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

+ ITA 439/2022

PR. COMMISSIONER OF INCOME TAX-1 Appellant

Through: Mr.Sanjay Kumar, Sr.Standing
Counsel for the Revenue.

versus

M/S BECHTEL INDIA PVT. LTD. Respondent

Through: None

Through: Date of Decision: 09th November, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J:

1. Present Income Tax Appeal has been filed challenging the order dated 18th December, 2020 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 7234/Del./2017 for the Assessment Year 2013-14.
2. The issue urged by the Revenue concerns the exclusion of three companies i.e. Certification Engineering International Ltd., HSCC India Ltd. and Mitcon Consultancy & Engineering Services Ltd. from the list of comparable companies for the purpose of determining Arm's Length Price of the international transactions between the assessee and its associated enterprises.

3. The assessee company incorporated on 21st April, 1994, is a wholly owned subsidiary of Bechtel Corporation USA. During the year under consideration, the assessee company was engaged in the business of export of customized electronic data to its overseas group companies.
4. Learned counsel for the Revenue states that the ITAT has erred in excluding Certification Engineering International Ltd. and HSCC India Ltd. on the ground that the same are government undertakings without considering that being a government undertaking does not *ipso facto* lead to enhanced profitability of a company.
5. He states that the ITAT has erred in excluding Mitcon Consultancy & Engineering Services Ltd. from the final list of comparables on the ground of functional dissimilarity without considering that TNMM is less sensitive to minor differences in functional profile and the assessee company and this company are broadly functionally similar.
6. Having perused the impugned order and the paper book, this Court finds that the ITAT excluded abovementioned three companies from list of comparable on the basis of detailed reasons after analysing and comparing the profiles of the said companies with the assessee company.
7. The ITAT with respect to comparable Certificate Engineering International Ltd., based on its annual report, observed that operations of the comparable company mainly include certification activities, third-party inspection activities, safety audit and ERDMP audits, and accordingly rejected this comparable on the ground being functionally dissimilar with the assessee company.
8. The ITAT relied on the order of its Co-ordinate Bench in assessee's own case for Assessment Year 2009-10 in ITA No. 882/Del./2014, wherein

the comparable Certificate Engineering International Ltd. was excluded by the ITAT on the same ground of being functionally dissimilar with the assessee company.

9. With respect to comparable HSCC India Ltd., the ITAT upon perusing profit and loss statement for the year under consideration, observed that the main revenue of the comparable company is of Rs.33.79 crores which has been shown in the directors report as consultancy income from designing and engineering, project management and procurement of medical equipment, drugs and pharmaceutical etc. The ITAT observed that the activity of providing consultancy cannot be held functionally similar to the activity of preparing engineering design and drawings and therefore, the company is functionally dissimilar with the assessee.

10. The ITAT further observed that HSCC India Ltd. is also a government undertaking and earns revenue from government contracts, and accordingly rejected the same as comparable relying on its Co-ordinate Bench's Order in assessee's own case for the Assessment Year 2009-10, wherein government controlled enterprises were excluded from the list of comparable companies.

11. Despite specific directions passed by this Court in the case of ***PCIT vs. Casio India Company Pvt. Ltd. [ITA 211/2022]*** directing the Income Tax Department to disclose whether the appeal to High Court against order(s) relied upon by the ITAT have been filed and the stage of the said appeals, the Revenue in the present appeal has failed to disclose the status of appeals (if any) in assessee's own case for the Assessment Years 2009-10, 2010-11 & 2011-12.

12. With respect to Mitcon Consultancy & Engineering Services Ltd, the ITAT upon perusing its annual report observed that the main revenue has been shown from consultancy fee (Rs.26.45 Crores) and income from vocational training (Rs.14.27 crores), which are functionally different from the assessee's activity of providing engineering design and drawing services and accordingly excluded Mitcon Consultancy & Engineering Services Ltd. from the final list of comparables for being functionally dissimilar with the assessee company.

13. The ITAT also relied on the order of its Co-ordinate Bench in ITA No. 6779/Del./2015 in assessee's own case for the Assessment Year 2011-12, wherein the ITAT excluded the Mitcon Consultancy & Engineering Services Ltd. as comparable on same ground of being functionally dissimilar with the assessee company.

14. This Court, in Revenue's appeal being ITA 655/2019 in assessee's own case for the Assessment Year 2011-12, vide the order dated 19th July, 2019 confirmed the order of the ITAT in ITA No. 6779/Del./2015.

15. Further, the Karnataka High Court in the case of **PCIT vs. Softbrands India Pvt. Ltd. [2018 SCC OnLine Kar 2330]** has held that the issue of comparables is a question of fact and not the question of law. Further, the High Court under Section 260-A of the Act would interfere only if it finds that the reasoning given by the authorities below is perverse.

The relevant portion of the said judgment is reproduced hereinbelow:-

“43. The contention raised before us that in view of some different views taken by the Tribunal by different Benches at different places, the present appeals under Section 260-A of the Act deserve to be entertained and admitted by this Court for laying down certain Guidelines about the Filters or Most

Appropriate Method to be adopted for determination of the 'Arm's length price', does not, in our considered opinion falls within the parameters of the substantial question of law. None of the sides was able to point out any perversity in the Orders of the Appellate Tribunal in this regard.

44. This Court cannot be expected to undertake the exercise of comparison of the comparables itself which is essentially a fact finding exercise. Neither the sufficient Data nor factual informations nor any technical expertise is available with this Court to undertake any such fact finding exercise in the said appeals under Section 260-A of the Act. This Court is only concerned with the question of law and that too a substantial one, which has a well defined connotations as explained above and findings of facts arrived at by the Tribunal in these type of assessments like any other type of assessments in other regular assessment provisions of the Act, viz. Sections 143, 147 etc. are final and are binding on this Court. While dealing with these appeals under Section 260-A of the Act, we cannot disturb those findings of fact under Section 260-A of the Act, unless such findings are ex-facie perverse and unsustainable and exhibit a total non-application of mind by the Tribunal to the relevant facts of the case and evidence before the Tribunal.

45. Otherwise if the High Court takes the path of making such a comparative analysis and pronounces upon the questions as to which Filter is good and which comparable is really comparable case or not, it will drag the High Courts into a whirlpool of such Data analysis defeating the very purpose and purport of the provisions of Section 260-A of the Act. Therefore what we observed above appears to us to be the sustainable view that the key to the lock for entering into the jurisdiction of High Court under Section 260-A of the Act is the existence of a substantial question of law involved in the matter. The key of ex-facie perversity of the findings of the Tribunal duly established with the relevant evidence and facts. Unless it is so, no other key or for that matter, even the in-consistent view taken by the Tribunal in different cases depending upon the relevant facts

available before it cannot lead to the formation of a substantial question of law in any particular case to determine the aspects of determination of 'Arm's Length Price' as is sought to be raised before us."

(emphasis supplied)

16. Consequently, the ITAT excluded Certification Engineering International Ltd. and HSCC India Ltd. not only on the ground that these companies were government undertaking, but also on ground of functional dissimilarities with the assessee company. The ITAT excluded the Mitcon Consultancy & Engineering Services Ltd. on the ground of functional dissimilarity with the assessee company as well on the ground that the same comparable was excluded by ITAT in assessee's own case for the Assessment Year 2011-12, and the said order of the ITAT was confirmed by this Court in ITA No. 655/2019.

17. Accordingly, no substantial question of law arises for consideration in the present appeal and the same is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 09, 2022
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