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

% Judgment delivered on: 28.11.2017

+ ITA 1064/2017 & CM No. 43177/2017

PR. COMMISSIONER OF INCOME TAX Appellant

versus

B. C. MANAGEMENT SERVICES PVT. LTD. Respondent

+ ITA 1083/2017 & CM No. 43280/2017

PR. COMMISSIONER OF INCOME TAX Appellant

versus

B. C. MANAGEMENT SERVICES PVT. LTD. Respondent

Advocates who appeared in this case:

For the Appellant(s) : Mr. Zoheb Hossain, Sr. Standing Counsel

For the Respondent(s) : None.

CORAM:-

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The Revenue is aggrieved by the order of the ITAT which in AY 2011-12, accepted the assessee's appeals. The questions of law urged are as follows:-

- “1. Whether the exclusion of four comparables i.e. e-Clerx Pvt. Ltd., M/s ICRA Techno Analytics Ltd., M/s TCS E-Serve Ltd. and M/s Accentia Technologies Pvt. Ltd., are sustainable and not erroneous?”*
- 2. Whether the findings of the ITAT with respect to foreign exchange gain and the manner of its treatment as part of Operating Income for ALP determination, is correct and is justified?*
- 3. Whether the exclusion of the Transfer Pricing adjustment made by the TPO, added notional interest on delay in receipt of payment of Associated Enterprises (AE) was justified?”*

2. The Assessee company was incorporated on 12.05.2010, which provides IT enabled services i.e. Application and infrastructure development and testing, system and performance operations management and support etc. to its associated enterprises.

3. The assessee was required to file Transfer Pricing Report along with its income tax returns on 28.11.2011 declaring the total income of Rs. 2,98,06,000/-.

4. The matter was referred to Transfer Pricing Officer (TPO) who made certain adjustments – to the tune of Rs. 2,89,52,326/- after taking into account the margins earned by the comparable industry/assessee, the detail and data of which was available. The assessee preferred its objections to the Dispute Resolutions Panel (DRP); which granted partial relief in the sense of direction to delete the comparable i.e. Accentia was made. The AO then completed the

assessment under Section 143(3). The Assessee preferred appeal to the ITAT.

5. The ITAT granted relief with respect to the assessee's appeals by directing the exclusion of all four comparables and rejected the Revenue's appeals. Likewise, the additions made by the AO on the ground of foreign exchange gains, as well as additions of notional interest; were deleted.

6. This Court notes that so far as the second and third questions i.e. foreign exchange and notional interest are concerned, they are no longer *res integra* in terms of the order made by the DB of this Court in *Principal Commissioner of Income Tax Vs. Cashedge India Pvt. Ltd.*, ITA 279/2016 decided on 04.05.2016.

7. In *Principal Commissioner of Income Tax Vs. Ameriprise India Private Limited* (ITA 206/2016) decided on 23.03.2016, this Court had held that foreign exchange gains earned by the assessee which is in relation to trading items and emanating from international transactions, direct value derived from it cannot be treated as Non-Operating losses and gains.

8. This Court notices that Revenue seeks to rely on the Safe Harbour Rules which were notified by the Revenue authority and came into force in 2013. In these circumstances, given that the present assessment period covers AY 2011-12, the treatment cannot be in accordance with those rules as held in '*Principal Commissioner of*

Income Tax Vs. M/s Cashedge India Pvt. Ltd., ITA 279/2016’, decided on 04.05.2016. Consequently, no question of law arises.

9. With respect to the treatment of notional interest by the TPO/AO, the Court is of the opinion that no question of law arises. In an identical situation, in *Principal Commissioner of Income Tax Vs. Bechtel India Pvt. Ltd. ITA 379/2016*, decided on 21.07.2016, the Court had held that such notional income on account of delayed payment made by the AO cannot be treated as part of the income and made the subject matter of the adjustments. The question no. 2 and 3 therefore does not arise for consideration.

10. So far as question no. 1 with respect to exclusion of four comparables is concerned, we notice that E-clerx was excluded on two grounds i.e. no segmental data was available, and it was functionally different as it was providing high end/BPO services.

11. This Court further notes that E-clerx is to provide financial services such as consultancy business solution and testing.

12. The Assessee provides IT abled services in infrastructure development and testing, system and performance operations management and support etc. The ITAT excluded E-clerx as comparable after noticing that it provided high value financial services relating to consultancy business and solution testing besides the web content management merchandising execution, web analytics, etc. This functional dissimilarity, and absence of segmental data led

to its exclusion as a comparable. Those are findings of facts based upon record. Consequently, exclusion of E-Clerx was in order and cannot be interfered with.

13. The exclusion of second comparable ICRA Techno Analytics Ltd. was on the basis that it had engaged itself in processing and providing software development and consultancy and engineering services/web development services. The reasons for exclusion were functional dis-similarities and that segmental data were unavailable. Again the findings of the ITAT are reasonable and based on record. The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity between that entity and the assessee, however, there is a close connection between TCS E-serve and TATA Consultancy Service Ltd. which was high brand value; that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable. The rationale for exclusion is therefore upheld. The assessee was aggrieved by the inclusion of Accentia a Software Development Company. The Revenue is aggrieved by the exclusion of Accentia from the TP analysis. The DRP had directed its deletion. We observe that the ITAT has noticed the unavailability of the segmental data so far as these comparables are concerned. Furthermore, the functionality of this entity was concerned, it is different from that of the assessee; Accentia was

engaged in KPO services in the healthcare sector.

14. In view of the above findings, this Court is of the opinion that no substantial question of law arises. The appeals are dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**SANJEEV SACHDEVA
(JUDGE)**

**NOVEMBER 28, 2017
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