

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 28TH DAY OF AUGUST 2018

PRESENT

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MRS.JUSTICE S.SUJATHA

I.T.A. No.495 /2017

BETWEEN:

1. The Pr.Commissioner of Income-tax
5th Floor, BMTC Building,
80 feet Road, Koramangala,
Bengaluru 560 095
2. The Deputy Commissioner of Income-Tax,
Circle-3(1)(2),
2nd Floor, BMTC Building,
80 Feet Road, Koramangala,
Bengaluru 560 095

...APPELLANTS

(By Mr. Dilip Adv., for K.V. Aravind, Adv.)

AND:

M/s Goldman Sachs Services Pvt. Ltd.,
Crystal Downs, Embassy Gold Links,
Business Park, Off: Intermediate Ring Road,
Bengaluru 560 071
PAN: AACCG 2435N

...RESPONDENT

(By Mr. SANDEEP HUILGOL FOR T SURYANARAYANA,
ADV.)

THIS I.T.A. IS FILED UNDER SECTION 260-A OF THE IT ACT, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW; ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, BANGALORE IN IT (TP)A NO.267/BANG/2015 DATED 06.01.2017 ANNEXURE-D AND CONFIRM THE ORDER OF THE DRP CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE-3(1)(2) , BENGALURU.

THIS I.T.A. COMING ON FOR HEARING THIS DAY,
S. SUJATHA J. DELIVERED THE FOLLOWING:-

JUDGMENT

Mr.K.V. ARAVIND FOR DILIP, Adv. for Appellants- **Revenue**
Mr. SANDEEP HUILGAL FOR T SURYANARAYANA,
Adv. for Respondent - **Assessee**

1. The Appellants-Revenue have filed this appeal **u/s.260A** of the Income Tax Act, 1961, raising purportedly certain substantial questions of law arising from the order of the **ITAT, 'A' Bench, Bangalore**, dated **06.01.2017** passed in **IT(TP) A No.267 /Bang/2015** (*Goldman Sachs Services P. Ltd., vs. Deputy Commissioner of Income-tax*) for **A.Y.2010-11**.

2. This appeal has been admitted on 17.01.2018 to consider the following substantial questions of law

framed in the Memorandum of appeal by the Appellants-Revenue are quoted below for ready reference:-

1) *Whether on the facts and in the circumstances of the case, the Tribunal is right in law in setting aside the disallowance made under section 14A read with Rule 83(2) (iii) of the Act by holding that neither assessing authority nor Dispute Resolution Panel has recorded specific finding as to whether the assessee has incurred specific expenditure or not even when the ingredients of section 14A are satisfied in the case of the assessee and the assessing authority has categorically specified the expenditure for such disallowance?"*

2) *Whether on the facts and in the circumstances of the case, the Tribunal is right in law in setting aside the directions of the DRP with regard to comparables, namely, ICRA online, Infosys BPO and Micro Land Limited even when the decisions relied upon by the Tribunal has not reached finality and*

all the required tests are satisfied with regard to aforesaid comparables?”

3) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in directing the Transfer Pricing Officer to grant Market Risk Adjustment without appreciating the risk adjustment involves two vital pre-conditions i.e., with regard to difference in risk level exist between tested party and the uncontrolled comparables which is possible to calculate in terms of numbers and the adjustment can be made in such circumstances only and in the present case both the aspects were not established by the assessee?

4) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in directing the Transfer Pricing Officer to exclude M/s Accentia Technologies Limited as comparable by following its earlier decision in the case of M/s ISG Nova Soft Technologies ssLimited which has not reached finality even when the said comparable satisfies qualitative and quantitative filters”?

3. The learned Tribunal, after discussing the rival contentions of both the Appellants-Revenue and the Respondent-Assessee, has given the following findings:-

Regarding substantial question of law No.1:-

“13. We have heard rival submissions. The fact remains that assessee’s investment as on 31.3.2009 was at Rs.1,51,46,000/- which remained so as on 31.3.2010 also. It responded to the AO saying that it has not earned any exempt income, no expenditure is incurred in relation to tax exempt investments and hence, disallowance u/s 14A rw Rule 8D is not warranted. Neither the AO nor the DRP recorded specific finding as to whether the assessee incurred specific expenditure(s) or not. There is not even an attempt to say what has happened on this issue in the earlier year (s) or in the subsequent year (s). In view of the facts and circumstances, the attempt to say what has happened on this issue in the earlier year (s) or in the subsequent year (s). In view of the facts and

circumstances, the impugned addition is deleted and the corresponding appeal ground is allowed.”

4. The controversy involved regarding this issue is squarely covered by the recent Judgment of this Court in ITA No. 342/2016, dated 12.6.2018 in the case of **The Pr. Commissioner of Income Tax & another Vs. M/s Advaith Motors Pvt. Ltd.**, whereby considering the arguments of both learned counsel appearing for the parties, it has been held that no substantial question of law required for further consideration by this Court. The relevant portion of the judgment is quoted herein for ready reference:

“ 4. Learned counsels at the bar brought to our notice that the said controversy is no longer res integra and the Division Bench of this Court in two matters has already held in favour of the assessee that the disallowance under Rule-8D of the Rules r/w Section 14A of the Act cannot exceed the expenditure directly relatable to earn the exempted

income in the form of 'Dividend' as computed in accordance with Rule-8D of the Rules.

5. *The relevant portions of the following two judgments are quoted below for ready reference:-*

(i) **Commissioner of Income Tax & Anr. Vs. Microlabs Ltd., [2016] 383 ITR 490 (Karn).**

"39. Aggrieved by the order of CIT(A), the assessee has raised ground No.2.

*40. We have heard the rival submissions. A copy of the availability of funds and investments made was filed before us which is at pages 38 to 42 of the assessee's paperbook and the same is enclosed as **ANNEXURE-III to this order**. It is clear from the said statement that the availability of profit, share capital and reserves & surplus was much more than investments made by the assessee which could yield tax free income.*

41. The Hon'ble Bombay High Court in Reliance Utilities & Power Ltd. 313 ITR 340 (Bom) has held that where the interest free funds far exceed the value of investments, it should be considered that investments have been made out of interest free funds and no disallowance u/s.

14A towards any interest expenditure can be made. This view was again confirmed by the Hon'ble Bombay High Court in CIT v. HDFC Bank Ltd., ITA No.330 of 2012, judgment dated 23.7.14, wherein it was held that when investments are made out of common pool of funds and non-interest bearing funds were more than the investments in tax free securities, no disallowance of interest expenditure u/s. 14A can be made.

42. In the light of above said decisions, we are of the view that disallowance of interest expenses in the present case of Rs.49,42,473 made under Rule 8D(2)(ii) of the I.T. Rules should be deleted. We order accordingly."

*The aforesaid shows that the Tribunal has followed a decision of the Bombay High Court in the case of **CIT v. HDFC Bank Ltd., (ITA No.330/2012 disposed of on 23/7/2014)**. When the issue is already covered by a decision of the High Court of Bombay with which we concur, we do not find any substantial question of law would arise for consideration as canvassed.*

6. In view of the above observations, the appeal is dismissed."

(ii) ***M/s.Pragathi Krishna Gramin Bank vs. Joint Commissioner of Income Tax (ITA Nos.100001/2018 & 100002/2018*** decided by the Division Bench of this Court at Dharwad Bench (**in which, one of us, Justice Vineet Kothari was a party**) also, the Court held in favour of the assessee in the following terms:-

“13. The manner in which the aforesaid disallowance has been made by the assessing authority and has been upheld by the appellate authorities leaves much to the desired and the same cannot be sustained and therefore the matter deserves to be remanded back to the Assessing Authority.

14. We make it clear that the expenditure for earning exempted income has to have a reasonable proportion to the income, so earned, going by the common financial prudence. Therefore, even if the Assessing Authority has to make an estimate of such an expenditure incurred to earn exempted income, it has to have

a rational nexus with the amount of income earned itself. Disallowance under Section 14A of Rs.2,48,85,000/- as expenses to earn exempted Dividend income of Rs.1,80,30,965/- is per se absurd and hypothetical. The disallowance under Section 8D cannot exceed the expenses claimed by assessee under the Proviso to Rule 8D. Therefore, where the assessee claimed that assessee did not incur any such expenditure during the year in question to earn Dividends of Rs.1,80,30,965/-, the burden was upon the assessing authority to compute the interest on such borrowed funds which were dedicatedly used for investment in securities to earn such exempted Dividend income. The disallowance under Section 14A cannot be a wild guesswork bereft of ground realities. It has to have a reasonable and close nexus with the factually incurred expenses. It is not deemed disallowance under Section 14A of the Act but an enabling provision for assessing authority to compute the same on the given facts and figures in the regularly maintained Books of Accounts. The assessing authority also could not have called upon the Assessee himself to undertake the exercise of computing the disallowance under Section 8D of the Rules. Such abdication of duty

in not permissible in law. Since no such exercise has been undertaken by the assessing authority, the case calls for a remand.

15. In this view of the matter, the findings of all the three authorities below for Section 14A of the Act are set aside and the matter is remanded back to the Assessing Authority for re-computing the disallowance of expenditure, if any, under Section 14A of the Act, in accordance with law.”

5. In view of the aforesaid two decisions, we do not find any substantial questions of law arising in the present appeal requiring our further consideration. The order passed by the learned Tribunal in this regard is therefore confirmed.”

Regarding substantial questions of law Nos.2 and 5 :

“06. Grounds No.4 & 7 of the Revcenue are against the DRP’s direction to the TPO to exclude ICRA online Ltd., Infosys BPO Ltd & Microland Ltd as comparables. In this regard the relevant portion of the DRP directions are extracted as under:

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07. The AR submitted that the assessee earns 99.88% of its revenue from export, the TPO has applied export filter of 75% for both software and iTES segment in ay2008-09, he has to be consistent, the DRP also upheld 75% export filter in AY 2009-120 etc. We have considered the rival submissions, gone through relevant orders, material and find that the DRP's above decision to exclude ICRA online Ltd and infosys BPO Ltd., as a comparable is justified on the basis of the ratios of the cases relied on/supra, and hence confirm it. On Mircroland Ltd., the AR submitted that the DRP, suo moto, directed the TPO to exclude it as a comparable. It is submitted that export information for the said company is available which is more than 75% of the total revenue. The segment information for the ITES services is also available in the audited financial statement which should also be considered for the inclusion and relied on the cases law reported in ISG Novasoft Technologies Ltd in IT in IT NO.185(B)/2015) a y 2010-11(Bangalre ITAT). The relevant portion of that order is extracted as under:

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Following the above decision, we set aside the directions of the DRP in this regard and direct the TPO to consider M/s Microland Ltd., as a good comparable for the purpose of analyzing the pricing of the international transaction undertaken by the assessee. Thus, appeal ground nos 4 & 7 of the Revenue are partly allowed. Assessee's appeal ground no.4.4 is allowed.

08. With regard to Accentia Technologies Ltd., the AR submitted that it is functionally different from it as that company is also engaged in medical coding which is a niche function requiring understanding of medical terminologies. Further, it is also engaged in KPO services including legal process outsourcing, and high end software services and also operates from onsite locations in US, UK, and Middle east. No segmental information is reported by that company in its financial statement, it owns IPs and during the year it amalgamated with Asscent Infoserve and relied on the following cases:

- *ISG Novasoft Technologies Ltd (IT No.185(B).2015) AY 2010-11 (Bangalore ITAT)*
- *Amba Research (India) Private Limited (IT no.286/Bang/201S) (AY 2010-11) (Bangalore ITAT)*
- *Goldman Sachs Services P Ltd Vs DCIT (IT(TP) A No.1659/B/2012 (AY 2008-09) (Bangalore ITAT)*
- *Ramapgreen Solutions Pvt. Ltd. (ITA No.1066/Del/2015) (AY 2008-09) (Delhi High Court).*

09. The relevant portion of the order from ISG Novasoft Technologies Ltd., in IT No.185(B)2015) a y 2010-11(Bangalore ITAT) is extracted under:

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Following the above decision, we direct the TPO to exclude Ms Acentia Tech Ltd., from the list of comparables, while analyzing the pricing of the international transaction undertaken by the assessee in the ITES segment. Thus appeal ground no. 4.2 of the assessee's appeal is allowed.

Regarding substantial question of law No.3

“10. The next issue is on the Working Capital Adjustment:

The Revenue objected to the restriction of working capital adjustment to the 1.01% as against the actual working capital adjustment carried out by TPO at 2.23%. The TPO has in principle agreed to the claim of the assessee for granting the working capital adjustment and has consequently granted the same. However, it is seen that the working capital adjustment was restricted to 1.01% which is the average cost of capital of the comparable selected by the TPO. In this regard, the DRP has held as under:

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The assessee relied on the decision of this Tribunal in Moong Controls India P Ltd., ITA 551/Bang/2015 ay 2010 dt 27.11.2015, wherein this Tribunal directed the TPO to allow actual adjustment towards the differences in the working capital position between the assessee and the entrepreneurial companies selected as comparable. We direct the TPO to follow this

decision. Thus Revenue's appeal ground nos 5 and 6 are dismissed. ”

8. However, this Court in a recent judgment in **ITA No.536/2015 C/w ITA No.537/2015** delivered on **25.06.2018 (Prl. Commissioner of Income Tax & Anr. Vs. M/s. Softbrands India Pvt. Ltd.,)** has held that in these types of cases, unless an *ex-facie* perversity in the findings of the learned Income Tax Appellate Tribunal is established by the appellant, the appeal at the instance of an assessee or the Revenue under **Section 260-A** of the Act is not maintainable.

The relevant portion of the said judgment is quoted below for ready reference:

“ Conclusion:

55. *A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the Treaties over the Domestic*

*Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could be raised before the High Court under **Section 260-A** of the Act, the Courts could have embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.*

56. We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law do not meet the requirements of **Section 260-A** of the Act and thus the appeals filed by the Revenue are found to be devoid of merit and the same are liable to be dismissed.

57. We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assessee, because, there may be cases where the Tribunal giving its own

*reasons and findings has found certain comparables to be good comparables to arrive at an 'Arm's Length Price' in the case of the assesseees with which the assesseees may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not at all a sufficient reason to invoke **Section 260-A** of the Act before this Court.*

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs."

9. Having heard the learned counsels for the parties, we are therefore of the opinion that no substantial question of law arises in the present case also. The appeal filed by the Appellants-Revenue is liable to be dismissed and it is **dismissed** accordingly.

No costs

**Sd/-
JUDGE**

**Sd/-
JUDGE**