2023:DHC:6392-DB

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

% ***Decision delivered on: 08.08.2023***

\+ **ITA 741/2018**

PR. COMMISSIONER OF INCOME TAX DELHI – 7 ..... Appellant
Through: Mr Kunal Sharma, Sr. Standing Counsel.

versus

M/S. OMNIGLOBE INFORMATION TECHNOLOGIES (INDIA) PVT. LTD. ..... Respondent
Through: Mr Neeraj Jain with Mr Aniket D. Agrawal and Abhishek Singhvi Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal concerns Assessment Year (AY) 2012-13.

2. *Via* this appeal, the appellant/revenue seeks to assail the order dated 01.01.2018 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

3. Mr Kunal Sharma, learned senior standing counsel, who appears on behalf of appellant/revenue, submits at the very outset, that the principal error that the Tribunal has committed was in excluding the following comparables picked up for benchmarking international transactions entered into by the respondent/assessee, through its associated enterprises.

(i) Acropetal Technologies Ltd [in short, "Acropetal"].

(ii) BNR Udyog Ltd. [in short, "BNR"].

(iii) Informed Technologies India Ltd. [in short, "Informed Technologies"]

5. Before we proceed further, the following broad facts are required to be noted.

6. The respondent/assessee is a 100% subsidiary of a company going by the name, Omniglobe Information Technologies (India) LLC, which is incorporated in USA.

7. The respondent/assessee had filed its return *qua* the aforementioned AY on 27.11.2012, whereby, it had declared its total income as Rs. 2,01,87,160/-.

8. The respondent/assessee was issued a notice under Section 143(2) of the Income Tax Act, 1961 [in short, "The Act"] on 23.09.2013.

9. On a reference being made by the Assessing Officer (AO), under Section 92CA(3) of the Act, the Transfer Pricing Officer [in short, "TPO"], passed an order dated 29.01.2016recommending upward transfer pricing adjustment, amounting to Rs.6,11,78,279/-. Accordingly, the TPO recomputed the income of the respondent/assessee at Rs.8,13,65,439/-.

11. In its order, the TPO concluded that the comparables offered by the respondent/assessee could not be accepted.

12. In place of the nine (9) comparables offered by the respondent/assessee, the TPO, *inter alia*, took into account the aforementioned three (3) comparables, i.e., Acropetal, BNR, and Informed Technologies, apart from (8) eight others.

13. Based on the recommendation of the TPO, a draft assessment order

was passed by the AO under Section 143(3) of the Act, which was communicated to the respondent/assessee on 05.03.2016.

14. The respondent/assessee, being aggrieved, filed its objections with the Dispute Resolution Panel (DRP), *inter alia*, with regard to the aforementioned three (3) comparables which were considered by the TPO in recommending the upward transfer pricing adjustment.

15. The DRP, *via* its order dated 14.09.2016, partly allowed the objections filed by the respondent/assessee, and directed the TPO to reduce the transfer pricing adjustment on the basis of its findings .

16. Based on the DRPs order, the TPO submitted a fresh report with the AO on 30.09.2016, whereby, the transfer pricing adjustment was reduced from Rs. 6,11,78,279/- to Rs. 3,22,06,526/-.

17. Resultantly, the final assessment order was passed by the AO under Section 144C read with Section 143(3) of the Act on 31.10.2016.

18. Thus, the transfer pricing adjustment made was equivalent to Rs. 3,22,06,526/-, as recommended by the TPO, after receiving the order of the DRP.

19. It is against this final assessment order that the respondent/assessee preferred an appeal with the Tribunal.

20. As noted above, the central point of inflection in the appeal was the inclusion of aforementioned three (3) comparables by the TPO, while recommending upward adjustment in transfer pricing.

21. Mr Sharma says that the Tribunal has committed a serious error in directing the exclusion of the subject comparables.

22. According to Mr Sharma, the three comparables were rightly included

by the TPO, while the recommending upward adjustment in transfer pricing.

23. To demonstrate that the Tribunal committed an error in appreciation of the order passed by the TPO, a reference was made to paragraph 15 of the Tribunal's order wherein, while discussing the comparable BNR, in the period under consideration, the Tribunal had recorded the BNR earned exceptionally high operating margin pegged at 40.62%, whereas in the preceding and succeeding year, the average operating margin of the comparable, i.e. BNR, was only 24.86%.

24. Mr Sharma submitted that these figures were picked up by the Tribunal from the study report of the respondent/assessee, without having regard to the TPO's analysis, wherein, it was noted that BNR's profit margin in the given year was 40.62%, and the segmental margin for two years preceding and succeeding the year under consideration was 33.04%.

25. Counsel for the respondent/assessee on the other hand, submitted that what the Tribunal looked at, apart from the margin of operating profit, was the specific characteristics of the services offered by the respondent/assessee and the comparables.

26. In this behalf, counsel for the respondent/assessee draws our attention to Rule 10(B)(2)(a) of the Income Tax Rules, 1962 [in short, "the Rules"].

26.1 Furthermore, counsel for the respondent/assessee draws our attention to those parts of the Tribunal's order which dealt with, and analysed the aforementioned comparables referred to by the TPO.

27 . Counsel for the respondent/assessee also said that the enunciation of the principle as to how the comparables in such situations have to be analysed has being dealt with by a coordinate bench of this Court in

Rampgreen Solutions Pvt. Ltd. v. CIT, 2015:DHC:6421-DB.

28. We have heard the learned counsel for the parties and have perused the record.

29. Insofar as this appeal is concerned, we are called upon to consider whether any substantial question of law arises. In our view, having examined the record, what has come to the fore is that an appreciation of the material placed before the Tribunal has taken place. The Tribunal, thereafter, has come to a definitive conclusion that, the aforementioned three comparables were wrongly included by the TPO in recommending an upward transfer pricing adjustment.

30. For the sake of convenience, the relevant part of the Tribunal's order is set forth hereafter:

> "***Acropetal Technologies Ltd.***
> *This company is engaged in development of products for healthcare, energy and environment sectors within the healthcare segment . <u>This company is operating as KPO service provider and is engaged in building, electronic, medical record. Further the company has integrated such EMRs with other aspects of patient life cycle such as drug and disease management and prescriptive and specialty medicine.</u> These all activities require high level of skill and application of intellectual property. At page 6 of the annual report of the company it has been stated as under:-*
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>> *"We have had an early lead in building components such as Electronic Medical Record (EMR) and others around the ecosystem of healthcare. Now we are unifying the same across the life cycle of a patient integrating with Drug & Disease Management, Clinical Life Cycle Management, and Prescriptive & Speciality Medicine. While we continue to service existing and new customers with the available offerings, we are in the process of developing new generation offerings that will position us as an industry Leader in the Healthcare Vertical. Our current market focus includes North America, Middle East and India in -that order of priority. "*

We further find that this company has developed and owns intellectual property related to the healthcare segment which is apparent from page 25 of the annual report which is placed in paper book page 257 and which has been made part of this order.

We further find that Hon'ble Tribunal in IT No. 1003/Del/2016 in the case of assessee itself had excluded Accentia Technologies Limited from the final set of comparable companies inter alia on the basis that company provided services in health care division and was also engaged in the business of providing KPO services. We further find that in the case of assessee itself for assessment year 2011-12 this company was excluded by DRP itself vide direction dated 1.12.2015. The findings of DRP relating to this company are reproduced below:

> *"As regards Eclerx Services Ltd. the Panel upon a consideration of the profile of Eclerx Services Ltd. arrived at the conclusion that it is a KPO. Hence, not comparable with a BPO. Therefore, this company should be excluded as a comparable. For the same reason, Acropetala technologies Ltd. being a KPO is also not held as a good comparable."*
>
> *In view of the above facts and circumstances the AO is directed to exclude this comparable."*

BNR Udyoq Ltd.

We find that this company is engaged in providing medical transcription services which cannot be compared with IT enabled services. The Hon'ble Tribunal in the case of appellant for the assessment year 2011-12 in ITA No. 103 excluded Accentia Technologies Limited from the final set of comparable companies inter alia on the basis that the company provided services in the healthcare division and also engaged in the business providing of KPO services. Similarly the Hon'ble Tribunal in the case of Avaya India (P) Ltd. vs. ACIT in ITA No. 5528/Del/2011 directed to exclude the company holding that a medical transcription service cannot be compared with IT enabled service provider. In ITA 23/PN/2014 and ITA 1897 again in the case of BNY Mellon International Operations (India) (P.) Ltd. vs. DCIT and Xchanging Technology Services India (P) Ltd. vs. DCIT the Hon'ble Tribunal has held that medical transcription services are functionally dissimilar to provision of BPO services.

We further find that this comparable during the year under consideration had earned exceptionally higher operating margin at 40.62% which fact is apparent from the operating margin of the preceding and succeeding years *wherein the average operating margin is 24.86%.The Hon'ble Tribunal in the case of Actis Advisors Pvt. Ltd. vs. DCIT in ITA No. 5277/Del/2011 has held that entities having high fluctuations in profit margins cannot be regarded as an appropriate comparable for the purpose of benchmarking ·analysis. In view of the above facts and circumstances we hold that BNR Udyog Ltd. is also not a suitable comparable and therefore we direct AO to exclude this comparable also for the purpose of benchmarking operating margin.*

Informed Technologies India Ltd.

This company is engaged in providing financial research services, data management services and such services cannot be compared with the routine transaction processing services provided by the appellant. The fact that this company is a leading providing of KPO services to the financial content industry is apparent from the website of the company. The company provides services with respect to research and data processing services to customers. Relevant snapshot of the website of the company is reproduced as under:

> *"Financial Research*
> *A leading provider of knowledge Process Outsourcing (KPO) services to the Financial Content Industry. "Informed-Tech is a partner that will propel your business forward with Research and data processing back-hand support."*

We further find that at page 8 of the annual report under head business review and development and operations. It has been mentioned that the company is operating as IT enabled knowledge based back office processing centre and it collects and analysis data on financial fundamentals corporate governance. It further mentions that company has developed insight into the market segment of financial content and has developed relationship with the customers. From these facts and circumstances we find that this company is also not a suitable comparable therefore we direct AO to exclude this service provider also."

[Emphasis is ours]

31. It may also be relevant to note that the TPO has accepted the fact that the respondent/assessee is into providing ITES and so-called BPO services, which are related to phone activation and local number portability, both to its clients and its parent company, which we have referenced hereinabove.

32. The moot question therefore, which arose for the consideration for the statutory authorities, including the Tribunal, was whether the services offered by the three (3) entities were comparable to those of the respondent/assessee.

33. The extract from the impugned order would demonstrate that, insofar as the three (3) comparables are concerned, they were providing services which were different from the respondent/assessee.

34. Acropetal was rendering Knowledge Process Outsourcing (KPO) services. The Tribunal has said that it was engaged in medical transcription services, which compendiously has been given the name Electronic Medical Record.

35. Likewise, insofar as the BNR was concerned, the Tribunal once again returned the finding of fact that it was engaged in providing medical transcription services.

36. Similarly, insofar as Informed Technologies was concerned, the Tribunal notes that it provides financial research and data management services. More particularly, insofar as Informed Technologies is concerned, the Tribunal notes that it is a leading player in KPO services, which extend from financial content to financial industry.

37. We are in agreement with the submissions of the counsel for the respondent/assessee that Rule 10(B)(2)(a) required that, when carrying out a comparability analysis of international transactions, with an uncontrolled transaction, the reference point should be, *inter alia,* the services provided by the entities which are being compared.

38. The Tribunal has, in our view, carried out that exercise. We may note

that Mr Sharma, is perhaps, right to the extent that the Tribunal did not consider the analysis of operating margin *vis-a-vis* BNR, which the TPO had carried out. The difference in operating margins clearly arose because the respondent/assessee has included revenue and expenses from medical transcription services, which the TPO excluded, and thereby caused the difference between the operating margins in the period in issue and the average margin which BNR had registered.

39. In our view, fluctuation in margin was not the only reason that the Tribunal provided in excluding BNR as a comparable. The fact that BNR offered a service which was different from that the respondent/assessee offered was the principal reason why the Tribunal concluded that BNR had been wrongly included in the comparables.

40. Thus, for the forgoing reasons, we are of the view that no interference is called for with the order passed by the Tribunal. According to us, no substantial question of law arises for our consideration.

41. The appeal is accordingly dismissed.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

AUGUST 8, 2023/tr