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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 454/2016

THE PR. COMMISSIONER OF INCOME TAX -4 ... Appellant
Through: Mr. Ruchir Bhatia, Advocate.

versus

INTERNATIONAL SOS SERVICES INDIA P. LTD. Respondent
Through: Mr. Neeraj Jain and Mr. Aniket D.
Agrawal, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE CHANDER SHEKHAR

ORDER

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30.05.2017

1. The challenge by the Revenue in this appeal under Section 260A of the Income Tax Act, 1961 ('Act') is to the impugned order dated 8th December, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1631/Del/2014 for the Assessment Year ('AY') 2009-10.

2. The question sought to be urged by the Revenue is whether the ITAT was justified in presuming that the margins earned by the government companies cannot be held to be reliable for computation of the Arm's Length Price ('ALP') of the international transactions involving the Assessee and in that context was the ITAT justified in excluding Apitco Limited as a comparable?

3. The Assessee is a private limited company engaged in the business of providing assistance services to travellers travelling to and from India and foreign nationals residing in India including providing medical services. The Assessee filed its return of income for the AY in question on 30th September, 2009 declaring an income of Rs. 2,00,30,075. The return was picked up for scrutiny. Since the Assessee had undertaken international transactions with its Associated Enterprise in Singapore, a reference was made by the Assessing Officer ('AO') to the Transfer Pricing Officer ('TPO') under Section 92CA(1) of the Act.

4. The TPO found that during the AY in question, the Assessee *inter alia* entered into international transaction for providing emergency assistance and support services to its AE. In its transfer pricing study, the Assessee has adopted the TNM method as the most appropriate method. The Assessee itself has selected 12 comparables where the average margin was 7.10% on a profit level indicator of OP/OC as against the Assessee's margin of 7.66%. These 12 comparables included public sector undertakings such as India Tourism Development Corporation Ltd. ('ITDCL') and Educational Consultants (I) Ltd. ('ECIL').

5. The TPO using filters rejected 10 comparables which included ITDCL and ECIL. Only Access India Advisors Ltd. and IDC(I) Ltd. were selected. The TPO selected 5 new comparables and these included Apitco Limited, Global Procurement Consultant Ltd., KCCA Business Services Pvt. Ltd, Killick Agencies & Marketing Ltd. and Orient Engineering & Commercial Co. Ltd. The average margin of the seven comparables selected by the TPO

was 27.63% as against the Assessee's margin of 7.66%. Accordingly, he proposed an upward TP adjustment.

6. By an order dated 20th December 2013, the Dispute Resolution Panel ('DRP') disposed of the Assessee's objections by excluding Killick Agencies & Marketing Ltd. and Orient Engineering & Commercial Co. Ltd. from the list of comparables. The AO then passed a final assessment order making an upward adjustment as regards the ALP.

7. The Assessee's appeal before the ITAT was allowed in part by the impugned order. After discussing the comparables as finally approved by the DRP, the ITAT drew a distinction between 100% government owned companies and private companies and gave its reasons why the government companies would not be appropriate comparables when the ALP of international transaction involving private companies is being examined. The ITAT, therefore, held that ECIL, ITDCL and Apitco being 100% government companies are to be excluded as comparables. The final list of comparables as approved by the ITAT included just four of the comparables.

8. Mr. Ruchir Bhatia, learned counsel appearing for the Revenue, submitted that there was no logic in excluding 100% government owned companies from the list of comparables only because the profit motive is not the only relevant consideration in the case of a government undertaking. He submitted that no reasons whatsoever have been given by the ITAT for excluding Apitco Limited as a comparable.

9. Mr. Neeraj Jain, learned counsel for the Assessee, on the other hand

pointed out that the Mumbai Bench of the ITAT has in an order dated 27th February, 2013 in the case of ThyssenKrupp Industries India Pvt. Ltd. excluded 100% government owned companies as comparables for the same reasons given by the ITAT in the present case. That decision of the Mumbai Bench of the ITAT was affirmed by the Bombay High Court in its judgment dated 28th March, 2016 in ITA No. 2218 of 2013 (*CIT v. ThyssenKrupp Industries India Pvt. Ltd.*).

10. The Court on perusing the aforementioned judgment of the Bombay High Court finds that in para 4(a) and 4(b) of the said order the Bombay High Court has held that the view taken by the Mumbai Bench of the ITAT “is a reasonable and plausible view.” It noted that the ITAT, Mumbai Bench had held that the Engineers India Ltd. could not be considered to be comparable for the reason “that contracts between Public Sector Undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable.” Interestingly in the present case the Assessee itself picked up two of the 100% government owned companies namely ECIL and ITDCL as its comparables but that was not accepted by the TPO or the DRP. The reason for the ITAT excluding Apitco as a comparable is also for the same reason that it was a 100% government owned company.

11. The Court finds that the view taken by the ITAT in the present case, which is consistent with the view expressed by the Mumbai Bench of the ITAT and which has been affirmed by the Bombay High Court, is indeed a plausible one to take.

12. Whether taking up a 100% government owned company as a comparable would be justified or not would depend on the facts and circumstances of the case. The basic rule as contained in Rule 10B of the Income Tax Rules would apply. In the facts of the present case, however, the Court finds that the view taken by the ITAT does not give rise to any substantial question of law.

13. The appeal is dismissed.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 30, 2017

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