

\$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 924/2016**

THE PR. COMMISSIONER OF INCOME TAX-1 Appellant
Through: Mr. Ruchir Bhatia, Senior Standing
Counsel for the Revenue.

versus

NEW RIVER SOFTWARE SERVICES PVT. LTD. Respondent
Through: Mr. Kamal Sawhney, Mr. Shikhar Garg
& Mr. Prashant Meharchandani,
Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

% **ORDER**
22.08.2017

C.M. No. 30036/2017 (for condonation of 7 days' delay in filing the reply)

1. The application has been filed by the Respondent seeking condonation of 7 days' delay in filing the reply.

2. For the reasons stated in the application, the delay in filing the reply is condoned. The application is allowed.

ITA No. 924/2016 & C.M. No. 46656/2016 (for condonation of 430 days' delay in filing the appeal)

3. This appeal by the Revenue is directed against the impugned order dated 27th March, 2015 passed by the Income Tax Appellate Tribunal

(‘ITAT’) in ITA No.451/Del/2013 for the Assessment Year (‘AY’) 2008-09.

4. At the outset it requires to be noticed that there is a delay of 430 days in filing the appeal. The explanation given for the delay is that the Department had initially filed an appeal before the High Court of Andhra Pradesh and Telangana. That appeal was dismissed on the ground of maintainability on 30th June, 2016.

5. However, it is seen that the present appeal was filed only on 22nd November 2016, i.e. almost five months thereafter. There is no satisfactory explanation for this further delay in filing the appeal. Consequently the Court is not inclined to condone the delay in filing the appeal.

6. Nevertheless, the appeal has also been examined on merits.

7. The short question urged by the Revenue in this appeal is whether the ITAT was correct in excluding Coral Hub Ltd.; M/s. Infosys BPO and M/s. Wipro BPO from the list of comparables for determining the arm’s length price of the international transaction involving the Assessee for the purposes of Transfer Pricing (‘TP’) adjustment.

8. As far as exclusion of Coral Hub Ltd. (earlier known as Vishal Information Technology Ltd.), the ITAT has, in the impugned order, given the following reasons therefor:

“8.3. Coral Hub (Vishal Information Technologies Ltd.): The annual report of this company is contained at page 476 to 525 of

the PB. However, the actual operations carried out by assessee have not been specified. The assessee's main contention is that this company was outsourcing a considerable portion of their business as is evident from the outsourcing cost to total cost which was 85.58% as noted earlier. Therefore, the business model of this company cannot be compared with the business model of assessee where salary cost was 54.67% of the total cost. When the business operations are out sourced, the profit margins are bound to increase substantially as compared to a business which is carried on through employees. Therefore, this company cannot be included in the list of comparables, though it might be carrying on the similar functions which assessee was carrying on. The functional profile no doubt is one of the major criteria but not the sole criteria for deciding whether the said company can be included in the list of comparables or not. The assets and risk profile also has to be taken into consideration. This company was selected by TPO and, therefore, the submissions of Id. Standing Counsel on the ground of functional profile cannot be accepted. Moreover, we note that Id. Counsel has pointed out that data entry charges were 84.5% of total expenditure and, therefore, this cannot be compared to assessee which was primarily imparting high end services. We, accordingly, direct for exclusion of this company from the list of comparables.”

9. This Court has in ***Rampgreen Solutions (P) Ltd. v. Commissioner of Income Tax [2015] 60 taxmann.com 355 (Del)*** dealt with this very comparable and noted that its business model was entirely different when compared to the Assessee who in that case was also carrying on a similar function and rendering knowledge process outsourcing service. It was observed by this Court that “plainly, a business model where services are rendered by employing one’s own employees and using one’s own infrastructure would have a different cost structure as compared to a business model where services are outsourced.”

10. The view taken by the ITAT in the present case is an entirely plausible one and cannot be said to be suffering from any legal infirmity so as to give rise to any substantial question of law.

11. As regards the exclusion of M/s. Infosys BPO, the same is covered in favour of the Assessee and against the Revenue by the decision in ***Commissioner of Income Tax v. Pentair Water India (P) Ltd. [2016] 69 taxmann.com 180 (Bom)*** and the decision dated 10th July, 2013 of this Court in ITA No.1204/2011 (***CIT v. Agnity India Technologies Pvt. Ltd.***).

12. Wipro BPO is more or less on the same footing as Infosys BPO as far as the size and scale are concerned. Consequently the Court finds no legal infirmity in the impugned order of the ITAT, which has, apart from excluding the above comparables, remanded the matter to the TPO on the question of working capital adjustment.

13. The appeal is dismissed therefore on account of both delay as well as merits.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 22, 2017

b'nesh