

10-ITXA-1209-2015

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

INCOME TAX APPEAL NO.1209 OF 2015

The Pr. Commissioner of Income Tax-1 .. Appellant.
v/s.
Aptara Technology Pvt. Ltd. .. Respondent.

Mr. Suresh Kumar, for the Appellant.
Mr. S. Sriram with Mr. Jas Sanghavi i/by PDS Legal, for the Respondent.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.**
DATE : 26th MARCH, 2018.

PC:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 2.2.2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 2.2.2015 is in respect of Assessment Year 2008-09.

2 Revenue urges the following questions of law, for our consideration:

“(A) Whether on the facts and in the circumstance of the case and in law, the Tribunal is correct in excluding Accentia Technologies Ltd. and Coral Hubs Ltd. as comparable, ignoring the said companies are engaged in the business of providing IT enabled services ?

(B) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in excluding Cosmic Global

ltd. and Crossdomain Solutions Ltd. without taking into account FAR analysis ?

(C) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in including Pentamedia Graphics Ltd. without taking into account FAR analysis and whether the principle of Res Judicata is applicable to the Income Tax Proceedings ?”

The Respondent-Assessee is rendering Information Technology Enabled Services ('ITES') to its Associated Enterprise (AE) Aptara Inc. The Respondent-Assessee is a service provider of e-learning solutions to its AE. The Respondent-Assessee determines the Arm's Length Price (ALP) of international transactions entered into with its AE by applying 'Transactional Net Margin' method ('TNM' Method). Revenue does not dispute the application of TNM Method as most appropriate method to determine the ALP for its international transaction. The dispute between the Revenue and the Respondent is in respect of comparables to be included and/or excluded while determining the ALP on application of TNM Method.

3 **Re. Question (A):-**

(I) Accentia Technologies Ltd. :

(a) The impugned order of the Tribunal excluded Accentia Technologies Ltd. from the list of comparables by rendering a finding of the fact that the services rendered by Accentia Technologies Ltd. is different from that offered by the Respondent to its A.E. It found on facts that Accentia Technologies Ltd. was providing medical transaction, billing and coding services, application development and customization service in respect of which segmental data was also not available while the

Respondent provides E-Learning service. Thus, the impugned order of the Tribunal found that M/s. Accentia Technologies Ltd. is not comparable with the Respondent-Assessee. Besides, impugned order also records a finding of fact that during the year the profitability of M/s. Accentia Technologies Ltd. had been impacted by merger/amalgamation and therefore, cannot be considered to be comparable.

(b) The grievance of the Revenue before us is that the merger and/or amalgamation would have no impact on the profitability of M/s. Accentia Technologies Ltd. Therefore, it was urged to be an appropriate comparable as both are rendering ITES services.

(c) We find that the impugned order of the Tribunal has after rendering a finding of fact that the activities of the tested party and comparable are functionally different, also records finding of fact that extraordinary events such as merger/amalgamation would have an impact/effect on the profitability of M/s. Accentia Technologies Ltd. Therefore, on both the above grounds, it was held to be not a comparable to the transaction of the Respondent with its AE.

(d) Infact on the issue of merger/amalgamation the Tribunal holds that it affected the profitability of M/s. Accentia Technologies Ltd. Reliance for the above was placed on the decisions of its co-ordinate benches in Hyderabad and Bangalore, i.e., **Capital IQ Information Systems (India) Private Ltd. v. DCIT (2013) 32 Taxmann.com 21 (Hyderabad)** and **Symphony Marketing Solutions India Pvt. Ltd. v. ITO (2013) 38 Taxmann.com 55 (Bangalore)**. The Revenue has not attempted to show either before the Tribunal or even before us that the merger/amalgamation which took place in the previous year relevant to subject assessment year did not have an impact on the profitability of the Accentia Technologies

Ltd. Merely because both the tested and the comparable provide ITES services they do not become comparable. This is so as the nature of services provided by use of Information-Technology is different. In any event, no challenge has been made to the finding of the Tribunal that the activities carried out by Accentia Technologies Ltd. and the Respondent-Assessee are functionally different and, therefore, not comparable.

(d) Therefore, the view taken by the Tribunal in excluding Accentia Technologies Ltd. is a possible view more particularly in the absence of the same being shown to be perverse. Thus, no interference is warranted.

II Coral Hub Ltd.:

(a) The impugned order of the Tribunal has excluded M/s. Coral Hub Ltd. from the list of comparable after rendering a finding of fact that activities undertaken by Coral Hub Ltd. are not comparable to that engaged by the Respondent-Assessee. It was found as a fact by the Tribunal that M/s. Coral Hub Ltd. is engaged in ITES particularly selling and purchasing of products and goods whereas the Respondent-Assessee is engaged in e-learning and content development activity. Besides, the Tribunal has recorded finding of fact that business model adopted by M/s . Coral Hub Ltd. was different in-as-much as it outsources its work to sub-vendors as against the Respondent-Assessee carrying out its activities in-house.

(b) The grievance of the Revenue is that both the Coral Hub Ltd. as well as the Respondent-Assessee are in the field of Information Technology Enabled Services. Therefore, by virtue of above fact, they become comparable.

(c) It is obvious that merely because the tested party and the

comparable provide ITES, they do not become comparable. The content of the services rendered by virtue of IT is to be examined before holding it to be comparable. Besides, the two are not comparable as the business model in both are different i.e. outsourcing in one and in-house in the other. We further note that the impugned order of the Tribunal places reliance upon the decision of the Tribunal dated 30.10.2013 of its co-ordinate bench in the case of **PTC Software India Pvt. Ltd.** which also excluded M/s. Coral Hub Ltd. (formerly known as 'Vishal Information Technologies Ltd.'). Mr. Suresh Kumar the learned counsel for the Revenue very fairly states that being aggrieved by the above order an appeal was filed to this Court being Income Tax Appeal No.732 of 2014 (CIT v. PTC Software). This appeal was dismissed upholding the finding of the fact of the Tribunal that M/s. Coral Hub (formerly known as 'Vishal Information Technologies Ltd.') was a company not only engaged in IT enabled services but also in providing agency services by way of outsourcing to third party vendors. In this case also, the impugned order of the Tribunal has come to a finding of the fact that the services rendered by the Respondent to its AE is different from the activities/services provided by M/s. Coral Hub Ltd. Therefore, they would not be comparable only on the ground that both of them broadly fall under the category ITES providers.

(d) The finding reached by the Tribunal is one of finding of fact which is not shown to be perverse. Thus, there is no reason to interfere with the finding of fact recorded by the Tribunal.

III Conclusion: In the above view, the question as proposed does not give rise to substantial question of law. Thus, not entertained.

4 **Re. Question (B):**

(I) Cosmic Global Ltd. :

(a) The impugned order of the Tribunal excluded Cosmic Global Ltd. as comparable after rendering a finding that the business model adopted by Cosmic Global Ltd. was outsourcing business model as against Respondent having an inhouse business model. Thus, profit margin would necessarily not be comparable. The impugned order of the Tribunal also placed reliance for the aforesaid finding upon the decision of Hyderabad Bench of the Tribunal in the case of **Capital IQ Information Systems (India) Private Ltd. v. DCIT, (2013) 32 Taxmann.com 21.**

(b) The Revenue has not been able to show that the aforesaid finding of fact arrived at by the Tribunal is in any manner perverse. Nor it has attempted to show that in spite of the business model being different, the tested party and M/s. Cosmic Global Ltd. are comparable.

(c) In the above view, non-inclusion of Cosmic Global Ltd. as comparable by the Tribunal does not call for interference.

(II) Crossdomain Solutions Ltd.:

(a) The impugned order of the Tribunal excluded M/s. Crossdomain Solutions Ltd. from the list of comparable. This after having rendered finding of fact that it was engaged in distinct activities such as payroll activity, 'Knowledge Process Outsourcing' (KPO) service, development of products and routine IT services. Further, the impugned order indicates that differences between the E-learning service and 'Knowledge Process Outsourcing' which would clearly establish that the activities are not comparable. The impugned order also records that M/s. Crossdomain Solutions Ltd. was engaged in payroll outsourcing on a substantive scale. Besides, there was no bifurcation available of profits earned individually on the various diversified activities being carried by M/s. Crossdomain

Solutions Ltd. Thus, it held that comparison on an entity level of M/s. Crossdomain Solutions Ltd. with the Respondent's AE transaction is not correct.

(b) The Revenue has not been able to show that the finding of the fact arrived at by the Tribunal is perverse.

(c) In the above view, there is no reason to interfere with the above finding of the Tribunal in respect of Crossdomain Solutions Ltd.

(III) Conclusion: For the reasons indicated above, this question as proposed being one of fact does not give rise to any substantial question of law. Thus, not entertained.

5. Re. Question No. (C):

(a) The impugned order of the Tribunal included Pentamedia Graphics Ltd. as comparable. This, after rendering finding of fact that for earlier Assessment Year 2007- 08 on identical fact situation when expenditure on account of multimedia development and web casting was incurred by it, M/s. Pentamedia Graphics Ltd. was included by the TPO as a comparable to arrive at ALP of the transaction entered into by the Respondent with its AE. In the absence of Revenue being able to establish any difference in the facts from that existing in the earlier Assessment Year 2007-08 to that existing in the subject Assessment Year, there is no warrant to exclude the same.

(b) Before us, the Revenue is not able to indicate any reason as to why in the absence of any change in the circumstances in the subject Assessment Year to that in the earlier Assessment Year the exclusion of Pentamedia Graphics Ltd. as comparable was justifiable. We find that the view taken by the Tribunal in the impugned order of including Pentamedia Graphics Ltd. as a comparable is a possible view.

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(c) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

6 Accordingly, the Appeal is dismissed. No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)