

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15<sup>TH</sup> DAY OF JANUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

**I.T.A. NO.681 OF 2015**

BETWEEN:

1. THE PR. COMMISSIONER OF INCOME TAX  
C.R. BUILDING, QUEENS ROAD  
BANGALORE-560001.
2. THE DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-11(1), NEW DELHI.

... APPELLANTS

(BY SRI. T.N.C. SRIDHAR, ADV.,)

AND:

M/S. EDS ELECTRONICS DATA  
SYSTEMS INDIA PVT. LTD.,  
[NOW MERGED WITH MPHASIS LIMITED]  
ABACUS SQUARE, 6TH FLOOR  
BLOCK-A, BAGMANE PARIN  
BAGMANE TECHNOLOGY PARK  
C.V. RAMAN NAGAR  
BANGALORE-560093  
PAN: AAACB 6820C.

... RESPONDENT

(BY SRI. SURYANARAYANA T, ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX  
ACT 1961, ARISING OUT OF ORDER DATED 23.06.2015 PASSED  
IN ITA NO.5951/DEL/2010 FOR THE ASSESSMENT YEAR 2006-07,  
PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR

SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. SET ASIDE THE APPELLATE ORDER DATED 23.06.2015 PASSED BY THE ITAT, 'C' BENCH, BENGALURU, AS SOUGHT FOR IN THE RESPONDENT-ASSESSEE'S CASE, IN APPEAL PROCEEDINGS IN ITA NO.5951/DEL/2010 FOR A.Y.2006-07.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

### **JUDGMENT**

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue. The subject matter of the appeal pertains to the Assessment year 2006-07. The appeal was admitted by a bench of this Court vide order dated 24.08.2016 on the following substantial questions of law:

*"(i) Whether on the facts ad in the circumstances of the case, the Tribunal is right in law in excluding M/s Vishal Information Technologies Ltd as comparable company of ITES segment in holding that M/s VITL outsources majority of its work ignoring the fact that outsourcing entails higher cost resulting in lower operating profit.*

*(ii) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in excluding M/s Nucleus Netsoft & GIS (India) Ltd., is not a comparable brushing aside the fact that it was taken as a comparable by the assessee on its own TP study and the fact that ITES is the primary business of the company?"*

2. Facts leading to filing of this appeal briefly stated are that the assessee is a company engaged in the business of development of computer software through different units i.e., Software Technology Park (STP) and Non STP units. The assessee got merged with M/s Mphasis Ltd. The assessee was having interaction transaction with associated enterprises. During the financial year 2005-06, the assessee rendered IT enabled services and had earned margin of 14.26% on total costs. In the transfer pricing study maintained by the assessee, it applied the transactional net marginal method as the most appropriate method and on

selection of certain companies as comparables whose average margin stood at 19.67%, the assessee concluded its international transaction as being at arms length. The Assessing Authority referred the matter to the Transfer Pricing Officer by an order dated 10.09.2009 determined the difference at Rs.120,973,568/- and subsequently, on the basis of the directions issued by the dispute resolution panel, Assessing Authority determined the arms length price difference at Rs.5,18,68,568/-. The assessee thereupon filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). The tribunal directed exclusion of Vishal Information Technologies Ltd. And Nucleus Netsoft and by placing reliance on decision of the coordinate bench of the tribunal in **'HSBC ELECTRONIC DATEA PROCESSING INDIA LTD. VS. ACIT', (2013) 38 TAXMANN.COM 141 (HYDERABAD - TRIB)** held that profile of HSBC supra is similar to assessee and therefore, Vishal

Information Technologies Ltd. And Nucleus Netsoft and GIS India Ltd. are required to be excluded. In the aforesaid factual background, this appeal has been filed.

3. Learned counsel for the revenue submitted that the tribunal without appreciating the fact that the assessee in its transfer pricing study before the Transfer Pricing Officer had chosen certain comparables and had later on contended before the tribunal that the same cannot be taken as comparables. Therefore, the assessee could not have been permitted to take contradictory stand and therefore, the tribunal could not have excluded the comparables. It is further submitted that the tribunal has failed to consider the findings of the Transfer Pricing Officer and Dispute Resolution Panel and has even failed to refer to the material brought on record by the Transfer Pricing Officer. It is also urged that when the appellate authority ignores the evidence on record, the same gives rise to substantial question of law. In support of aforesaid submission, reliance has

been placed on '**VIJAY KUMAR TALWAR VS. COMMISSIONER OF INCOME TAX**', 330 ITR 1.

4. On the other hand, learned counsel for the assessee submitted that the decision of the tribunal that Vishal Information Technologies Ltd. And Nuclues Netsoft and GIS (India) Ltd. are functionally not comparable is a finding of fact and the revenue has neither challenged the same as perverse nor has brought any material on record to demonstrate its perversity and therefore, no substantial questions of law arises for consideration. It is further submitted that in any event, Vishal Information Technologies Ltd is not comparable to the assessee and has rightly been excluded as it is functionally dissimilar. In support of aforesaid submissions, reliance has been placed on **SUDARSHAN SILKS & SAREES VS. CIT, 300 ITR 205** and decision of Punjab and Haryana High Court in **PCIT VS. IHG IT SERVICES (INDIA) PVT. LTD. ITA NO.264/2016 DATED 05.12.2016** and decision of the

High Court of Delhi in **CIT VS. UT STARCOM INC., ITA NO.767/2017 DATED 25.09.2017.**

5. We have considered the submissions made by learned counsel for the parties and have perused the record. It is trite law that tribunal is a final fact finding authority and has to consider the material brought before it. In the instant case, the relevant extract of the order passed by the tribunal, reads as under:

*14. We have considered the rival submission and are of the view that in light of the aforesaid decision of ITAT rendered in case of a company, which is engaged in rendering ITES services similar to that of the assessee, the aforesaid companies have to be excluded as functionally not comparable with that of the assessee. We hold and direct accordingly. The AO is directed to compute the arithmetic mean after excluding the aforesaid companies from the list of comparables. The AO is also directed to give the benefit of +/- 5% variation to the arithmetic mean of the assessee with that of*

*the comparables as provided in the 2nd proviso to Section 92CA of the Act. Other issues raised in grounds No.1.1 to 1.5 by the assessee do not require any adjudication in view of the above conclusions and as conceded by the Id. Counsel for the assessee.*

6. Thus, from perusal of the relevant extract of the order passed by the tribunal, it is evident that the tribunal has neither considered evidence brought on record by the Transfer Pricing Officer and has neither considered the findings of the Transfer Pricing Officer as well as the dispute resolution panel and in a cryptic and cavalier manner has recorded a finding in favour of the assessee. No cogent reasons worth the name have been assigned by the tribunal for recording the findings. Therefore, in the facts and circumstances of the case, the order passed by the tribunal dated 23.06.2015 is hereby quashed. The substantial questions of law are answered accordingly. The matter is remitted to the tribunal for decision afresh in accordance with law by a

speaking order.

In the result, the appeal is disposed of.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**

**SS**

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