



IT(TP)A No.1012/Mum/2016 &
CO. No. 54/Mum/2016
Hitachi Data System India Private Limited
Assessment Year:2011-12

आयकर अपीलीय अधिकरण “के” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.1012/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

Assistant Commissioner of Income Tax-14(2)(1) Room No. 474, 4 th Floor Aaykar Bhawan, M.K.Road Mumbai – 400 020	बनाम/ Vs.	Hitachi Data Systems India Pvt. Ltd. 6 th Floor, C-Wing, Laxmi Tower Bandra Kurla Complex Bandra (East) Mumbai – 40 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AABCH-4372-C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

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Hitachi Data Systems India Pvt. Ltd. 6 th Floor, C-Wing, Laxmi Tower Bandra Kurla Complex Bandra (East) Mumbai – 40 051	बनाम/ Vs.	Assistant Commissioner of Income Tax-14(2)(1) Room No. 474, 4 th Floor Aaykar Bhawan, M.K.Road Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AABCH-4372-C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	V.Jenardhanan, Ld. DR
Assessee by	:	M.P.Lohia & Nikhil Tiwari, Ld. ARs

सुनवाई की तारीख/ Date of Hearing	:	03/05/2018
घोषणा की तारीख / Date of Pronouncement	:	04 /05/2018

आदेश / ORDER



Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeal by revenue for Assessment Year [AY] 2011-12 contest the *final assessment order* dated 31/12/2015 passed u/s 143(3) read with *Section 144C(13)* of the Income Tax Act, 1961 by *Ld. Assistant Commissioner of Income Tax-14(2)(1)* pursuant to the directions of *Ld. Dispute Resolution Panel [DRP]* wherein the returned income of Rs.376.08 Lacs *e-filed* by the assessee on 29/09/2011 has been accepted. The revenue is aggrieved by relief provided by *Ld.DRP* to the assessee against certain *Transfer Pricing [TP] Adjustment* as proposed by *Ld. Transfer Pricing Officer [TPO]* in an order u/s 92CA(3). The assessee, challenging the directions of *Ld. DRP* on certain issues relating to *transfer pricing adjustment*, has filed *cross-objections* against the same.

2. The registry has noted that the appeal has been filed with a delay of 37 days. However, upon perusal of *Form No. 36* filed by the revenue, it is noted that the *date of communication of order appealed against* in *Column No. 9* has wrongly been mentioned as *24.11.2015* whereas the date of passing of impugned order is *31/12/2015*. The same has been clarified by the revenue during hearing before us. *Prima facie*, the appeal is in order and therefore, we proceed to dispose-off the same on merits.

3.1 Facts in brief are that certain *International transactions* as carried out by the assessee during the impugned AY with its *Associated*



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Enterprises [AE] as reported in *Form No. 3CEB* were referred for determination of *Arm's Length Price [ALP]* to Ld. TPO u/s 92CA(1) on 17/12/2013. The assessee was engaged in the business of providing marketing and support services like promoting the sales of AE's products in India, marketing presentation to potential customers of its AE, general corporate communications, public relations, advertisement and channel communications among other activities. The dispute under appeal is related with determination of *ALP* of *marketing support services fees* of Rs.35.66 crores received by the assessee from its *AE* which has been benchmarked in the *Transfer Pricing [TP] study* using *Transactional Net Margin method [TNMM]*, *Profit Leven Indicator [PLI]* being *operating profit / operating cost [OP/OC]* and the assessee being the tested party. The assessee computed its own *PLI* of 9.40% as against *mean PLI* of 10.36% as reflected by six comparable entities and therefore, claimed the transactions to be at *ALP*. The Ld. TPO while accepting assessee's five comparables, added six more comparables and computed mean *PLI* of eleven comparables as 15.47% as against assessee's *PLI* of 9.40% and worked out *TP* adjustment of Rs.240.54 Lacs against the same.

3.2 Incorporating the order of Ld. TPO, *draft assessment order u/s 144C(1)* dated 23/03/2015 was passed, which was assailed by the assessee with partial success before Ld. DRP vide directions u/s



144C(5) dated 02/11/2015. The Ld. DRP directed for exclusion of one comparable namely *Empire Industries Ltd.* as selected by Ld. TPO by making following observations:-

Apparently, the TPO has taken segmental result of trading and indenting activity. Looking at the fact that the assessee is providing marketing support services to its AE whereas Empire industries Ltd. is earning 40% of its revenue from trading activities, we are of the opinion that the companies are functionally different and therefore, the AO is directed to drop Empire Industries Ltd. from the list of comparables.

The exclusion of the said comparable has resulted into *TP* adjustment being reduced to 'Nil'. Aggrieved, the revenue is in further appeal before us.

4. The Ld. Departmental Representative [DR] supported the stand of Ld. TPO whereas Ld. Authorized counsel for Assessee [AR], relying on certain judicial pronouncements, supported the stand of Ld. DRP by submitting that the said entity was not comparable to the assessee and therefore, rightly been excluded by Ld. DRP.

5. We have heard the rival contentions and perused relevant material on record. Upon due consideration, we find that the methodology used to benchmark the transactions is *TNMM* which require only broad functional comparability of the entities. However, at the same time, it is also imperative that entities being selected as comparable to carry out *TP study* are functionally similar to the assessee on broad parameters. A predominantly trading entity could not be compared with predominantly service providing entity. It is undisputed fact that the impugned entity namely *Empire Industries*



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Limited was into trading segment and a major chunk of its revenue was coming from trading activity as against the assessee, which was predominantly a service providing entity. Therefore, finding the stand of Ld. DRP quite fair and reasoned one, we dismiss Ground Numbers 1 & 2 of revenue's appeal.

6. In Ground Number 3, the revenue is aggrieved by treatment of certain *AMC* expenses as prior period expenditure while arriving at assessee's margins. However, upon perusal of orders of lower authorities, we find that no such adjustment is proposed / envisaged and the ground seems to have been raised erroneously. Therefore, the same stand dismissed in *limine*. Rest of the grounds is general in nature.

7. Since, we have already dismissed revenue's appeal as above, the *cross-objections* raised by the assessee becomes merely academic in nature and therefore, dismissed.

8. Finally, the appeals as well as *cross-objection* stand dismissed.

Order pronounced in the open court on 04th May, 2018.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 04.05.2018

Sr.PS:-Thirumalesh



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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai**