company provided wide range of services which were essentially advisory in nature and thus comparable to the assessee.
  2. IDC India Limited - The Tribunal held this company was engaged in research and survey functions which were functionally comparable to advisory support services rendered by the assessee and hence comparable.
  3. Informed Technologies Limited – The Tribunal included this company by observing that this company collected and analysed data on financial fundamentals, corporate governance, director/executive compensation and capital market and this was similar to work done by the assessee.
  4. Kinetic Trust Limited – The Tribunal included this company by observing that the TPO accepted this company as a comparable for AY 2009-10 and this company could not be rejected merely because of low turnover filter if it was functionally similar.

- iii) On further appeal by Revenue, the Bombay HC held as under

### Decision

- i) The Bombay High Court observed that the findings arrived by the Tribunal were entirely on facts and the Revenue had failed to show as to how the said findings were perverse in any manner whatsoever. The Bombay High Court observed that the entire exercise of making transfer pricing adjustments on the basis of comparables was nothing but a matter of estimate of a broad and fair guess-work of the authorities based on factual relevant materials brought before the authorities i.e. the TPO, the DRP and the Tribunal, which are the fact finding authorities.
- ii) The High Court observed that the rationale for inclusion of the comparables excluded by the TPO had been dealt with in extensive detail by the Tribunal and the reasons given for exclusion of the new comparables by the TPO had been adjudicated by the Tribunal after proper consideration.
- iii) In light of the above, the High Court, by placing reliance on the decision of Karnataka High Court in case of *Softbrands India (P.) Ltd.* [IT Appeal No. 536 of 2015, dated of 25-6-2018], held that, since the Revenue had failed to demonstrate any perversity in the order of the Tribunal, no substantial question of law arose for consideration.

**Note:** - Similar view has also been taken by the Bombay High Court in case of *PCIT vs. AGM India Advisors (P.) Ltd.* [2020] 117 *taxmann.com* 291 (Bombay)

## 2

### *ACIT vs. Comverse Network Systems India Pvt. Ltd.*

(2020) [TS-264-HC-2020(P & H)-TP] & (2020) [TS-261-HC-2020(P & H)-TP]

**Company engaged in software development services could not be compared with comparables -- providing wide array of services; engaged in diverse activities; engaged in software products having IP and not providing software development services and diverse field of bioinformatics and related fields. Further, company engaged in sales & post-sale support service could not be compared with comparables -- engaged in seismic research activity; engaged in infrastructure consultancy services; engaged in engineering consultancy; project management services and architectural consultancy; engaged in civil engineering and architectural consultancy; providing consultancy in the field of engineering infrastructure field; rendering high-end technical services; engaged in engineering design services; involved in huge engineering turnkey projects.**

### Facts

- i) The assessee, a domestic company, was a wholly-owned subsidiary of Comverse Network Systems Inc. USA, engaged in the provision of sales and post-sales support services, software development services, professional and maintenance services to its AEs.
- ii) During the course of assessment proceedings, the TPO considering the functional profile of the assessee aggregated transactions pertaining to software development services, professional (i.e. customization, configuration etc.) services and maintenance (i.e. troubleshooting)

services, into a single segment i.e. software development segment. Thus, the TPO benchmarked the following two segments namely i) software development segment and ii) sales and post-sale support services segment, by carrying out a fresh search for both segments having results as under:

- a. Software development segment -  
The TPO sought inclusion of Avani Cincom Technologies Limited; Celestial Labs Limited; Infosys Limited; Kals Information Systems Limited; Wipro Limited for AY 2008-09 and E- Infochips Bangalore Limited; Infinite Data Systems Private Limited for AY 2010-11
  - b. Sales & post-sale support service -  
The TPO proposed inclusion of Alphageo India Limited; Mahindra Consulting Engineers Limited; Kirloskar Consultants Limited; Stup Consultants Limited; Semac Private Limited and exclusion of Himachal Futuristic Communication Limited for AY 2008-09. Further, the TPO sought inclusion of Engineers India Limited; IBI Chamatur Engineering and Consultancy Ltd; RITES Limited and TCE Consulting Engineers Ltd for AY 2010-11.
- iii) The action of the TPO was upheld by the DRP and on further appeal, the Tribunal held as under:
- a. Software Development Segment
    1. Avani Cincom Technologies Limited – This company was rejected on account of being functionally dissimilar, as it was engaged in software product company having IP and not providing software development services.

2. Celestial Labs Limited – This company was rejected since it was engaged in diverse field of bioinformatics and related fields in addition to the ERP solutions and hence was functionally dissimilar to the software development segment of the assessee.
3. Infosys Limited - This company was rejected on grounds of functional dissimilarity as it was a market leader and engaged in diverse activities including software services and software products, on account of owning Intangibles and high brand value.
4. Kals Information Systems Limited – This company was excluded on account of being functionally dissimilarity as it was engaged in both software services and software products.
5. Wipro Limited –This company was excluded on grounds of functional dissimilarity as it was engaged both in software products and software development services, owned Intangibles and undertook R&D.
6. E- Infochips Bangalore Limited - This company was excluded on grounds of functional dissimilarity since it was engaged in development of software as per specific requirement of client and the functional profile of the said company did not indicate that ITeS was included in

the software development segment.

7. Infinite Data Systems Private Limited - This company was excluded on grounds of functional dissimilarity since provided a wide array of services like technical consulting, design and development of software maintenance, system integration, implementation etc. and quantitative details of sales from these individual sectors were not available.

b. Sales & post-sale support service

1. Alphageo India Limited – The Tribunal excluded this company on ground of functional dissimilarity as it was engaged in providing seismic research activity such as 2D and 3D seismic services for design and preplanning of 2-D and 3-D surveys, seismic data acquisition.
2. Mahindra Consulting Engineers Limited - The Tribunal excluded this company on ground of functional dissimilarity as it was engaged in infrastructure consultancy services.
3. Kirloskar Consultants Limited – This company was excluded on ground of functional dissimilarity as it was engaged in engineering consultancy, project management services, architectural consultancy.
4. Stup Consultants Limited - This company was excluded

on ground of functional dissimilarity as it was involved in profession of civil engineering and architectural consultancy.

5. Semac Private Limited – This company was excluded on ground of functional dissimilarity as it was engaged in providing engineering consultancy services which was absolutely different from the sales and post-sales support services rendered by the assessee. Further, the Tribunal observed that the requirement of human resources competence for providing consultancy in the field of engineering was all together different from the manpower required for providing sales and post-sales support services.
6. Engineers India Limited - The Tribunal held that the assessee provided support services to its AE in respect of sale of software by AE and that bug fixing was also a part of post-sales support services, which could have been treated partly as function of technical nature, however, the same could not be compared with consultancy provided in the field of engineering infrastructure field provided by this company.
7. IBI Chamatur Engineering and Consultancy Ltd – The Tribunal excluded this company as it was functionally dissimilar since

it was involved in huge engineering projects which were turnkey in nature.

8. RITES Limited – The Tribunal excluded this company since it was rendering high-end technical services and being a Govt. of India undertaking which were incomparable with the low-end sale and post-sale services rendered by the assessee.
9. TCE Consulting Engineers Ltd – The Tribunal directed exclusion of this company on grounds of functional dissimilarity since along with engineering design services, this company was engaged in activities that extended from concept to engineering and segmental details for the same were not available.

- iv) On further appeal by Revenue, the Punjab & Haryana HC held as under

#### Decision

- i) The Punjab & Haryana High Court observed that the Tribunal rejected the comparable selected by the TPO for both the segments and for both the years, by citing functional dissimilarity, huge size, ownership of intangibles etc. (comparable wise reasons discussed below) and apart from generally challenging the rejection of comparables, no grounds of perversity in the order of the Tribunal was brought to the notice of the Court by the Revenue. In view of the same, the HC dismissed the appeal of the Revenue.
- ii) The HC relied on its co-ordinate bench ruling in case of ***PCIT vs. Equant***

***Solutions India Pvt. Ltd. (ITA No. 419/2016), Bombay HC*** in the case of ***CIT vs. PTC Software (395 ITR 176)*** and in ***PCIT vs. Barclays Technology Centre India Pvt. Ltd. (409 ITR 108)*** and the Karnataka HC in case of ***PCIT vs. Softbrands India Pvt. Ltd. (406 ITR 513)***, wherein the Tribunal's decision on comparables selection was upheld in absence of perversity in Tribunal's findings, pointed out by Revenue.

### 3

***PCIT vs. Gulbrandsen Chemicals (P) Ltd.***

**[2020] 119 taxmann.com 52 (Gujarat)**

**Internal CUP could not be applied for benchmarking transaction pertaining to sales made to AEs by an assessee engaged in manufacturing of chemicals when the economic circumstances and contractual terms of the transactions with AEs were fundamentally different from the independent transactions entered into by assessee with non-AEs.**

#### Facts

- i) The assessee, an Indian company, was engaged in the manufacturing of chemicals for its divergent industrial customers. During the year under consideration, the assessee had sold the said chemical products to its AEs as well as non-AEs. The assessee benchmarked the international transaction pertaining to sale of chemical product to its AEs using TNMM as the MAM. During the course of assessment proceedings, the international transactions entered into by the assessee were referred to the TPO for benchmarking.
- ii) The TPO observed that the assessee changed the most appropriate

method (MAM) for benchmarking its international transaction from Internal CUP, as adopted in the preceding years, to TNMM in the year under consideration. The TPO rejected TNMM as the MAM and instead adopted Internal CUP as the MAM for benchmarking the said international transaction, by observing as follows:

- a. The assessee had changed the MAM, without providing any appropriate reasons
- b. The assessee had sold huge volumes of products to AEs at a lower rate and hence shifted huge profits outside India
- iii) The TPO accordingly computed the average sale price of chemical products sold to AEs and compared the same with the price at which the said chemical products were sold to non-AEs.
- iv) The CITA(A) upheld the order of the TPO by observing that CUP was a superior method for benchmarking as compared to TNMM and further, the assessee had not explained the huge difference between the price charged for AEs and non-AEs. However, the CITA(A) granted relief in respect of the computation of the TP adjustment, by observing that the TP adjustment had to be computed for each chemical product and each AE separately.
- v) Cross appeals were filed before the Tribunal and the Tribunal held that the application of the Internal CUP as the MAM was not justified. The Tribunal observed that the transactions between the AEs and the non-AEs were different i.e. the economic circumstances and contractual terms between the two were fundamentally different in as much as that a.) the assessee received advance

payment against the sales to its AEs whereas a credit period was offered on sales to its non-AEs; b.) the AEs of the assessee were under an obligation to purchase at least 50% of the total production of the assessee and thereby there was a huge difference in the volume of sales between AEs and non-AEs; c.) the assessee was separately reimbursed for the R&D cost along with an appropriate markup and d.) the AEs had granted interest-free ECB loans to the assessee. Since accurate adjustments could not be made to remove the said differences, internal CUP could not be adopted. The Tribunal further observed that the assessee applied TNMM by comparing the profits on transactions with AEs and the non-AEs and no specific defects were pointed out in the allocation of costs in the segmental accounts which were duly reconciled with entity level consolidated accounts.

- vi) On further appeal by Revenue, the Gujarat HC held as under

#### Decision

- i) The Gujarat High Court observed that findings of fact as recorded by the Tribunal could not be termed as perverse or contrary to the evidence on record, since the Tribunal had taken into consideration the voluminous documentary evidence on record for the purpose of coming to the conclusion.
- ii) The Gujarat HC relied on the decision of Delhi High Court in the case of ***Make My Trip India (P.) Ltd. [2017] 399 ITR 297 (Delhi)*** wherein it was held that difference of opinion as to the appropriateness of one or the other method for determining the ALP could not be a subject matter of appeal under section 260A of the IT Act.

## 4

***CIT vs. Visual Graphics Computing Services India (P.) Ltd.****[2020] 120 taxmann.com 123 (Madras)*

A functionally similar comparable could not be rejected merely on the ground that the said comparable follows a different financial year, if, from the available data of the comparable company, results for financial year under consideration could be reasonably extrapolated.

**Facts**

- i) The assessee, an Indian company, and a captive service provider primarily rendered visual aid services and back-office services relating to global finance and accounting in nature of ITeS services, to its AEs. The assessee adopted TNMM to benchmark its international transaction and adopted operating profit/operating cost as its PLI. The assessee concluded its benchmarking by concluding that its standalone profit margin was 11.89% (after seeking adjustment for working capital and risk) as against the comparables weighted average margin of 10.33%.
- ii) During the course of assessment proceedings, the TPO made an adjustment by including/excluding the following comparables resulting in the average margin of comparables being worked @ 16.62%:
  - a. Infosys BPO Ltd – The assessee objected to inclusion of this company on grounds of huge turnover, however, the said objection was rejected by the TPO by placing reliance to the decision of the Delhi Tribunal in case of ***Ameriprise India (P.) Ltd. vs. Asstt. CIT [2015] 62 taxmann.com 237.***
  - b. Cosmic Global Ltd - The assessee objected to inclusion of this company on grounds of functional dissimilarity, however, the said objection was rejected by the TPO by observing that the assessee had originally included this in its TP study report.
  - c. The TPO also excluded certain companies selected by the assessee on account of the fact that the said companies were having different financial years
  - iii) The action of the TPO was upheld by the DRP.
  - iv) The Tribunal by relying on the co-ordinate bench decision in assessee's own case i.e. ***Visual Graphics Computing Services India (P.) Ltd. vs. Asstt. CIT [2017] 79 taxmann.com 178 (Chennai-Trib)*** directed exclusion of Infosys BPO Ltd. (on the reasoning that this company had a huge turnover as compared to the assessee) and Cosmic Global Ltd. (on the reasoning that this company was operating on a different business model i.e. it had a very low employee cost to total cost ratio and it was getting its work done through outsourcing, which impacted its operating margins). Further, the Tribunal also directed the TPO to include those comparables selected by the assessee which were rejected by the TPO solely on account of having different financial years (even though the same were functionally comparable), by placing reliance on the decision of in the case of ***RR Donnelley India Outsource (P.) Ltd. vs. Dy. CIT [2016] 75 taxmann.com 306 (Chennai- Trib)***. The Tribunal also directed the TPO to rework the working

capital adjustment, after considering the value of advances and deposits recoverable in cash or kind and further granted 2% towards risk adjustment on an adhoc basis by placing reliance on **KOB Medical Textiles (P.) Ltd. vs. Dy. CIT[2017] 81 taxmann.com 223 (Chennai- Trib).**

- v) On further appeal by Revenue, the Madras HC held as under:

### Decision

- i) W.r.t inclusion of Infosys BPO Ltd. the Madras High Court placed reliance on the decision of Karnataka High Court in **Pr. CIT vs. Swiss ReGlobal Business Solutions India (P.) Ltd. [2018] 96 taxmann.com 643**, decision of Delhi High Court in case of In **Pr. CIT vs. Symphony Marketing Solutions India (P.) Ltd. [2019] 417 ITR 289 (Delhi)** and decision of Bombay High Court in case of **CIT vs. Principal Global Services (P.) Ltd. 257 Taxman 244 (Bom.)**, and excluded Infosys BPO Ltd. on the reasoning that Infosys BPO Ltd. had a very huge turnover as compared to the assessee.
- ii) W.r.t inclusion of Cosmic Global Ltd, the Madras High Court upheld the order of the Tribunal by observing that the Tribunal had relied on co-ordinate bench decision in assessee's own case to exclude the said comparable. In the said co-ordinate bench decision it was held that Cosmic Global Ltd could not be compared with the assessee, since it was operating on a different business model i.e. it had a very low employee cost to total cost ratio and it was getting its work done through outsourcing, which impacted its operating margins. The Revenue had filed an appeal against the said co-ordinate bench order before the Madras High Court and the said appeal

was dismissed by the Madras High Court since there involved no question of law.

- iii) W.r.t rejection of comparable selected by the assessee having different financial year, the High Court upheld the order of the Tribunal by placing reliance on the decision of the High Court of Delhi in **Pr. CIT vs. Baxter India (P.) Ltd. [IT Appeal No. 260 of 2018, dated 26-7-2018]**, wherein it was held that if from the available data, the results for a financial year can reasonably be extrapolated then the comparable could be excluded.
- iv) W.r.t working capital adjustment and grant of 2% adhoc risk adjustment; the High Court dismissed the said ground since it did not involve any substantial question of law. The Madras High Court placed reliance on the co-ordinate bench decision in the case of **CIT vs. Same Deutz-Fahr India (P.) Ltd. 253 Taxman 32/405 ITR 345**.

## 5

**PCIT vs. Open Solutions Software Services (P.) Ltd.**

[2020]116 taxmann.com 708 (Delhi)

**While applying TNMM, comparables could not be picked on the basis of broad classification under various heads and the actual functional profile of comparable must be similar, if not same, to that of the assessee. Further, merely because a comparable passed through the filters adopted by the TPO, it could not be said that the assessee could not challenge its inclusion in the list of comparables**

### Facts

- i) The assessee, an Indian company, was engaged in the business of development of computer software

and related services which interalia included software development, research and other services to its AE. The assessee benchmarked its international transactions for AY 2010-11, by applying the TNMM and selected 14 comparable companies engaged in software development services. During the course of assessment proceedings, the TPO introduced 4 new comparables namely Wipro Technology Services Ltd, Infosys Ltd, Persistent Systems and Thirdware Solution whose inclusion was affirmed by DRP.

ii) On appeal, the Tribunal directed exclusion of the said comparables by observing as follows:

- a. Infosys Ltd – The Tribunal observed that this company possessed huge tangibles of more than ₹ 1,00,000/- Crores and was a full-fledged risk bearer with a turnover of more than ₹12,000/- Crores, whereas the assessee was a captive service provider and therefore such a giant company could not be compared with the assessee.
- b. Wipro Technology Services Ltd – The Tribunal excluded this company as it failed the RPT filter and there was a pre-arrangement between Citi group and Wipro Ltd, whereby Wipro Ltd. acquired 100% interest in Citi Technology Services.
- c. Persistent Systems & Thirdware Solution – The Tribunal excluded this company on the grounds of functional dissimilarity and absence of segmental information with regard to its earnings and sales in the segment of software development

iii) On further appeal by Revenue, the Delhi HC held as under:

### Decision

- i) W.r.t the plea of the Revenue that a broad similarity in the functions of assessee and comparable is sufficient for the application of TNM method, the High Court rejected the said plea by referring to section 92C(1) and Rule 10B which manifests that in order to ensure a correct estimation of the ALP, it is critical that the entities chosen as comparables are functionally similar to the assessee. The High Court relied on co-ordinate bench decision in case of ***Chrystcapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP]*** and held that if the comparable and the assessee are functionally similar, then the comparable cannot be excluded only on the ground that it is operating on supernormal profits. The High Court observed that the characteristics of the services provided, contractual terms of the transaction indicating how the responsibilities, risks and benefits are to be shared between the parties, conditions prevailing in the markets, the size of the geographical markets, can be some of the factors in respect of which the similarity and dissimilarity has to be evaluated.
- ii) W.r.t the plea of the Revenue that high turnover of the comparable companies cannot ipso facto be a criteria for excluding them unless there is functional dissimilarity, the High Court accepted the said plea of the Revenue and observed that a comparable could not be excluded merely on the ground of high turnover, however, further noted that none of the comparables were excluded solely on the ground of high turnover by the Tribunal, but primarily

on account of the dissimilarity in the overall profile of the said comparables. With respect to the abovementioned comparables, the High Court observed as follows:

a. Infosys Ltd – The High Court observed that the Tribunal had relied on its co-ordinate bench ruling in case of ***Fiserv India Pvt Ltd [TS-313-ITAT-2015(DEL)-TP]***, and the said ruling had been upheld by this Court [TS-437-HC-2016(DEL)-TP] and thereby the said comparable should be excluded.

b. Wipro Technology Services Ltd – The High Court observed that there was a prior agreement between Citi Group and Wipro Ltd and hence was a deemed international transaction u/s 92B(2) Thus, this comparable was no longer an uncontrolled transaction and failed to meet the RPT filter of 25%.

c. Persistent Systems & Thirdware Solution – The HC observed that Revenue had not disputed the factual position that both the companies were engaged in the sale of software products as well as rendering software development services and the segmental information with regard to its software development segment were not available and that the co-ordinate bench in case of ***CashEdge [TS-262-HC-2016(DEL)-TP]*** had upheld exclusion of this comparable for the very same AY 2010-11.

iii) W.r.t the plea of the Revenue that inclusion of comparables could not be challenged once they meet the requisite filters, the High Court rejected the said plea by observing that the use of filters

had to be necessarily validated from the annual reports and therefore the TPO would have the freedom to adopt or reject the comparables even if the said comparables meet the relevant filters.

## B. Tribunal

6

***Giesecke & Devrient [India] Pvt. Ltd. vs. ACIT***

***[2020] 120 taxmann.com 338 (Delhi - Trib.)***

**Rate of dividend distribution tax (DDT) applicable on dividends paid to shareholders by an I Co. under section 115-O of the IT Act, would be restricted to the rates prescribed under the respective DTAA (India-Germany DTAA in the present case) for a non-resident shareholder**

### Facts

i) The assessee, an Indian company, was a 100% subsidiary of a German entity. The assessee was engaged in the business of trading in currency verification and processing systems. During the course of assessment proceedings, the AO made certain transfer pricing adjustments and certain corporate tax adjustments, which were upheld by the DRP.

ii) During the course of proceedings before the Tribunal, the assessee raised an additional ground of appeal, whereby the assessee sought extension of the benefit of the lower dividend tax rate of 10% under the India-Germany DTAA qua the dividend paid to its shareholder (a tax resident of Germany) viz-a-viz the dividend distribution tax (DDT) under section 115-O of the IT Act [i.e. 15% plus applicable surcharge and cess].

iii) In relation to the admission of said additional ground, the assessee placed

reliance on the decision of Hon'ble Supreme Court in the case of **National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC)** and contended that the said additional ground was a purely legal issue and thus admissible.

- iv) The Revenue contended that the said issue was never taken before the AO nor before the DRP and it was a *malafide* attempt to distort the proceedings before the Tribunal. Further, the Revenue also argued that the said additional ground was not a pure legal issue but also required verification of facts and that the lower authorities had followed due process of law without denying natural justice to the assessee.
- v) The ITAT held as under:

#### Decision

#### W.r.t admission of the additional ground of appeal

- i) The Tribunal held that similar additional ground was admitted in the case of **Maruti Suzuki India Ltd vs. DCIT (ITA 961/DEL/2015)** vide an interim order dated 31st October 2019. Further, the writ petition filed by the Revenue against the said interim order was also dismissed by the Delhi High Court (WP(C) 1324/2019, order dated 16-12-2019). In view of the same, the Tribunal admitted the additional ground of appeal for adjudication. The Tribunal noted that the issue raised in the additional ground, which required its consideration, was whether the DDT as per section 115-O of the ITA should be restricted to the rate of tax on dividends as provided in the India-Germany DTAA governing non-resident shareholders.

#### W.r.t the merits of the additional ground of appeal

- ii) The Tribunal interpreted section 115-O of the IT Act in the following manner:
  - a. Additional income-tax (i.e. DDT) under section 115-O was a tax on income (which interalia include 'dividend' within its purview under section 2(24) of the IT Act) and the term 'tax' as defined under section 2(43) of the IT Act. Therefore the levy of additional income-tax under section 115-O of the IT Act had its origin in the charging provisions of section 4 of the IT Act.
  - b. DDT was a tax levied on the company and not on its shareholder. Reliance was placed on the decision of Bombay High Court in case of **Godrej & Boyce Mfg. Co. Ltd vs. DCIT [2010] 194 Taxman 203 (Bombay HC)**
  - c. On perusal of the legislative history of section 115-O of the IT Act (i.e. memorandum to Finance Bill 1997, 2003 and 2020), it could be inferred that the intent of collecting DDT from the company, was for the purpose of administrative convenience rather than a legal necessity and was a charge on dividend income. The burden of DDT falls on the shareholders rather than on the company, as the amount of distributed profits available for shareholders stands reduced to the extent of DDT levied.
  - d. The Memorandum to Finance Bill, 2020, explained that the incidence of tax on dividend income was on the payer company and not on the

recipient where it should normally have been, as the dividend was income in the hands of the shareholders and not in the hands of the company. Accordingly, the DDT regime was removed and the classical system of taxing dividend in the hands of shareholders reintroduced.

- e. The IT Act did not provide for a separate adjudication/passing of separate order with regard to adjudication of DDT liability. Further, while the IT Act had provisions for consequences of non-payment of DDT, there was no separate/specific provision in the IT Act for collection and recovery of DDT in default.
- iii) The Tribunal observed that the India-Germany DTAA restricting the tax rate of dividend to 10% was notified vide notification dated 29 November 1996 i.e. prior to the introduction of the DDT regime introduced initially by the Finance Act 1997. The Tribunal also noted the decision of Delhi HC in case of ***DIT vs. New Skies Satellite BV [2016] 68 taxmann.com 8 (Delhi HC)*** wherein it was held that an amendment to the domestic tax law could not be read into the treaty provisions without amending the treaty itself.
- iv) In light of the above, the Tribunal held that DDT was a levy on the dividend distributed by the Indian company and was an additional tax was covered by the definition of tax which was covered by the charging section. The charging section itself was subject to the provisions of section 90 of the IT Act. The liability to DDT under the IT Act which was on the company, may not be relevant when considering the

applicability of rates of dividend tax set out in the DTAA. The generally accepted principles relating to interpretation of DTAA's in light of object of eliminating double taxation did not bar the application of DTAA's to DDT.

- v) Accordingly, the Tribunal held that the DDT levied could not exceed the rate specified in the India-Germany DTAA in respect of dividend (viz. 10%). However, the Tribunal noted the provisions of Article 10(1) and (2) of the India-Germany DTAA (i.e. providing the rate of tax of dividend @ 10%) were not applicable if the beneficial owner of the said dividend income carried on business in the other contracting state (viz. India in the current case) through a PE situated therein (i.e. India). Thus, the Tribunal remitted the matter to the AO for this factual verification.

**Note:**

- i. In the aforesaid case, the Tribunal also adjudicated the following issues:
  - a. W.r.t Transfer Pricing Adjustment in smart cards distribution segment – The Tribunal held that when segmental details were available, then the TPO was not justified in using combined figures of trading and service segments for the purpose of making a transfer pricing adjustment.
  - b. W.r.t Transfer Pricing Adjustment in software development segment – The Tribunal held that the assessee could not be compared with Infosys Ltd and Larsen & Toubro Infotech Ltd, since both the said comparables were operating as a full-fledged risk-taking entrepreneur, whereas the assessee was operating at a minimal risk as

100% services were provided to its AEs.

- c. W.r.t Disallowance u/s 40(a)(i) – The Tribunal held that payment of training expenses, purchase of materials, reimbursement of training expenses and pension were not liable for tax withholding at source, since the said payments were in nature of pure reimbursement of expenses.
- d. W.r.t Disallowance of advance written off – The Tribunal remanded this issue to the AO for examination of the evidences submitted by the assessee.

### ***Sanghvi Foods (P) Ltd. vs. ITO***

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[2020] 117 taxmann.com 322 (Indore - Trib.)

**Where a non-resident sold goods to the assessee, an Indian company, through its group/subsidiary company located in India, a 'business connection' of the said non-resident was established in India and, therefore, the payments made by the assessee to the said non-resident for purchase of goods, were liable for tax deduction at source under section 195 of the IT Act**

#### **Facts**

- i) The assessee, an Indian company, was engaged in the business of manufacturing of wheat products, running of cold storage and running of windmills under its different units. The assessee had purchased spare parts for old machines and flour milling machine from a non-resident (namely Buhler AG).
- ii) The AO issued a notice 201(1)/201(1A), to the assessee to show cause as to why taxes were not withheld under

section 195 of the IT Act. Further, the AO under section 133 of the IT Act, sought certain information from an Indian company namely Buhler India Pvt. Ltd. ('BIPL') and based on the information received from BIPL came to a conclusion that BIPL was working on behalf of the Buhler AG and apart from selling goods in India also provided marketing services to its Buhler AG. Accordingly, the AO held that the non-resident (i.e. Buhler AG) had a 'business connection' in India through BIPL and therefore the profit element embedded in the payments made by the assessee to the non-resident would be taxable in India and thereby taxes were required to be withheld under section 195 of the IT Act.

- iii) Before the CIT(A), the assessee contended that no taxes were required to be withheld since the goods were capital goods in nature and were purchased from Buhler AG on a principal to principal basis. Further, the assessee also argued that BIPL, subsidiary of Buhler AG, had no authority to conclude contract on its own and accordingly, Buhler AG did not have a business connection in India. The assessee placed reliance on the decision of Indore Tribunal in case of ***Hind Energy & Coal Benefication (India) Ltd vs. ITO [2019] 110 taxmann.com 72 (Indore-Trib)***
- iv) The CIT(A) perused the correspondence between the assessee and BIPL, and held that a 'business connection' of Buhler AG was constituted in India through its group/subsidiary company, by observing as follows:
  - a. BIPL was authorised to negotiate, raise quotation, revise quotation

and also confirm an order on behalf of Buhler AG

- b. BIPL provided a combined quotation to the assessee and the assessee had placed the order through BIPL, which had an authority to send quotations and take orders from the assessee
- c. Buhler AG had only raised an invoice only after substantial tasks were carried out by BIPL i.e. processing orders, raising quotations, revising quotations, finalizing terms, confirming the purchase order, etc. Therefore, BIPL had provided vital services to Buhler AG and its role was not restricted to marketing of the product, but to lead the conclusion of the contract for Buhler AG.
- v) The CIT(A) placed reliance on the decision of Privy Council in case of ***CIT vs. Remington Typewriter Co (Bombay) Ltd 5 ITR 177 (PC)***, wherein it was held that a 'business connection' existed when an American Company incorporated a subsidiary company in India to carry on its business in India. The CIT(A) also held that the assessee had failed to furnish tax residency certificate or Form 10F and therefore, reference to DTAA was not required.
- vi) On further appeal, the Tribunal held as under:

### Decision

- i) The Tribunal upheld the order of the CIT(A), by observing that BIPL was providing support service to Buhler AG, which interalia included services in nature of a.) Identifying customers interested in the products; b.) Liaisoning with customers on their requirement and product specification as well as handling customer enquiries relating to the product; c.) Forwarding customer enquiries to Buhler AG and receiving quotation from Buhler AG for the prospective customers.
- ii) In light of the above, the Tribunal held that BIPL being subsidiary/group company of Buhler AG was having a regular business activity in India and apart from the trading business it also regularly provided marketing services to Buhler AG and therefore a 'business connection' of Buhler AG was constituted in view of clause (a), (b) and (c) of Explanation 2 to section 9(1) of the IT Act.
- iii) The decision relied by the assessee in case of Hind Energy & Coal Benefication (India) Ltd (supra) was distinguished, since, in the facts of that case, the agent was a third party and the agent provided services to many other companies, which was not the case of the BIPL.



The world is the great gymnasium where we come to make ourselves strong.

Swami Vivekananda