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

\+ ITA 241/2018

THE PR. COMMISSIONER OF INCOME TAX -3 ..... Appellant
Through: Sh. Ruchir Bhatia, Sr. Standing Counsel.

versus

EVALUESERVE SEZ (GURGAON) PVT. LTD. ..... Respondent
Through : Ms. Ananya Kapoor, Advocate.

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

O R D E R

% **26.02.2018**

1. The Revenue challenges an order of the Income Tax Appellate Tribunal (ITAT) which accepted the assessee's contentions so far as comparison with six entities in the determination of Arm's Length Price (ALP) and Transfer Pricing adjustment under Section 93CA of the Income Tax Act, 1961 [hereafter "the 1961 Act"], was concerned.

2. The assessee is engaged in IT-enabled services (ITeS) such as research activities in terms of agreements with its Associated Enterprise (AE). It primarily concerns itself with business information, market research and intellectual property research.

3. The Transfer Pricing Officer (TPO), while carrying out the ALP determination procedure took into account the profitability and margins of ten comparable entities. The assessee was aggrieved by the inclusion of six of them and approached the Disputes Resolution Panel (DRP). Its contentions were rejected and the draft assessment order was finalized by the Assessing Officer (AO).

4. The assessee, therefore, appealed to the ITAT which accepted the assessee's plea and directed the exclusion of the said six comparables for various reasons. That is the subject matter of Revenue's appeal.

5. This Court notices that as far as the exclusion of three comparables – M/s. TCS E-Serve Limited; M/s. TCS E-Serve International Limited and M/s. Infosys BPO Ltd. is concerned, the ITAT was cognizant of and took note of the circumstances that these entities had a high brand value and, therefore, were able to command greater profits; besides, they operated on economic upscale. This approach cannot be faulted having regard to the decision of this Court in *Pr. Commissioner of Income Tax v. B.C. Management Services Pvt. Ltd.* 2018 (89) Taxman.com 68 (Del), which reads as follows:

> *"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 execution were functional dissimilarities 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."

6. The ITAT noted that M/s. Accentia Technologies Ltd. was mainly performing medical transcription services. It was of the opinion that its service was similar to the one that the assessee was engaged in. However, it also noted that there was no segmented data and on that account, directed the exclusion of that entity from the list of comparables. Likewise, in the case of M/s. ICRA Techno Analysis Ltd., it was found that the said entity was engaged in business intelligence and analytics supplies, software development, consultancy services, engineering services, web development and hosting services. Besides functional dissimilarity, the ITAT also noted that there was no segmented data to compare its activity with the assessee. Likewise, in the M/s. eClarx Services, the ITAT noted that its activity was functionally dissimilar because it performed KPO function whereas the assessee was classifiable as BPO.

7. All the reasons given by the ITAT, in the opinion of the Court, are justified and supported by the judgment in *B.C. Management (supra)*. In the case of M/s. eClarx Services, the findings of fact with respect to dissimilarity binds the Revenue.

8. For the above reasons, no substantial question of law arises. The writ petition is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 26, 2018/ajk