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Bombay High Court

Pr. Commissioner Of Income Tax -7 vs Goldman Sachs (India)Securities ... on 10 June, 2019

Bench: Akil Kureshi

Priya Soparkar

1

6 itxa 30-17-o

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.30 OF 2017

Pr.Commissioner of Income-Tax-7 ... Appellant
 V/s.
 Goldman Sachs (India) Securities Pvt. Ltd. ... Respondent

Mr.Suresh Kumar with Ms.Mohinee Chougule for the
 Appellant.
 Mr.Madhur Agarwal with Mr.Upendra Lokegaonkar i/by M/s
 Mint & Conferers for the Respondent.

CORAM : AKIL KURESHI AND
 S.J.KATHAWALLA, JJ.

DATE : JUNE 10, 2019.

P.C.:-

1. Appeal is admitted for consideration of following substantial question of law:-

"Whether on the facts and in the circumstances of the case and in law, the ITAT was right in holding that the discount on issue of ESOP is allowable as deduction in computing the income under the head profit and gain of the business?"

2. We notice that the revenue has suggested following additional questions:-

Priya Soparkar 2 6 itxa 30-17-o "i. Whether on law and in the facts of the instance case, was the Tribunal right in directing the AO to exclude Motilal Oswal Investment Advisory Pvt. Ltd. from the list of comparables, when the DRP has in this years found that the major source of revenue came from

financial Advisory services and not from any activity of merchant banking. Assessee company itself has reported in its annual report income from operations under the head Advisory fees a fact that has not been controverted by the Respondent company? ii. Whether on law and in the facts of the instance case, was the Tribunal right in directing the AO to exclude Brescon Advisors from the list of comparables, when the DRP has in this years found that the functions performed by this company are broadly similar to the functions performed by tested party. Assessee company itself has reported in its note to accounts that company engages in intermediation and advisory services a fact that has not been controverted by the Respondent company?

iii. Whether on the facts and in the circumstances of the case and in law, the Tribunal vitiated in directing the Assessing officer to exclude Khandwala Securities Limited from the list of comparables, when the DRP has in this year's found that the company engaged in corporate advisory services and function performed by this company are broadly similar to the functions performed by the tested party?

iv. Whether on the facts and in the circumstances of the case and in law, the Tribunal vitiated in directing the Assessing officer to exclude Sundaram Finance distribution Ltd from the list of comparables Priya Soparkar 3 6 itxa 30-17-o when the DRP has in this years found that the functions are akin to the investment advisory services?

v. Whether on law and in the facts of the instance case, was the Tribunal right in directing the AO to exclude Integrated Capital Service Ltd from the list of comparables, when the DRP has in this year found that this company was adopted as a comparable by the assessee itself in its TPSR a fact that has not been controverted by the Respondent company?

vi. Whether on law and in the facts of the instance case, was the Tribunal right in directing the AO to exclude Axis Private Equity Ltd from the list of comparables, when the DRP has in this years found that the functions performed by this company are broadly similar to the functions performed by tested party?

vii. Whether on the facts and in the circumstances of the case and in law, the ITAT was right in holding that the penalty was on account of irregularities committed by the assessee's client without appreciating the facts that non compliance to clearing house trades and trades and client code modification are default attributable to the assessee company majorly and not to its client?"

3. All these questions arise out of transfer pricing adjustment in case of the respondent-assessee. In so far as question No.i is concerned, the Tribunal excluded the instance of one Motilal Oswal Investment Advisory Private Limited on the ground that the said company was Priya Soparkar 4 6 itxa 30-17-o carrying on business of mergers and acquisitions and other related activities as well as, as a merchant banker, whereas the assessee was providing Investment Advisory Services. Learned counsel for the revenue however contended that the Transfer Pricing Officer had recorded that during the year under consideration Motilal Oswal had earned income only from Advisory fees and not from any activity of merchant banking. According to him, therefore, the Tribunal committed an error in discarding Motilal Oswal as a comparable.

4. We notice that similar issue had come up for consideration before the Tribunal in case of Carlyle India Advisors (P.) Ltd. Vs. Deputy Commissioner of Income-tax, 10(1), Mumbai1. The Tribunal considered the instance of Motilal Oswal and discarded the same relying on the earlier decision in case of the very same assessee in which the Tribunal had inter-alia observed that the profit and loss account appears to be only consolidated account. The company is registered 1 (2014) 49 taxmann.com 476 (Mumbai -Trib.) Priya Soparkar 5 6 itxa 30-17-o with SEBI as a merchant banker. It was further observed that the said company was engaged in merchant banking. This view has been confirmed by this Court in series of judgments for example:- Principal Commissioner of Income Tax Vs. NVP Venture Capital India (P.) Ltd.1. This question is therefore, not considered.

5. In relation to question No.ii, we notice that the Tribunal had cited proper reasons for discarding this comparable. It was noticed that the audit report of Brescon Advisors shows that its income is earned from debt realization and debt syndication. The company also makes significant investments using its

own funds. The Tribunal relied on its earlier decision holding that the company which mostly uses its own investments cannot be compared with the present case. The Tribunal also observed that overall profile of the company was not functionally similar. We are broadly in agreement with the view of the Tribunal. The Tribunal has cited proper 1 (2018) 100 taxmann.com3 (Bombay) Priya Soparkar 6 6 itxa 30-17-o reasons by discarding Brescon Advisors Private Limited as a comparable.

6. In so far as question No.iii is concerned, the Tribunal noted that in case of Khandwala Securities the overall operations included Investment Banking Corporation Advisory Services, Institutional Banking etc.. The annual report of the company showed that its performance was affected by global crises and resultant market melt down. These were the distinguishing features noticed by the Tribunal. The Tribunal also noted that the DRP also admitted the said company also engaged is corporate advisory services for which separate segmental are available. Primarily, on these grounds, the Tribunal discarded the said instance. We see no error in view of the Tribunal.

7. In so far as question No.iv is concerned, it pertains to the instance of one Sundaram Finance Distribution Limited. In this case we notice that the Tribunal recorded that this company had no employees and Priya Soparkar 7 6 itxa 30-17-o had outsourced its activities. In similar circumstances, in case of Aptara Technology the Tribunal had found that the said was not comparable. The issue had traveled to the High Court at the hands of the revenue. This Court in case of [Principal Commissioner of Income-tax-1 vs. Aptara Technology \(P.\) Ltd.](#)¹ rejected the revenue's appeal. Without recording separate reasons, therefore, this question is not considered.

8. In so far as question No.v is concerned, it pertains to one Integrated Capital Service Limited. The DRP refused to exclude the said company only on the ground that same was included by the assessee in its transfer pricing study. The Tribunal was of the opinion that this cannot be a ground to bind the assessee. It was open for the assessee to bring correct facts on record and claim the exclusion of the said instance.

9. This view has been consistently taken by this Court in several orders. No question of law in this respect 1 (2018) 92 taxmann.com 240 (Bombay) Priya Soparkar 8 6 itxa 30-17-o therefore arises.

10. The question No.vi pertains to an instance of one Axis Private Equity Limited. In this context, the Tribunal noted that the said company was engaged in managing directly or indirectly investment in mutual fund, venture capital fund etc. It was noticed that the company had acted as Investment Manager of Axis Infrastructure fund and its related party transactions were more than 90%. The Tribunal therefore, held that this company was functionally different from the assessee-company and was therefore, excluded from the comparable. In that view of the matter, no question of law arises.

11. The question No.vii pertains to disallowing an expenditure which the revenue argues was in the nature of penalty. We notice that similar issue was considered by this Court in case of The Income Tax Commissioner Mumbai City-4 Vs. Angel Capital & Debit Market Ltd. (Income Tax Appeal (L) No.475 of 2011) in the order dated 28th July, 2011, following question was Priya Soparkar 9 6 itxa 30-17-o examined:-

"Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the disallowance made by the Assessing Officer of claim of the Assessing Company for a deduction of payment of Rs.6,51,240/- towards penalty paid to Stock Exchange even though the penalty payment was clearly disallowable under Explanation to [Section 37\(1\)](#) of the Income Tax Act?"

12. The question raised by the revenue was rejected making following observations:-

"3. As regards question (C) is concerned the finding of fact recorded by the ITAT is that the amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments were not on account of any infraction of law and hence allowable as business expenditure. In such a case the explanation to section 37 would not apply. Accordingly question (C) raised by the Revenue cannot be entertained."

In that view of the matter, this question is also not entertained.

13. Admission of the appeal is thus confined to the sole question of law framed.

Priya Soparkar 10 6 itxa 30-17-o

14. Learned counsel Shri Agarwal waived notice of admission.

15. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

(S.J.KATHAWALLA, J.) (AKIL KURESHI, J.)