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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ITA 17/2016**

PR COMMISSIONER OF INCOME TAX-3 ..... Appellant
Through: Mr. Rohit Madan, Senior standing counsel.

versus

FISERV INDIA PVT LTD ..... Respondent
Through: Mr. Sachit Jolly, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% 06.01.2016

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is directed against the impugned order dated 26th June 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1822/Del/2014 for the Assessment Year ('AY') 2009-10.

2. The Assessee, M/s. Fiserv India P. Ltd. ('FIPL') is a wholly owned subsidiary of Results International Systems Inc. ('RISL'), USA. Further, RISL is a 100% subsidiary of Fiserv Inc. USA ('FI'). During the relevant AY, FIPL provided software development and maintenance services to its associate enterprises ('AEs'), namely, Fiserv Global Services Inc., USA

('FGSI'), for which it was compensated in terms of the Master Service Agreement ('MSA') entered into between FIPL and FGSI on cost plus 15%. In its Transfer Pricing ('TP') document furnished for the AY in question, FIPL disclosed certain international transactions with its AEs. This included transactions involving the payment towards software development services for the value of Rs. 204,03,31,108. The arm's length price ('ALP') was determined by FIPL by applying transactional net margin method ('TNMM'). The operating profit to total cost ('OP/TC') ratio was taken as the profit level indicator ('PLI') in the TNMM analysis. The average PLI of comparables was arrived at 9.54% whereas PLI of FIPL was arrived at 15% on cost. 29 comparables were selected by FIPL in the aforementioned PLI exercise. Since the profit margin of FIPL on the above basis was more than the determined range of the mean margin of the comparables, no TP adjustment was offered in the return of income.

3. The Transfer Pricing Officer ('TPO') by an order dated 14th December 2012 rejected the TP study and substituted a fresh process. The filters and comparable selected by the FIPL were modified. Thereafter, the TPO selected a list of 13 comparables and determined the PLI of the comparables companies at 25.78% as against PLI of 15% of FIPL. Accordingly, the TPO

proposed a transfer pricing adjustment of Rs. 19,69,44,637 to the taxable income of the Assessee (FIPL).

4. By an order dated 20th December 2013 the Dispute Resolution Panel ('DRP') upheld the proposed adjustment made by the TPO, subject to claim of working capital adjustment as per the OECD methodology. The TPO was directed to re-compute operating margin of FIPL as well as comparable companies in terms of the guidelines provided by Safe Harbour Notification dated 18th September 2013. A revised final list of 14 comparable companies was drawn up. The final assessment was completed by the Assessing Officer ('AO') by an order dated 24th February 2014 assessing the total income of the FIPL after making a transfer pricing addition of Rs. 19,04,65,871.

5. Before the ITAT, the Assessee confined its grievance to the exclusion of 6 comparables from the final set of comparables selected by the DRP. The ITAT held that since the Assessee was engaged in software development services and one of the comparables viz., Bodhtree Consulting Limited, was engaged in software development programmes, the said comparable was directed to be excluded. As far as another comparable viz., Infosys Limited, it was held that since the Assessee was captive service provider to its AE, Infosys Ltd. was not a valid comparable.

6. As regards M/s. Thirdware Solutions, the ITAT took note of the fact that the annual report did not reveal the bifurcation of sales through SEZ and STPI units and, therefore, it was required to be excluded. As regards M/s. Sonata Software, it mainly dealt in product, sale, offshore development services, research and development, and significant related party transactions. The aggregate related party transactions of FIPL were about 40% of the total service income of Rs. 243.57 crores. Sonata Software was not a valid comparable as it failed the RTP filter of 25% applied by the TPO.

7. The ITAT had also given valid reasons for excluding Kals Information System as a comparable. As regards M/s. Mindtree, the ITAT required AO/TPO to take into account the effect that the acquisition by Mindtree of another company TES PV Electronic Solutions Private Limited, with the approval of the High Court of Karnataka, would have in treating it as a comparable.

8. The ITAT has also dealt with the issue of foreign exchange fluctuation as operating income/expenses and held that this issue is no longer *res integra* and is in favour of the Assessee by the decision of the Coordinate Bench of ITAT in ***Westfalia Separator India Pvt. Ltd. v. ACIT*** (ITA No. 4446/D/02).

Accordingly, the AO/TPO was directed to treat the foreign exchange gain/loss as an operating item. The AO/TPO was directed to compute the ALP of the international transactions entered into by FIPL with its AEs keeping in view the observations made in the order of the ITAT.

9. In the present appeal, the Revenue has projected the following questions for consideration by the Court:

> (i) Whether the ITAT was right in rejecting the comparables, as noted above, and whether the application of stringent standards of comparability will defeat the purpose of flexibility provided in the comparability analysis for determining ALP?
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> (ii) Whether the ITAT was right in foreign exchange fluctuation as operating expenses/income without considering that it has no bearing on the transaction and that Safe Harbour Rules stipulate exclusion of foreign exchange gain/loss as operating expenses/income?

10. As regards question (ii) it is pointed out by learned counsel for the Assessee that the Safe Harbour Notification dated 18th September 2013 relied upon by the Revenue is prospective and did not apply to the AY in question. Even otherwise the Court finds that the decisions relied upon by the ITAT in the impugned order covers this issue in favour of the Assessee

as far as the AY in question is concerned. Consequently, the Court declines to frame any question on the issue.

11. As far as question (i) is concerned, the Court finds that the ITAT has undertaken a detailed factual analysis and given cogent reasons for the exclusion of the comparables in question. The Court is not persuaded to hold that any substantial question of law arises as regards the said issue.

12. The appeal is accordingly dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

JANUARY 06, 2016
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