

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-1 : NEW DELHI

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.2375/Del/2011
Assessment Year : 2005-06

DCIT,
Circle 16(1),
New Delhi.

Vs.

Tech Books Electronics
Services Pvt. Ltd.,
A-28, Mohan Cooperative
Industrial Estate,
Mathura Road,
New Delhi.
PAN: AAAC6050A

(Appellant)

(Respondent)

Assessee By : Shri C.S. Agarwal, Sr. Advocate &
Shri R.P. Mall, Advocate
Department By : Shri Neeraj Kumar, Sr. DR

Date of Hearing : 26.09.2016
Date of Pronouncement : 28.09.2016

ORDER

PER R.S. SYAL, AM:

This appeal by the Revenue emanates from the order dated 25.2.2011 passed by the CIT(A) in relation to the assessment year 2005-06.

2. The only issue raised by the Revenue through various grounds is against the deletion of transfer pricing addition of Rs.1,14,27,114/- by directing to include M/s Datamatics Ltd. with calibrated OP/TC margin of 1.76% from the list of comparables.

3. Briefly stated, the facts of the case are that the assessee is a 100% subsidiary of Tech Books, US. It is engaged in providing IT enabled data conversion services and also providing marketing, business development/product selling services etc. to its associated enterprises (AEs). The assessee reported an international transaction with receipt of a sum of Rs.19,96,58,147/- on account of 'Software development and customized electronic data.' The assessee applied Transactional Net Margin Method (TNMM) in its Transfer pricing study as the most appropriate method for demonstrating that the international transaction of rendering the services was at arm's length price (ALP). For doing so, the assessee shortlisted 22 companies as comparable and used multiple year data. The AO referred the matter of determination of ALP of the international transaction to the Transfer Pricing Officer (TPO). During

the course of proceedings before the TPO, the assessee submitted a fresh list of 29 (sic 27) comparable companies with an average Operating Profit/Total Costs (OP/TC) at 18.79%. The TPO accepted the other comparables cited by the assessee except for two companies, namely, M/s Tata Services Ltd. and M/s Datamatics Ltd. The mean margin of the remaining comparable companies was determined at 20.51%. By applying this profit margin as a benchmark, the TPO determined the amount of transfer pricing adjustment at Rs.1,14,27,144/-. This amount was added by the AO in the final assessment order. In the first appeal, the Id. CIT(A) deleted the addition by agreeing with the assessee's contention for the inclusion of Datamatics Ltd. with profit margin of 1.76%, which, if included in the profit margin of other comparable companies, would bring the overall arithmetic mean OP/TC within the permissible limit of the assessee's profit margin. The Revenue is aggrieved against the inclusion of Datamatics Ltd. in the list of comparables.

4. We have heard the rival submissions and perused the relevant material on record. It is observed that the TPO excluded Tata Services Ltd. and M/s Datamatics Ltd. from the list of comparables given by the assessee. The Id. CIT(A) directed the inclusion of Datamatics Ltd. by holding that the rejection of Datamatics Limited by the TPO on the ground that it followed an irregular annual pattern, was not tenable particularly when the financial results could have been calibrated so as to coincide with the financial year of the appellant. He found that the assessee had suitably adjusted financial results of Datamatics Limited by which the operating results for the financial year 2004-05 were determined for a period of 12 months. This was held to have been done so as to coincide with the financial year of Datamatics Ltd. with that of the appellant. He also noticed that the assessee computed OP/TC of 1.76% of this company, which was fair and reasonable and in harmony with the established norms and principles. He still further held that the contention of the TPO that the data of Datamatics Limited was not contemporaneous because of irregular annual pattern, was not correct.

Contemporaneous data as referred to in rule 10D(4), in his opinion, did not necessarily mean data pertaining exactly to the same financial year and covering the same period as the international transaction under consideration. He held that 'Contemporaneous' simply meant relating to the same period of time and did not necessarily mean during the same tax year/month. The ld. DR, *inter alia*, raised objection to this finding returned by the ld. CIT(A) that the contemporaneous data can be a period of 12 months even other than the financial year, when the assessee is following the financial year. Without disputing the functional similarity of Datamatics Ltd. with the assessee, he mainly harped on the argument that when data for the same period of an otherwise comparable company is not available or the same cannot be deduced from the audited financial accounts without carrying out any adjustment to such annual accounts, then such a company should be excluded from the list of comparables.

5. Admittedly, Datamatics Ltd. drew its account on the basis of calendar year, whereas the assessee made its account on the basis of

financial year. A valid comparison, in our considered opinion, can be made only if the comparable company has also the same financial year. In this regard, we consider it appropriate to note the relevant part of sub-rule (4) of Rule 10B which provides that: “*the data to be used in analyzing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction had been entered into.*” It is obvious from the language of sub-rule (4) that the comparability of an uncontrolled transaction can be analyzed only with the “*data relating to the financial year*” in which the international transaction has been entered into. In other words, if the tested party has March as year ending, then, the comparables must also have the data relating to the financial year ending 31st March itself. The reasoning given by the Id. CIT(A) in para (v) of the impugned order that the contemporaneous data did not necessarily mean data pertaining exactly to the same tax year/month, in our opinion, is an incorrect interpretation of Rule 10D(4). We feel that for making a valid comparison, it is *sine qua non*

that the data of the comparables must be for the same period as that of the assessee company. In other words, for the assessee having accounts on financial year basis, the comparables also must have the data for that financial year alone. If such a data is not readily available, then, the company *albeit* functionally comparable, disqualifies for inclusion in the list of comparables. Similar view has been taken by the Delhi Bench of the Tribunal in the case of *Mercer Consulting (I) Pvt. Ltd. Vs. DCIT* vide its order dated 6th June, 2014 (ITA No.966/Del/2014). We, ergo, vacate the view point of the Id. CIT(A) on this score.

6. The Id. AR contended that though the year ending of Datamatics Ltd. is different, yet, the assessee collated its data for the financial year 1.4.2004 to 31.3.2005, giving OP/TC at 1.76% from their Annual accounts only, which was placed before the Id. CIT(A). It was claimed that this figure was determined by adopting the figures of quarterly data from the Annual reports of this company, which were adjusted for the financial year ending 31.3.2005.

7. We want to deal with the apprehension expressed by the Id. DR about the difficulty in working the relevant figures for the year ending 31st March, 2005 on the basis of data given by this company. At the cost of repetition, we reiterate that only when correct figures of an otherwise functionally comparable company are possible to deduce for the year ending matching with the assessee, without carrying out any adjustments to such accounts by any interpolation or extrapolation, that it would merit inclusion in the list of comparables. In the otherwise scenario, such a company would automatically go out of the reckoning.

8. There is no dispute that the calculation of OP/TC of Datamatics Ltd. for the current year was entertained by the Id. CIT(A) for the first time, who did not seek comments of the AO/TPO on such calculation. It is further manifest that this calculation was never put up by the assessee before the TPO/AO. As such, we cannot countenance the correctness of such a calculation. Under such circumstances, it would be just and fair if the TPO/AO are given opportunity to ascertain the correctness of such a figure. We order accordingly. The impugned order is, therefore, set

aside and the matter is remitted to the file of the AO/TPO for checking the veracity of the OP/TC of Datamatics Ltd. It is clarified that only if the assessee succeeds in providing the relevant data of this company for the concerned financial year on the basis of the information available from their Annual reports without making any calculations at its own, that the TPO should include this company in the list of comparables by considering its OP/TC on the basis of the financial year ending 31.3.2005. If however, even though its quarterly data is available and can be compiled for the relevant financial year, but the amounts of operating profit or operating cost etc. for the relevant financial year are not directly available without any apportionment or truncation, then this company should not be considered as comparable. Similar view has been taken by the Delhi bench of the Tribunal in *Macquarie Global Services Pvt. Ltd. VS. DCIT* vide its order dated 22.01.2015 in ITA No. 6803/Del/2013.

9. Relying on the mandate of rule 27 of the ITAT Rules, the Id. AR contended that the assessee challenged before the Id. CIT(A) the

exclusion of Tata Services Ltd., along with Datamatics Ltd. Apart from that, the assessee also raised certain other grounds *qua* the transfer pricing adjustment. Since the assessee's profit margin came within the eligible range with the inclusion of Datamatics Ltd., the ld. CIT(A) stopped there and did not deal with other issues challenged before him. The ld. AR argued that if on a fresh examination by TPO/AO, it emerges that Datamatics Ltd. cannot be included in the list of comparables, then the entire exercise of the transfer pricing be restored to the file of the TPO/AO, who will be obliged to determine the ALP afresh without having any regard to the exercise done earlier. The ld. AR contended that in such fresh proceedings, the assessee should be made free to ask for the inclusion of new companies and also the exclusion of the existing companies. This was opposed by the ld. DR.

10. The ld. AR has invoked rule 27 of the ITAT Rules, 1963 for the argument that if Datamatics Ltd. is found by the TPO to be not includible in the list of comparables or if despite its inclusion, the average profit of all the comparables warrants the transfer pricing

adjustment, then the entire exercise of benchmarking be done afresh. This rule with the caption 'Respondent may support order on grounds decided against him' provides that : '*The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him.*' When we consider the language of the rule, it becomes vivid that there is no warrant for the setting aside of the entire proceedings for doing a *de novo* determination. The language of the rule is unambiguous in providing that the respondent has the right to support the order on the grounds decided against him. No decision on an issue challenged before the CIT(A) also amounts to a decision against the appellant. It is but natural that if the CIT(A) deletes the addition on one ground out of several grounds challenged before him, there can be no reason with the assessee to file an appeal against the order of the CIT(A) on the issues not decided, when the ultimate addition has been deleted. Suppose the decision of the CIT(A) on the ground decided in favour of the assessee is reversed in subsequent proceedings, the assessee cannot be rendered without remedy. In such a situation, the

assessee can argue before the tribunal that the issues challenged before the CIT(A), which remained undecided, be adjudicated upon. Then, the tribunal will be duty bound to either decide such issues directly or remit the matter to the lower authorities for adjudication. In no case, the entire assessment can be directed to be redone even on the issues which attained finality and remained undisputed before the CIT(A).

11. Adverting to the facts of the instant case, we find that the assessee simply challenged a few issues of transfer pricing adjustment before the Id. CIT(A) as is apparent from Form No. 35. Some of such issues were not decided by the authority for the reason of relief allowed on the inclusion of Datamatics Ltd. Under such circumstances, when we are sending the examination of Datamatics Ltd. to the TPO/AO and suppose if due to one reason or the other, this company is either not included or after inclusion of its OP/TC, the relief as allowed by the Id. CIT(A) is wiped out or reduced, then the scope of the proceedings be extended to encompass the consideration of other issues which were challenged by the assessee before the first appellate authority, but remained undisposed

off . The ambit of fresh proceedings cannot be extended beyond that. We, ergo, refuse to accept the contention put forth on behalf of the assessee for an altogether *de novo* determination of the ALP of the international transaction. It is hereby directed in the ultimate analysis that the fresh examination in the case of eventuality as discussed above, be confined only to the issues agitated before the Id. CIT(A), which were not dealt with by him. With these observations, we set aside the impugned order and remit the matter to the file of AO for doing the needful as indicated above, after allowing a reasonable opportunity of being heard to the assessee.

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

The order pronounced in the open court on 28.09.2016.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 28th September, 2016.

dk

Copy forwarded to:

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

AR, ITAT, NEW DELHI.