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# Indian High Court refuses to review dispute over transfer pricing comparables selection

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An Indian High Court on June 29 ruled in a transfer pricing dispute that Indian tribunals are the final fact-finding authority; therefore, questions such as the appropriateness of comparables cannot be reviewed by the High Court.

The case, brought by India's revenue department before the Karnataka High Court, concerned the use of particular transfer pricing comparables to assess the arm's length price of related party transactions involving Softbrands India Private Limited.

The parties asked the High Court to determine whether the Income Tax Appellate Tribunal properly rejected certain comparables that were used by the revenue department to determine the arm's length price and whether the tribunal was justified in requiring that the comparables used must be of companies that have 15% of total revenue from related parties.

The court said that transfer pricing adjustments are essentially fact finding exercises based on estimates of broad and fair guesswork. The tribunal is the final fact finding authority, and therefore an appeal on this subject cannot be entertained by the revenue department or the taxpayer unless it involves a substantial question of law, the court said.

The High Court went on to examine the scope of 'substantial question of law,' for which power of appeal is granted under Section 260-A of the ITA.

In this regard, it held that the taxpayer must demonstrate perversity in the findings of the tribunal for a factual finding to give rise to a substantial question of law. This was substantiated by judicial precedents both at High Court and Supreme Court level.

Given that the arguments raised in the instant case were regarding pick of comparables, short-listing of them, applying of filters, etc., the High Court held that these questions are factual and therefore cannot be entertained by the High Court.

The High Court has also noted that the process of making huge transfer pricing adjustments results in litigation at several levels and forums. And, if such questions are entertained by the High Courts and Supreme Court, it will cause further delay and hamper judicial dispensation in such cases.

## Analysis

The ruling of the High Court affirms an age-old principle that the tribunal is the final fact-finding authority and the High Court and Supreme Court can only answer substantial questions of law arising out of such judgments. The existence of a substantial question of law is *sine qua non* for maintaining an appeal before the High Court.

Interestingly, in the present case, instead of dismissing the appeal upfront, the High Court dives into the order of the tribunal and even discusses it, to some extent.

However, since the questions provided to the High Court require facts to be analyzed and brought before the High Court, the High Court clarified that mere dissatisfaction with the findings of facts arrived at by the learned tribunal is not at all a sufficient reason to invoke Section 260-A of the ITA before the court.

However, considering recent changing trends in the economy concerning digitalization it becomes interesting to analyze this judgment.

Presently, courts and tribunals are still trying to tax the digital economy within the existing provisions of law and, accordingly, the law in this respect is still evolving.

The courts in India refer to OECD commentaries, international authors, and the multilateral instrument to conclude in this regard.

The High Court has stated that questions on interpretation of domestic law or tax treaties, share transfers, and base erosion and profit shifting (BEPS) would be considered as 'substantial' questions of law.

Therefore, if questions involving transfer pricing adjustments in a digital set up are driven by these international tax principles, in addition to facts, one can still argue that the High Court could entertain such appeals.

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