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

\+ ITA 945/2017, CM APPL.40187/2017

THE PR. COMMISSIONER OF INCOME TAX-4 ..... Appellant
Through: Mr. Ruchir Bhatia with Mr. Gaurav Khetarpal, Advocates.

versus

M/S INTUIT TECHNOLOGY SERVICES LTD. ..... Respondent
Through: Mr. Divyanshu Agrawal, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

O R D E R

% **08.11.2017**

1. The question of law urged in this case is with respect to the rejection of a comparable, i.e., Celestial Biolabs Ltd. by the Income Tax Appellate Tribunal ("ITAT") – by way of affirmation of the appellate Commissioner's order.

2. The assessee's returns were sought to be analysed for ALP determination. It is engaged in the business of software development for its associated enterprises, i.e., Intuit Inc. It mainly provides software development services, which include design, research, development and production of software and deliver them to the AE.

3. The TPO had selected and included several comparables

including Celestial Biolabs Ltd. The assessee's appeal was accepted by the CIT (A) who was of the opinion that the said comparables could not be included in the TPO analysis as it was functionally different and besides had extraordinary profits during the year on account of use of bioinformatics tools, implantation of ERP in the pharma sector and other software development services. The relevant discussion by the CIT (A) in this regard is as follows: -

> *"3.8.2 I have carefully considered the submission of the appellant. This company is functionally different and has earned extraordinary high profits during the year on account of use of bioinformatics tools, implantation of ERP in the Pharma Sector, software development services and also through been examined. I find that this company fails the employee cost filter. Besides that, this company is consistently receiving loans from Department of science and Industrial Research and hence the economic circumstances of this company are at absolute divergence from the appellant. In view of these reasons, I am of the opinion that this company should be excluded from the set of comparables. It is also brought to my notice that DRP in many cases has rejected this comparable software on similar grounds."*

4. ITAT concurred with the findings of the CIT (A) holding as follows: -

> *"6. We have heard both the parties and perused and carefully considered the material on record, while it is true that the decisions cited and relied on by the Ld. A.R. were with respect to the immediately previous assessment year and there cannot be an assumption that it would continue to be applicable for this year as well. The same parity of reasoning is applicable to the Ld. TPO who seems to have selected this company as a comparable based on the reasoning given in the TPO's order for the earlier assessment year in assessee's own*

case. It is evidently clear that the Ld. TPO has not carried out any independent FAR analysis for this company for this year viz. Assessment Year 2008-09. To that extent, in our considered view, the selection process adopted by the Ld. TPO for inclusion of this company in the list of comparables is defective and suffers from infirmity.

6.1 Apart from relying on the afore cited judicial decisions, the assessee has brought on record substantial factual evidence to establish that this company is functionally dissimilar and different from the assessee before us. Even the Ld. CIT (A) has discussed at para 3.8.2."

5. This Court is of the opinion that the rationale given by the appellate Commissioner and the ITAT for exclusion of Celestial Biolabs Ltd. as a comparable are relevant. Functional similarity is one of the key considerations, which make an entity comparable to another for a TPO analysis for ALP determination. Having regard to the important differences and the significant development, i.e., implantation of ERP and other practices by the Celestial Biolabs Ltd., its exclusion in the present case was justified.

6. Consequently, we are of the opinion that no substantial question of law arises; the appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

SANJEEV SACHDEVA, J

NOVEMBER 08, 2017
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