

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD**

BEFORE
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER
&
SHRI MADHUSUDAN SAWDIA, ACCOUNTANT MEMBER

आ.अपी.सं / **ITA No. 381/Hyd/2022**
(निर्धारण वर्ष / Assessment Year: 2018-19)

Primera Medical Technologies Vs. Deputy Commissioner of
Private Limited, Income Tax,
Hyderabad Circle-5(1),
[PAN No. AAICP1509J] Hyderabad

अपीलार्थी / Appellant

प्रत्यर्थी / Respondent

निर्धारिती द्वारा / Assessee by: Shri PVSS Prasad, AR
राजस्व द्वारा / Revenue by: Smt. L. Sunitha Rao, CIT-DR

सुनवाई की तारीख/Date of hearing: 19/06/2024

घोषणा की तारीख/Pronouncement on: 28/06/2024

आदेश / ORDER

PER K. NARASIMHA CHARY, J.M:

Aggrieved by the final assessment order dated 18/07/2022 passed consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), in the case of Primera Medical Technologies Private Limited, ("the assessee") for the assessment year 2018-19, under section 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income Tax Act, 1961 (for short "the Act"), assessee filed this appeal.

2. At the outset, learned AR submitted that a delay of 15 days occurred in filing the appeal due to the covid complications suffered by the concerned persons and submitted that a meritorious case may not be thrown out at the threshold due to the delay of only 15 days. He further submitted that the assessee does not stand to gain by allowing the time to lapse. Though the learned DR resisted the condonation of delay the fact remains that the plea of the assessee that the concerned persons suffered covid related complications, does not appear to be anything abnormal or unusual. Taking a lenient view, we deem it just and proper to condone the delay. We, therefore, now shall proceed to hear the appeal and decide the same on merits.

3. Brief facts of the case are that the assessee is a company, engaged in the business of providing ITeS in the area of health information services, health information management, medical coding, Revenue cycle management, data quality services, core measures, electronic medical record implementation and support services to its Associated Enterprise (AE), namely, Prime HealthCare Services Inc.

4. Assessee filed the return of income for the assessment year 2018-19 on 29/11/2018, declaring an income of Rs. 15,44,42,240/-. In view of the international transactions with its AE, determination of Arm's Length Price (ALP) was referred to the learned Transfer Pricing Officer (learned TPO). Assessee adopted Transactional Net Margin Method (TNMM) with OP/OC as Profit Level Indicator (PLI). Assessee's margin was at 15.21%. By selecting 27 companies as comparables for provision of ITeS, assessee arrived at the average margin of such comparables at 10.71% and concluded that the transaction with its AE was at ALP.

5. Learned TPO, however, rejected certain comparables, conducted study and prepared the final list of comparables with 17 entities, to reach the margin at 24.84%, basing on which he suggested an upward adjustment of Rs. 9,86,66,724/-. Accordingly, learned Assessing Officer passed draft assessment order dated 20/09/2021, adding such an amount to the income of the assessee.

6. Aggrieved, assessee preferred objections before the learned DRP and challenged, insofar as this appeal is concerned, the inclusion of Tech Mahindra Business Services Ltd., Infosys BPM Ltd., Vitae International Accounting Services Pvt. Ltd., E-Clerx Services Ltd., Domex E – Data Pvt. Ltd., MPS Ltd., and Motiff India Infotech Pvt. Ltd., on the grounds of huge turnover, brand value, carrying huge R&D facilities, functional dissimilarity etc. Learned DRP declined to delete these entities by rejecting the contentions of the assessee. Final assessment order was passed on 18/07/2022, carrying out the directions of the learned DRP. Hence, this appeal. We shall now proceed to deal with the excludability of these entities in the light of the submissions on either side.

7. Firstly coming to Tech Mahindra Business Services Ltd., Infosys BPM Ltd., and E-Clerx Services Ltd., assessee's contention was that non-application of the maximum turnover filter in selection of comparables is bad under law. According to the learned DRP, when the functionality is similar, mere turnover cannot be a factor to reject an entity to be a comparable. It is the argument of the learned AR that as compared to the turnover of the assessee at Rs. 117.9 crores, the turnover of Tech Mahindra Business Services Ltd., is Rs. 703.6 crores, Infosys BPM Ltd. is

Rs. 3280 crores and that of E-Clerx Services Ltd., is Rs. 1888.97 crores, respectively.

8. Basing on the decision of the Hon'ble Bombay High Court in the case of CIT vs. M/s. Pentair Water India Pvt. Ltd. (2016) 69 taxmann.com 180 followed in the case of Obopay Mobile Technology India Private Limited [TS-20-ITAT-2016 (Bang)-TP] for the assessment year 2010-11, PCIT vs. M/s. Obopay Mobile Technology India Private Ltd., in ITA No. 586/2016, dated 23/07/2018 and PCIT vs. New River Software Services (P) Ltd., (2017) 85 taxmann.com 302 (Delhi), learned AR submitted that the turnover is obviously a relevant factor to consider the comparability.

9. Nextly, he submitted that the Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd., vs. ITO (2018) 98 taxmann.com 183 (Karnataka), approved the view taken by the Bangalore Bench of the Tribunal that the application of tolerance range of turnover of ten times on both sides of assessee's turnover was proper. Same was the view taken by the Hon'ble Karnataka High Court in the case of PCIT vs. Swiss Re Global Business Solutions India (P) Ltd., (2018) 96 taxmann.com 643 (Karnataka). Consistent with the said view, the Hyderabad Bench of the Tribunal also in the case of iMedx Information Services (P) Ltd., vs. DCIT (2023) 150 taxmann.com 217 (Hyderabad – Trib.) held that the application of tolerance range of turnover of ten times on both ends to fix the turnover filter would meet the ends of justice.

10. Per contra, learned DR vehemently disputed the objection of the assessee basing on the turnover. She placed reliance on the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment

Advisors (India) (P.) Ltd. vs. DCIT [2015] 56 taxmann.com 417 (Delhi), for the principle that huge profit or a huge turnover, ipso facto does not lead to its exclusion.

11. We have considered these contentions in the light of the decided case law. Insofar as the turnover filter is concerned, Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P.) Ltd. (supra), held that huge profit or a huge turnover, ipso facto does not lead to its exclusion; whereas in the case of Pentair Water India Pvt. Ltd. (supra), the Hon'ble Bombay High Court held that turnover is a relevant criteria for choosing companies as comparables in determining the ALP in Transfer Pricing cases. Hon'ble Karnataka High Court, however, in the case of Obopay Mobile Technology (supra), having noticed the view taken by the Hon'ble Delhi High Court in the case Chryscapital Investment Advisors (India) (P.) Ltd. (supra), and also the decision of the Hon'ble Bombay High Court in the case of M/s. Pentair Water India Pvt. Ltd. (supra), upheld the Tribunal order excluding certain entities from the list of comparables on the ground of huge turnover, while following the principle that where two views are possible on an issue, the view favourable to the assessee has to be adopted.

12. In these circumstances, following the footprints of the Hon'ble Karnataka High Court in the case of Obopay Mobile Technology India Private Ltd., (supra), we hold that the turnover is a relevant criteria for choosing companies as comparables in determining the ALP in Transfer Pricing cases.

13. Now turning to the next question as to the appropriate turnover filter, in all the decisions relied upon by the learned AR, a consistent view is taken that the application of tolerance range of turnover of ten times on both sides of assessee's turnover was proper. Following the same, we direct the learned Assessing Officer to adopt the same for a fresh search. With this view of the matter, we set aside the findings of the authorities below and direct the learned Assessing Officer/learned TPO to take the range of turnover filter at ten times on both the ends and conduct search afresh to take a plausible view.

14. Coming to the Vitae International Accounting Services Pvt. Ltd., Domex E – Data Pvt. Ltd., and MPS Ltd., though these entities broadly fall in the category of ITeS, but at the next level, there is a critical variation in their functionality. Vitae International Accounting Services Pvt. Ltd., is engaged in providing accounting, auditing and tax services apart from providing services in the knowledge specific domains to their clients, which require application of knowledge and advanced analytical and technical skills; whereas Domex E – Data Pvt. Ltd., is engaged in providing e-commerce operations, involving high end KPO services, which involves business analyticals, financial analytics and market research. MPS Ltd., is engaged in content solutions for the digital world like content authorizing and development, content production, content transformation and fulfilment and customer support.

15. In Maersk Global Centres (India) (P.) Ltd., vs. ACIT [2014] 43 taxmann.com 100 (Mumbai – Trib.) (SB) the question as to whether for the purpose of determining the arm's length price of international transactions of the assessee company providing back office support

services to their overseas associated enterprises, companies performing KPO functions should be considered as comparable was referred to the Special Bench. In this context, the Special Bench observed that the answer to this question will depend on the facts and circumstances of each case inasmuch as if the assessee company, on the basis of its own functional profile, is found to have provided to its AE the low end back office support services like voice or data processing services as a whole or substantially the whole, the company is providing mainly high end services by using their specialized knowledge and domain expertise cannot be considered as comparables. It further observed that the purpose of attaining a relatively equal degree of comparability can be achieved by taking into consideration the functional profile of the tested party and comparing the same with the entities selected as potential comparables on broad functional analysis taken at ITeS level. The principal functions performed by the tested party should be identified and the same can be compared with the principal functions performed by the entities already selected to find out the relatively equal degree of comparability, and that if it is possible by this exercise to determine that some uncontrolled transactions have a lesser degree of comparability than others, they should be eliminated. In this sort of cases, in the case of Rampgreen Solutions (P.) Ltd., vs. CIT [2015] 60 taxmann.com 355 (Delhi), Hon'ble Court observed that the quality and nature of services of each entity cannot be undermined by using the broad classification of ITeS sector and the selection of comparables should be done by taking a conscious call.

16. It, therefore, makes the things clear that considering all the entities that are selected by using the broad classification of ITeS, which takes

within its fold various types of services with completely different content and value will undermine the peculiarity of services/products offered by various entities under such classification, and, therefore, a conscious selection as to the quality and nature of content of service has to be taken into account in finalizing the list of comparables. As observed by the Hon'ble Delhi High Court Rule 10B(2)(a) of the Income Tax Rules, 1962 ("the Rules") mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics.

17. Going by this view taken by the Special Bench in the case of Maersk Global Centres (India) (P.) Ltd., (supra) and Hon'ble Delhi High Court in the case of Rampgreen Solutions (P.) Ltd., (supra), we find that the functions performed by Vitae International Accounting Services Pvt. Ltd., Domex E – Data Pvt. Ltd., and MPS Ltd., fall broadly in the class of ITeS, but those are akin to the functions enumerated in clause (iv) to (vii) of Rule 10TA(g) of the Rules, thereby rendering themselves to be non-comparables to the assessee. We, therefore, direct the learned Assessing Officer/learned TPO to exclude these entities from the list of comparables.

18. Coming to Motiff India Infotech Pvt. Ltd., only reason urged before us to exclude this entity is its huge advertising and promotional expense. On this aspect, learned TPO observed that any independent entity in an uncontrolled market structure would be spending routine marketing or sales promotion expenses and per se that does not amount to any extraordinary expense, since it would be impossible to find out any comparable without marketing or sales promotions expense in an uncontrolled market. Learned DRP observed that no material is available to conclude that the

brand or the expenses impacted the revenues of this entity. Since there is no dispute on the functional profile of this entity, we find it difficult to exclude this entity from the list of comparables. We direct the learned Assessing Officer/learned TPO to conduct fresh study in the light of the above observations and determine the ALP of the international transaction.

19. In the result, appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on this the 28th day of June, 2024.

Sd/-
(MADHUSUDAN SAWDIA)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Hyderabad,
Dated: 28/06/2024

TNMM

Copy forwarded to:

1. Primera Medical Technologies Private Limited, C/o. Prasad and Prasad, CAs, Flat No. 301, M.J. Towers, H.No. 8-2-698, Road No. 12, Banjara Hills, Hyderabad.
2. The Deputy Commissioner of Income Tax, Circle-5(1), Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
7. GUARD FILE.

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