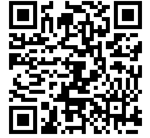

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 05.09.2023*

\+ **ITA 787/2019 & CM No.39008/2019**

THE PR. COMMISSIONER OF INCOME TAX -6 ..... Appellant

Through: Mr Ruchir Bhatia, Sr Standing Counsel with Mr Pratyaksh Gupta, Standing Counsel and Ms Deeksha Gupta, Adv.

versus

MENTOR GRAPHICS (INDIA) PVT. LTD. ..... Respondent

Through: Mr Himanshu S. Sinha, Mr Parash Bishwal and Mr Bhuwan Dhoopar, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

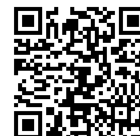
CM No.39008/2019 ***[Application filed on behalf of the appellant seeking condonation of delay of 258 days in re-filing the appeal]***

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of 258 days.

2. Mr Himanshu S. Sinha, who appears on behalf of the respondent/assessee, says that he does not oppose the prayer made in the application.

3. Accordingly, the delay is condoned.



4. The application is disposed of, in the aforesaid terms.

ITA 787/2019

5. This appeal concerns Assessment Year (AY) 2008-09.

6. *Via* this appeal, the appellant/revenue seeks to challenge the order dated 23.05.2018, passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. We may note that the Tribunal *via* the impugned order has, in fact, dealt with cross-appeals filed before it by the appellant/revenue as well as the respondent/assessee.

7.1 The appellant/revenue's appeal was numbered as ITA No.1204/Del/2014, which was filed concerning AY 2009-10.

7.2 Likewise, the respondent/assessee had filed two appeals, numbered ITA No.410/Del/2013 and ITA No.1484/Del/2014, concerning AY 2008-09 and 2009-10 respectively.

8. However, as noted right at the beginning, the appellant/revenue has come up in appeal *vis-à-vis* AY 2008-09 whereby, the respondent/assessee's appeal, i.e., ITA No.410/Del/2013 was partly allowed.

9. In the appeal preferred by the respondent/assessee before the Tribunal, it had asked for exclusion of the following nine (9) comparables:

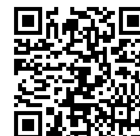
(i) Infosys Ltd. [in short, "Infosys"]

(ii) KALS Information Systems Ltd. [in short, "KALS"]

(iii) Bodhtree Consulting Ltd. [in short, "Bodhtree"]

(iv) Tata Elexi Ltd. [in short, "Tata Elexi"]

(v) Avani Cincom Technologies Ltd. [in short, "Avani"]



(vi) Wipro Ltd. [in short, “Wipro”]

(vii) E-Zest Solutions Ltd. [in short, “E-Zest”]

(viii) Persistent Systems Ltd. [in short, “Persistent”]

(ix) Softsol India Ltd. [in short, “Softsol”]

10. It is not in dispute that out of the aforementioned nine ((9) comparables, the Tribunal has *via* the impugned order directed the exclusion of eight (8) comparables, barring Softsol.

10.1 We are told by Mr Himanshu S. Sinha, who appears on behalf of the respondent/assessee, that the respondent/assessee has not preferred an appeal on that score.

11. Insofar as the appellant/revenue is concerned, Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, submits that this appeal is confined to the direction issued by the Tribunal to exclude the following four comparables:

(i) Avani

(ii) Wipro

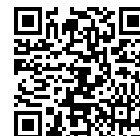
(iii) E-Zest

(iv) Persistent

12. Mr Bhatia says that the approach adopted by the Tribunal was unsustainable and, therefore, interference is called for by this court.

13. On the other hand, Mr Sinha relies upon the impugned order in support of his submission that the Tribunal has returned findings of fact and, therefore, no interference is called for by the court.

14. Having examined the record and heard learned counsel for the parties, we find that the following emerges:



15. Insofar as the respondent/assessee is concerned, it is in the business of software development services.

16. Therefore, while examining the approach adopted by the Tribunal, one would have to see whether the exclusion of the four comparables ordered by the Tribunal was in accordance with the well-accepted norms laid down by this court.

17. On examining the impugned order, we find that insofar as Avani, Wipro, and Persistent are concerned, the Tribunal has returned a finding of fact that no segmental data is available. These three comparables are in the business of software products and services and no segmental data is available.

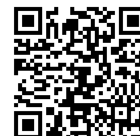
18. The finding of fact recorded by the Tribunal vis-à-vis Avani is that it deals in software products and services, there is a categoric finding that no segmental data is available and, therefore, it is not a good comparable.

18.1 Likewise, the same position was obtained vis-à-vis Wipro. Wipro also, according to the Tribunal, deals in software products and services and no segmental data, according to it, is available vis-à-vis this entity as well.

18.2 The position vis-à-vis Persistent is no different. The finding of fact recorded by the Tribunal is that it had dealt in software products and services and there was no segmental data available.

19. We may note that Mr Bhatia has, however, argued quite vigorously that before the Transfer Pricing Officer (TPO), the respondent/assessee had accepted Persistent as a comparable.

19.1 Mr Bhatia also contended that, having taken this position, quite obviously, no objection was filed vis-à-vis this comparable before the



Dispute Resolution Panel (DRP).

19.2. Concededly, the objection to the inclusion of Persistent was taken by the respondent/assessee for the first time before the Tribunal. Therefore, it was Mr Bhatia's submission that the Tribunal could have taken note of this aspect of the matter and, accordingly, dealt with the issue as to whether or not Persistent should be excluded as a comparable.

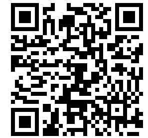
20. In our view, the argument, though, attractive at first blush, cannot carry the case of the appellant/revenue very far for the following reasons:

(i) Firstly, the Tribunal is the final fact-finding authority.

(ii) Secondly, the object of the exercise conducted by the statutory authorities in matters dealing with transfer pricing is to ultimately determine as to whether the transaction entered into between the respondent and its associated enterprises is at arm's length. Therefore, a position taken by an assessee at the initial stage can always be revisited and once such a step is taken, the statutory authority would have to examine it on merits and conclude finally as to whether or not, as in this case, the exclusion of comparables would help in reaching a conclusion as regards the international transaction executed between the respondent/assessee and the associated enterprises.

21. Therefore, the matter has to be examined, and not as Mr Bhatia would like to contend- which is that this is a case of approbation and reprobation, but whether the statutory authority has examined the merits and then come to a conclusion either way.

22. In this case, we find that the Tribunal has, in fact, examined the matter and concluded that Persistent as a comparable had to be excluded, as no



segmental data was available.

23. This brings us to the last comparable which is E-Zest. In this case also, we find that the Tribunal also returned a finding that the said entity dealt in software product development services and high-end technical services which, according to it, fell under the umbrella of Knowledge Process Outsourcing (KPO) services.

23.1. Based on this, the Tribunal concluded that E-Zest had to be excluded from the array of comparables as the respondent/assessee was not a KPO service.

24. We thus find, as discussed above, that concerning the four (4) comparables in issue, the Tribunal has returned findings of fact.

25. Given this position, we are not inclined to interfere with the impugned order.

26. According to us, no substantial question of law arises for our consideration.

27. The appeal is, accordingly, closed.

28. Parties will act based on the digitally signed copy of the judgment.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

SEPTEMBER 5, 2023

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