

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "B" NEW DELHI)
BEFORE SHRI G.D. AGRAWAL, HON'BLE VICE-PRESIDENT AND
SHRI RAJPAL YADAV: HON'BLE JUDICIAL MEMBER

ITA Nos. 3268 & 4354/Del/2010

Assessment Years: 2005-06 & 2006-07

Concerto Software India Pvt. Ltd. (Now Aspect Contact Centre Software India Pvt. Ltd), 2 nd Floor, Commercial Tower, New Delhi (PAN: AABCD4039Q) (Appellant)	vs.	Assistant CIT, Income-tax Circle-1, New Delhi. (Respondent)
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Appellant by: Shri GC Srivastava, Adv.
Respondent by: Shri Vikas Suryavanshi, Sr. DR

ORDER

PER RAJPAL YADAV: JUDICIAL MEMBER

In assessment year 2006-07, assessee is challenging the assessment order passed under section 143(3) read with section 144C of the Income-tax Act, 1961 on 29.06.2010. In assessment year 2005-06, assessee is challenging the order of the Learned CIT(Appeals) dated 1.5.2010. We have heard both the appeals together and deem it appropriate to dispose them of by this common order.

2. First, we take the appeal of the assessee in assessment year 2006-07. The brief facts of the case are that the assessee company is engaged in the business of software marketing and support services. It has filed its return of

income on 29.11.2006 declaring an income of Rs.62,49,160. It was accepted under section 143(1) on 31.10.2007. However, subsequently, the case of the assessee was selected for scrutiny assessment and a notice under section 143(2) dated 10.10.2007 was issued and served upon the assessee. Assessing Officer had thereafter issued notice under sec. 142(1) of the Act. On scrutiny of accounts, it revealed to the Assessing Officer that the assessee is a subsidiary of Concerto Inc. USA. It has been providing sales support service to the clients of its parent company. It had undertaken international transaction in respect of purchase of computer software having value of Rs.3,55,10,470 and rendered support service of having value of Rs.268,65,264. In order to benchmark the international transaction, assessee has adopted transactional net margin method with operating profit earned on total cost as the profit level indicator. Assessing Officer had made reference to the learned TPO to determine whether assessee has adopted arm's length price in respect of its transaction entered with the A.E. Learned TPO has passed an order under sec.92CA(3) on 23.10.2009 and observed that the assessee has reported PLI of 12.16% (O.P. Over TC) whereas the average PLI of the comparables is 28.82%. In this way, learned Assessing Officer has observed that there is a difference of Rs.92,63,786 which required to be added in the value of international transaction. Accordingly, she made the

recommendations. Learned Assessing Officer has passed the draft assessment order whereby he accepted the recommendations made by the TPO. The assessee has filed objections. Learned DRP without referring the objections of the assessee upheld the draft assessment order and issued the directions accordingly. The relevant discussion in the order of the learned DRP reads as under:

“2.3 We have considered the arguments of the assessee company. The TPO has given detailed reasons in the order u/s. 92CA(3) for computing the Arm’s Length Price of the International transactions. The TPO has given detailed reasons for considering the current year data of comparables. The reasoning of applying various filters has been discussed in detail. The TPO has observed that the claim of assessee for the ad hoc adjustment on account of risk cannot be accepted because the assessee could not exhibit difference in its own risk matrix and that of comparables, which require risk adjustments. The TPO has therefore computed the OP/TC of the assessee company at 28.82% after computing the average OP/TC of the two comparables. The upward adjustment of Rs.92,63,786 on the International Transactions, as computed by the TPO and Assessing Officer is quite reasonable and we find no compelling reasons to interfere with the same”.

3. The learned counsel for the assessee at the very outset submitted that the issue deserves to be set aside to the file of the learned DRP because

learned DRP failed to look into the objections filed by the assessee in 55 pages. He emphasized that the assessee has filed specific objections as to how Jetking InfoTrain Ltd. is not a comparables. He pointed out that this company is entirely engaged into providing computer training services, hence, its result cannot be compared with that of the assessee. Similarly, assessee has pointed out as to how Reliance Infra-structure and Consultant Ltd. could not be compared with the activities of the assessee. Learned D.R.P. has not made any reference about these objections of the assessee. Accordingly, he prayed that the issue be set aside to the file of the learned D.R.P. for readjudication. Learned D.R. on the other hand relied upon the order of the learned TPO and pointed out that all these objections have been looked into by the TPO and learned D.R.P. has accepted the order of the learned T.P.O. for the reasons assigned therein.

4. We have duly considered the rival contentions and gone through the record carefully. On perusal of page Nos. A30 to A37, we find that the assessee has filed detailed objections on selection of two comparables i.e. Jetking Infratrains and Reliance Infra-structure Consultants. Learned D.R.P. has not made any reference in the impugned order extracted supra about the objections of the assessee, thus, the order of the learned D.R.P. cannot be

termed as a speaking order. The assessee has submitted objections running into many pages but learned D.R.P. has just summarize the issue in paragraph No.2.3 in few lines. In other paragraphs, learned D.R.P. has just noticed the facts of the case. Thus, in our opinion, the order of the learned D.R.P. deserves to be set aside.

5. In view of the above discussion, appeal of the assessee for assessment year 2006-07 is allowed for statistical purposes and all the issues are restored to the file of the learned D.R.P. for fresh adjudication. It is needless to say that the observations made by us will not impair or injure the case of A.O. or would not cause any prejudice to the defence/explanation of the assessee. The assessee will be at liberty to submit any explanation as well as any material in support of its contentions. Learned D.R.P. shall provide due opportunity of hearing to the assessee.

6. In the appeal for assessment year 2005-06, the solitary grievance of the assessee is that Learned CIT(Appeals) has erred in upholding the disallowance of Rs.1,14,51,811.

7. The brief facts of the case are that assessee has filed its return of income on 31.10.2005 declaring an income of Rs.54,82,249. The case of the assessee was selected for scrutiny assessment and a notice under sec. 143(2) dated 12.6.2006 was issued and served upon the assessee. In response to the notice of hearing, Shri JS Sahni, CA appeared before the Assessing Officer from time to time and submitted the details. On scrutiny of the accounts, Assessing Officer found that there is a fall in the net profit ratio during the year as compared to the net profit in the earlier years. He found that in assessment year 2004-05, assessee has shown net profit at Rs.66.85% whereas in the present year, net profit has been reported at 10.87%. On an analysis of the record, learned Assessing Officer found that though turnover is decreased in comparison to last year but expenses on account of salary and wages, telephone, bonus and customers seminars have increased significantly as compared to previous year figure. He confronted the assessee to explain why there is no reduction in the expenditure. Before adverting to the explanation of the assessee, we deem it appropriate to take note of the revenue recognized by the assessee in assessment years 2004-05, 2005-06 and the various expenses debited in the P & L account as well as the amounts disallowed by the Assessing Officer. Such details have been

placed before us in a tabular form by the learned counsel for the assessee.

They read as under:

INCOME	A.Y. 2004-05 AMOUNT (RS)	A.Y. 2005-06 AMOUNT (RS)
Commission earned on sale of software	32,486,157	29,015,048
Rendering of support services	20,414,808	23,969,395
Maintenance revenue	35,330,743	Nil
Total income	88,231,709	52,984,443

Expenses	A.Y. 2004-05 (A)	A.Y. 25005-06 (B)	Amount disallowed (B)- (A)
Salary & Wages	7,670,073	11,621,336	3,951,263
Telephone	2,715,976	6,557,519	3,841,543
Bonus	Nil	2,121,551	2,121,551
Customer Seminars	Nil	1,537,454	1,537,454
			11,451,811

8. The assessee has submitted before the Assessing Officer vide reply dated 12.12.2008 that assessee company was incorporated on 23.10.2001 as a subsidiary of Concerto Software Inc, USA. The parent company is engaged in the business of development of computer software and the assessee company acts its sale and support entity in India. In this year, there

is a change in the policy of recognizing income due from its parents company. Up to March 31,2004, the assessee company was recognizing a part of sales which were marketed by the support team of the assessee company. However, towards the end of fiscal year 2005 and thereafter the parent company was in process of restructuring its operations and the role performed by the assessee got restricted to conducting limited marketing activity in India and support in relation to implementation of the software, thus, there was a fall in the profitability. Learned Assessing Officer observed that on perusal of employees list, it reveals that certain employees were engaged in providing maintenance services. In this year, all the employees who were working in the company in assessment year 2004-05 were also working. The assessee has hired four new employees also but there is no revenue from maintenance services. Thus, there is no justification for increase in the number of employees when the operations of the company are being curtailed. The Assessing Officer confronted the assessee to explain the situation, the reply was to be filed up to 26.12.2008. Assessing Officer has observed that no reply was filed and accordingly he disallowed a sum of Rs.1,14,51,811 out of the various expenses.

9. Appeal to the learned CIT(Appeals) did not bring any relief to the assessee.

10. With the assistance of learned representatives, we have gone through the record carefully. The explanation of the assessee is that no payments were made to the persons who are specified under section 40A(2)(b) of the Act. Assessing Officer nowhere conclusively held that the expenses were found to be bogus. The income of the assessee has been accepted by the learned TPO as being on arm's length basis. Thus, the Assessing Officer has made the addition merely on estimates. On the other hand, Learned DR pointed out that the details in itself suggests that assessee has no justification for claiming such higher expenditure, when its turnover has been reduced drastically. We have considered these submissions and perused the record. It reveals from the assessment order that Assessing Officer has first time confronted the assessee on 2nd of December, 2008. It was supposed to file reply by 10.12.2008. The assessee has filed the reply on 12.12.2008. Again the Assessing Officer raised the query on 24.12.2008 and directed the assessee to explain by 26.12.2008. In this short period, assessee could not submit the reply and the Assessing Officer accordingly passed the assessment order before 31.12.2012, though the date of order is not discernible from the assessment order. But in any case, the limitation was up

to 31.12.2012. Looking into this aspect, we are of the view that sufficient opportunity was not granted to the assessee by the Assessing Officer. He has just provided two days time for explaining its position. Therefore, we set aside the orders of the Revenue Authorities Below and remit this issue to the file of the Assessing Officer for readjudication.

11. In the result, both the appeals are allowed for statistical purposes.

Decision pronounced in the open court on 18.05.2012

Sd/-
(G.D. AGRAWAL)
VICE-PRESIDENT

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Dated: 18 /05/2012
Mohan Lal

Copy forwarded to:

- 1) Appellant
- 2) Respondent
- 3) CIT
- 4) CIT(Appeals)
- 5) DR:ITAT

ASSISTANT REGISTRAR