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

+ ITA 124/2018

PRINCIPAL COMMISSIONER OF INCOME TAX-7 Appellant
Through: Mr. Sanjay Kumar, Advocate.

versus

M/S ORACLE (OFSS) BPO SERVICES PVT. LTD. Respondent
Through: Mr. Kamal Sawhney, Mr. Shikhar
Garg and Mr. Prashant
Meharchandani, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

% **05.02.2018**

The Revenue's appeal under Section 260-A of the Income Tax Act, 1961 (for short "the Act") challenges the impugned order passed by the Income Tax Appellate Tribunal (for short "ITAT").

It is urged that the deletion directed by the ITAT, based upon its application of the Related Party Transaction ("RPT") and the exclusion of the comparable i.e. M/s Wipro Limited (BPO service segment), is in error of law.

The brief facts are that the assessee in its return for Assessment Year ("A.Y.") 2007-08 reported three categories of international transactions with its Associated Enterprise ("AE"). The first being 'provision of services'; the second related to 'recovery of expenses'

and the third related to 'sale of call manager phones'. The TP report filed by the assessee includes 22 comparables. The assessee chose the Transactional Net Marginal Method ("TNMM") as the most appropriate method in its report. The Transfer Pricing Officer ("TPO") accepted TNMM as the most appropriate method for the determination of the Arm's Length Price ("ALP"). However, the TPO excluded 13 comparables out of the list of 22 comparables on the basis that they were not premised upon the relevant single year data but rather based upon multiple years' data. The OP/TC yielded an operating margin to the AE at 11.61% (within the tolerable range of +/-5% of the three years weighted average of OP/TC), which was computed at 12.51%. The average margin considered by the TPO of comparables was 22.09%.

On the basis of application of settled statutory principles, the TPO made an upward adjustment of ₹3,25,93,468/-. A draft assessment order was made by the Assessing Officer ("AO") on the basis of the TPO's report.

The assessee approached the Dispute Resolution Panel (for short "DRP") which conducted its fresh exercise, and after considering the relevant years' data (which was by then available before it) rejected four comparable companies. The others were included and the margin arrived at by the DRP was 23.62%. This resulted in an adjustment of ₹7,21,92,932/-.

The assessee's appeal to the ITAT resulted in deletion of the adjustments made by the DRP. These were primarily based upon the

ITAT's fresh assessment and appraisal of the circumstances. It also took into account the RPT and excluded certain comparables by applying a broad ballpark threshold of taking into account the functioning and profits of comparable entities, whose unrelated transactions were in equal to or in excess to 75% of their business. The Revenue is aggrieved against this filter. It is also aggrieved by the exclusion of M/s Wipro Limited from the list of comparables. The ITAT did so on the basis that the entity had a significant brand presence in the market and could not be deemed to be a comparable entity.

The Revenue urges that the application of the RPT filter in this case was not appropriate; it is pointing to the two entities. It was suggested during the course of hearing that the RPT recorded was in excess of 100% which is improbable and this, *per se*, should be examined. It was submitted that consequently the ITAT should not have worked out the adjustments or directed the deletion but rather remitted the matter for fresh consideration by the Assessing Officer ("AO").

The Court is of the opinion that there is no merit in the Revenue's arguments. The RPT filter, is relevant and fits in with the overall scheme of a transfer pricing study which is premised primarily on comparing light entities having similar if not identical functions. Therefore, if a particular entity predominantly has transactions with its associate enterprise – in excess of a certain threshold percentage, its profit making capacity may result in a distorted picture, either

way. In these circumstances, the ITAT, in the present case, followed a previous precedent and was of the opinion that a broad threshold figure of 25% RPT in the case of comparables was essential. Applying that rationale, the ITAT excluded some comparables listed in the TPO's report. There is no error of law *per se* in this approach. As to the exclusion of M/s Wipro Limited, here too, the Court is of the opinion that the brand value of an entity has a significant role in its ability to garner profits and negotiate contracts. Thus, while considering the comparables, the likelihood of profits derived or attributable to the brand having regard to the consistency of the quality of services that an entity is able to offer would be relevant; although functionally, the two entities may be similar in terms of the services or products they offer, brand does play its own role in price or cost determination. If this singular aspect is kept in mind, the ITAT's approach cannot be faulted with.

For the above reasons, the Court is of the opinion that no question of law arises. The appeal is consequently dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 05, 2018

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