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

\+ ITA 286/2018

PR. COMMISSIONER OFLNCOME TAX – 2 ..... Appellant
Through Mr. Zoheb Hossain, Sr. Standing counsel.

versus

M/S CHRYS CAPITAL INVESTMENT ADVISORS (INDIA) PVT. LTD. ..... Respondent
Through Mr. Vikas Srivastava, Mr. Mayank Aggarwal, Mr. Atul Nanawat and Ms. Kanika Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

O R D E R

% **12.03.2018**

Admit.

Issue notice. Mr.Vikas Srivastava, Adv accepts notice of the appeal.

With the consent of the counsel for the parties, the appeal was heard finally.

Following question of law arises for consideration :

> *"Did the Tribunal (ITAT) fall into error in excluding the two comparables i.e. Keynote Corporate Service Ltd. and Motilal Oswal Investment Advisors Pvt. Ltd.?"*

The question framed pertains to the transfer pricing/ALP determination, carried out by the Transfer Pricing Officer (TPO) under Section 92CA read with Rule 10D of the Income Tax Rules. So far as Keynote Corporate Service Ltd. is concerned, the ITAT appears to have excluded that entity from the list of comparables on the ground that for the present as also the previous year, the entity had reported abnormally high profits. The Revenue correctly urges that abnormal profits *per se* do not warrant exclusion of the comparables which might otherwise be functionally similar. The assessee urges that for AY 2006-07 after the judgment was delivered by this Court [on 27.04.2015 in Chrys*capital Investment Advisors (India) Pvt. Ltd. Vs. Dy. Commissioner of Income Tax,* (2015) 376 ITR 183 (Delhi)], the question of functional similarity was gone into and the ITAT rendered elaborate findings that Keynote Corporate Service Ltd. was entirely dis-similar. It is submitted that likewise in January, 2017, similar findings with respect to functional dis-similarity of Keynote Corporate Service Ltd. from the assessee's business were rendered by ITAT. It appears that Tribunal has not considered these judgments in the light of the settled law that each year's findings might be a guide, but, cannot be conclusive on the issues involved. This Court notices that for AY 2007-08, undoubtedly, there were some special reasons inasmuch as Keynote Corporate Service Ltd had undergone amalgamation with another entity. In these circumstances, the question whether Keynote Corporate Service Ltd figures are to be included or not, requires fresh determination, having regard to the specific issue of functional similarity; the matter is therefore, remitted to ITAT. It is open to the ITAT to consider the findings with respect to the preceding years after the amalgamation. The ITAT will record its appropriate findings year-wise on the issue of functional similarity.

With respect to the inclusion of Motilal Oswal Investment Advisors Pvt. Ltd., the Tribunal was of the opinion that on the application of appropriate filter (of 25% profits as threshold) the entity had to be excluded since it returned more than that percentage of total expenditure. The Revenue's complaint is that in doing so, the ITAT appears to have ignored that in respect of other transactions, the formula adopted i.e. percentage of related parties transaction (being sales to related parties plus expenses paid to such parties over sales turnover) was not adopted only in the case of this entity (Motilal Oswal Investment Advisors Pvt. Ltd.). The ITAT appears to have adopted the formula of percentage of RPT being equal to expenses paid to related parties divided by total expenditure multiplied by 100, only in the case of this entity. While doing so, the ITAT followed its previous ruling in *SunGard Solutions (India) (P) Ltd. vs. Dy. DIT,* (2014) 51 taxmann.com 339 (Pune). This Court is of the opinion that adopting one procedure for only one entity and adopting another for all other entities or comparables can lead to a distorted picture. In these given circumstances this issue too is remanded to the ITAT for fresh consideration.

The appeal is allowed in the above terms.

The financial similarity/dis-similarity shall be considered afresh by the Tribunal (ITAT) especially having regard to the developments that occurred after AY 2007-2008.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MARCH 12, 2018/rc