

[2019] 108 taxmann.com 643 (Pune - Trib.)/[2019] 73 ITR(T) 219 (Pune - Trib.)[07-06-2019]

TRANSFER PRICING : A company considered as comparable not only includes revenues from Software development services but also from I.T. enabled services as well and it goes without saying that I.T. services and I.T. enabled services are as distinct in connotation and nature as north pole is from south pole whereas IT services include software development services, IT enabled services means services rendered with already developed software and as IT and ITeS services are not comparable, assessee rendering only IT services cannot be compared with company which renders both IT and ITeS



[2019] 108 taxmann.com 643 (Pune - Trib.)

IN THE ITAT PUNE BENCH 'C'

Approva Systems (P.) Ltd.

v.

Deputy Commissioner of Income-tax, Pune *

R.S. SYAL, VICE PRESIDENT

AND PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

IT APPEAL NO. 2444 (PUN.) OF 2016

[ASSESSMENT YEAR 2012-13]

JUNE 7, 2019

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 2012-13 - Whether a company considered as comparable not only includes revenues from Software development services but also from I.T. enabled services as well and it goes without saying that I.T. services and I.T. enabled services are as distinct in connotation and nature as north pole is from south pole - Whereas IT services include software development services, IT enabled services means services rendered with already developed software and as IT and ITeS services are not comparable, assessee rendering only IT services cannot be compared with company which renders both IT and ITeS - Held, yes [Para 8] [In favour of assessee]

CASE REVIEW

CIT v. Verizon India (P.) Ltd. [2013] 36 taxmann.com 391/219 Taxman 29/[2014] 360 ITR 342 (Delhi) (para 7) *followed*.

CASES REFERRED TO

CIT v. Tata Power Solar Systems Ltd. [2017] 77 taxmann.com 326/245 Taxman 93/298 CTR 197 (Bom.) (para 5), *Pr. CIT v. Xchanging Technology Services India (P.) Ltd.* [TS-446-HC-2016 (DEL)-TP] (para 5), *CIT v. Mercer Consulting (India) (P.) Ltd.* [2016] 76 taxmann.com 153/[2017] 390 ITR 615 (Punj. & Har.) (para 5) and *CIT v. Verizon India (P.) Ltd.* [2013] 36 taxmann.com 391/219 Taxman 29/[2014] 360 ITR 342 (Delhi) (para 7).

Dr. Sunil Moti Lala, Adv. for the Appellant. **Sandip Kumar R. Salunke** for the Respondent.

ORDER

R.S. Syal, Vice President. - This appeal by the assessee is directed against the order passed by the CIT (A)-13, Pune on 28-07-2016 in relation to the Assessment Year 2012-13.

2. Succinctly, the factual matrix of the case is that the assessee is a wholly owned subsidiary of Approva, US. It provides Software Development Services and Quality Assurance (Testing) Services to its Associated Enterprises (AEs) on exclusive basis as a captive unit. The assessee filed its return declaring total income of Rs. 2.26 crore. The income-tax return was accompanied by the Audit Report in Form No. 3CEB detailing its international transaction of providing software services. The assessee received revenue of Rs. 14.45 crore from rendering software development services. The Transactional Net Marginal Method (TNMM) was applied as the most appropriate method for benchmarking the international transaction with Profit Level Indicator (PLI) of Operating Profit to Total Cost (OP/TC). Such profit rate of the assessee was 14.72%. Certain comparables were chosen with average PLI of 15.03%. This is how, the assessee showed that its international transaction was at ALP. The Assessing Officer (AO) took up the benchmarking analysis at his own. He rejected certain companies from the assessee's list of comparables and introduced certain fresh companies. In this manner, he shortlisted 4 companies with their average operating profit margin at 22.18%. By applying this profit rate as arm's length margin to the assessee's international transaction, the AO made transfer pricing addition amounting to Rs. 1,26,92,794/-. In the first appeal, the Id. CIT (A) made certain adjustments to the average profit margin of comparables. On the basis of the findings given by the Id. CIT (A), the AO passed a consequential order computing average profit margin of comparables at 19.48%. By applying such a profit rate as arm's length margin, the AO has computed transfer pricing addition of Rs. 88,48,944/-. The assessee is aggrieved by sustenance of such an addition.

3. We have heard both the sides and gone through the relevant material on record. The first issue taken up by the Id. AR is against the inclusion of Vama Industries Ltd. in the final set of comparables. In fact, the assessee chose this company as comparable. However, during the course of proceedings before the AO, it was contended that the same should be excluded. This contention did not find favour with the AO. The Id. CIT (A) upheld the inclusion of this company in the final

set of comparables. The Id. AR submitted that this company should be excluded from the list of comparables on several reasons including different functional profile. The Id. DR raised a preliminary objection for non-exclusion of this company putting forth that it was a comparable chosen by the assessee itself and hence it cannot be allowed to resile from its own stand.

4. We are disinclined to sustain the preliminary objection taken by the Id. DR that the assessee should be prohibited from taking a stand contrary to the one which was taken at the stage of the T.P. study or during the course of proceedings before the AO/TPO. It goes without saying that the object of 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 be excluded. There can be no estoppel against the provisions of the Act. Extending this proposition further to the context of the transfer pricing, if an assessee fails to report an otherwise comparable case, then the TPO is obliged to include it in the list of comparables, and in the same manner, if the assessee wrongly reported an incomparable case as comparable in its TP documentation and then later on claims that it should be excluded, then, there should be nothing to forbid it from claiming so, provided the company so originally reported as comparable is, in fact, not comparable. Simply because a company was wrongly chosen by the assessee as comparable, cannot tie its hands in contending before the Tribunal that such a company was wrongly chosen as comparable which, in fact, is not. There is no qualitative difference in a situation where the assessee claims that a wrong company inadvertently included for the purpose of comparison should be excluded and the situation in which the Revenue does not accept a particular company chosen by the assessee as comparable. The underlying object of the entire exercise is to determine the arm's length price of an international transaction. Simply because a company was wrongly considered by the assessee as comparable cannot act as a deterrent from challenging the fact that such a company is actually not comparable.

5. The Hon'ble Bombay High Court in several decisions including *CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93/298 CTR 197 has held that a party is not barred in law from withdrawing from its list of comparables, a company included on account of mistake. Similar view has been taken by the Hon'ble Delhi High Court in *Pr. CIT v. Xchanging Technology Services India (P.) Ltd.* [TS-446-HC-2016 (DEL)-TP] and the Hon'ble Punjab & Haryana High Court in *CIT v. Mercer Consulting (India) (P.) Ltd.* [2016] 76 taxmann.com 153/[2017] 390 ITR 615. In view of the foregoing discussion, we do not find any substance in the preliminary objection taken by the Id. DR.

6. Now we turn to examine the actual comparability of Vama Industries Ltd. Before proceeding to analyze the comparability of this company, it would be befitting to consider the functional profile of the assessee. At the cost of repetition, it is noted that the assessee is engaged in providing software development services and quality assurance (testing) services and the later are also admittedly in the nature of software development services. The nature of services has not been disputed by the AO. We have gone through the Annual report of Vama Industries Ltd. for the year under consideration, a copy of which has been placed on record. Profit and loss account of this company has been set out at page 29 of the Annual report, which indicates revenue from

operations at Rs. 14.01 crore. Bifurcation of such revenues is available in Note no. 20 as Sale of products (Domestic - Rs. 9,55,70,528/- & Export -Rs. Nil) at Rs. 9,55,70,528/- and Other operating revenues (Domestic - Rs. 1,17,40,234/- & Export - Rs. 3,28,66,174/-) at Rs. 4,46,06,408/-. Further bifurcation of 'Other operating revenues' from export is given in Note No. 33 which shows revenue from export of Engineering services at Rs. 3.22 crore and revenues from software development services at Rs. 6.02 lakh. The segmental information of this company has been given at page 50, which deciphers revenues from 'Software development services' at Rs. 3.28 crore, revenue from 'Hardware sales and services' at Rs. 10.21 crore and revenue from 'Metals and minerals' at Rs. 51.19 lakh leading to total consolidated revenue of Rs. 14.01 crore. Thus, it is clear that the revenue from 'Software development service' segment, which has been considered for the purposes of comparison with the assessee's only international transaction of rendering software development services, stands at Rs. 3.28 crore. On perusal of Note no. 33 to the annual accounts of this company as referred to above containing break-up of revenue from 'Software development services' segment, it emerges that revenue from software development services is only a sum of Rs. 6.02 lakh and the entire remaining revenue of Rs. 3.22 crore is from engineering services. There can be no dispute on the proposition that engineering services are quite distinct from software development services in terms of skill, effort and expertise etc. An effective comparison of the assessee's lone software development services can be made only with a company which is also either rendering software development services alone or if it is doing some other activity also, then necessary information for computing operating profit rate from the software development services, can be separately identified. If a company is rendering software development services and also engineering services and further there is no information available from its Annual report to find out the operating profit from the software development services, then such a company cannot be considered as comparable with the assessee rendering only software development services.

7. The Hon'ble Delhi High Court in *CIT v. Verizon India (P.) Ltd.* [2013] 36 taxmann.com 391/219 Taxman 29/[2014] 360 ITR 342 considered a case in which the assessee was engaged in providing marketing services. The AO selected certain companies as comparable which were rendering engineering services. The Tribunal's view in upholding the exclusion of such companies rendering engineering services was upheld by observing that the marketing services cannot be compared with engineering services. Similar ratio applies to the facts of the instant case as well. Whereas the assessee in question is engaged in rendering software development services, it cannot be compared with a company rendering software and technical services, more so, when the percentage of software development services is minuscule, at just 1.86%.

8. It is further pertinent to note that the Directors' report of this company contains 'Segment-wise performance' at page 11, which states that : "As of March 31, 2012 our main reportable segments are Software Development & Services (IT & ITeS) and Product/Hardware Sales & Services". It is, thus overt that the "Software Development & Services" segment of Vama Industries Ltd., which has been considered as comparable not only includes revenues from Software development services but also from I.T. enabled services as well. It goes without saying that I.T. services and I.T. enabled services are as distinct in connotation and nature as north pole is from the south pole. Whereas IT services include software development services, IT enabled services means services

rendered with the already developed software. As IT and ITeS services are not comparable, the assessee rendering only IT services cannot be compared with a company which renders both IT and ITeS. In view of the foregoing discussion, we are satisfied that Vama Industries Ltd. is not a functionally comparable company and the same should be excluded from the list of comparables.

9. The Id. AR submitted that if Vama Industries Ltd. is excluded then its profit margin would fall within +/-5% range and there would be no need to examine other comparables challenged in the instant appeal. In view of our decision on exclusion of Vama Industries Ltd., we do not deem it appropriate to delve into other companies from the angle of comparability.

10. In the final analysis, we set-aside the impugned order and restore the matter to the file of the AO for recomputing the ALP of the international transaction of the assessee of rendering software development services by excluding Vama Industries Ltd. from the final set of comparables.

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

ANIRUDDHA

* In favour of assessee.