IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA-388-2018 (O&M)

Date of Decision: 19.3.2019

The Principal Commissioner of Income Tax, Gurgaon

....Appellant.

Versus

ZTE Telecom India Pvt. Ltd., Gurgaon

...Respondent.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.

PRESENT: Mr. Tajender K. Joshi, Senior Standing Counsel,
for the appellant.

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AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 19.3.2018 (Annexure A-V) passed by the Income Tax Appellate Tribunal, Delhi Bench, '1-2', New Delhi (hereinafter referred to as "the Tribunal") in ITA No. 5971/DEL/2014, for the assessment year 2007-08, claiming the following substantial question of law:-

> "Whether the Hon'ble ITAT was correct in excluding Infosys Technologies Ltd. as a comparable relying on the decision of the Hon'ble High Court in the case of CIT Vs. Agnity India Technologies Pvt. Ltd. when the circumstances are totally different and when assessee itself has taken Infosys as a comparable in its TP Study

Report?"

2. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee filed its return of income on 14.11.2007 for the assessment year 2007-08 declaring an income of ₹ 1,82,91,080/-. A reference was made to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP). The TPO vide order dated 26.10.2010 (Annexure A-I) passed under Section 92CA(3) of the Act proposed the Transfer Pricing Adjustment at ₹ 2,98,61,631/-. The Assessing Officer vide draft order dated 20.12.2010 (Annexure A-II) made the addition of ₹ 2,98,61,631/- on account of Transfer Pricing Adjustments and ₹ 14,29,434/- on account of interest on service tax and TDS. Vide order dated 9.2.2011 (Annexure A-III), the Assessing Officer framed the final assessment under Section 143(3) of the Act at a total income of ₹ 4,95,82,145/- including addition of ₹ 2,98,61,631/- on account of Transfer Pricing Adjustments and ₹ 14,29,434/- on account of interest on service tax and TDS. Feeling aggrieved by the order, Annexure A-III, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Chandigarh [for brevity "the CIT(A)"]. The CIT(A) vide order dated 19.8.2014 (Annexure A-IV) while partly allowing the appeal, reduced the addition on Transfer Pricing Adjustment to ₹ 1,51,63,336/-. Still dissatisfied, the assessee filed an appeal before the Tribunal. The Tribunal vide order dated 19.3.2018 (Annexure A-V) partly allowed the appeal of the assessee and directed the TPO to exclude Infosys Technology Ltd. from the comparability analysis of software support systems segment of the assessee while determining Arm's Length Price of the international transactions. Hence, the present appeal by the revenue.

3. After hearing learned counsel for the appellant, we do not find any merit in the appeal.

4. The only issue that arises in this appeal is as to whether Infosys Technologies Limited has been rightly excluded from the list of comparables for determining ALP?

5. No doubt, the assessee itself had selected Infosys Technologies Ltd. as a comparable company in its transfer pricing study report and vide letter dated 13.10.2010 accepted it to be so before the TPO without any comment. However, it was challenged for the first time before the CIT(A). The assessee claimed that Infosys Technologies Ltd. was not a valid comparable to the assessee as the assessee was a pigmy as compared to the giant Infosys Technologies Ltd.

6. The Tribunal while accepting the plea of the assessee had recorded that the assessee is providing services of commissioning of software embedded in the equipment supplied by M/s ZTE Telecom to its customers in India. The services provided by the assessee also includes localization and customization and is engaged in providing low end software services. The requirements of and specifications provided by the AE(s) that ZTE India Pvt. Ltd. provides software support services. Thus, neither it is engaged in end to end development of a product nor does it own any products. The assessee diagnosis and correct the software and further updates for the bugs in those software. It also performed routine maintenance for the software whereas the Infosys Technologies Ltd. operates at full fledged risk and perform the services of application design, software engineering and the technology lapse. The assessee was not even the developer of the software but merely providing software support

services. Accordingly, it was concluded that the Infosys Technologies Ltd. could not be treated to be a comparable in the present case for assessing ALP and, thus, it directed the TPO to exclude Infosys Technologies Ltd. from the comparability analysis of software support systems segment of the assessee while determining Arm's length price of international transactions. The relevant findings recorded by the Tribunal read thus:-

> "9. Now we straightway come to the issue of whether the Infosys analysis for the software support services segment or not is the limited issue before us. It is important to note that assessee himself has selected Infosys Technologies Ltd. as a comparable company in its transfer pricing study report. That shows that at the time of preparation of transfer pricing study report assessee find himself that Infosys is having the similar FAR as compared to the assessee. Before the ld. Transfer Pricing Officer the updated margins were also provided of this company and no objections were taken. This fact is evident from the letter of Transfer Pricing Officer dated 31.08.2010 addressed to the assessee. Furthermore, before the Transfer Pricing Officer vide letter dated 13.10.2010 has accepted the comparable without any comment. Therefore, it is apparent that assessee has not challenged this comparable before the ld. TPO. However, for the first time it was challenged before the ld CIT(A) on the above ground. The functional profile of the assessee of the software support

segment is that assessee is providing services of commissioning of software embedded in the equipment supplied by ZTE Corporation to its customers in India. The services performed by the appellant also include localization and customization of appellant is engaged in providing low and software services like diagnosis of software, updation of software, inspection of software, routine maintenance of software etc. Thus, requirements of and specifications provided by the AE(s) that ZTE India provides software support services. Thus, neither is it engaged in end to end development of a product nor does it own any products. The assessee diagnosis and correct the software and further updated for the bugs in those software. It also performs routine maintenance for the software. Whereas, the Infosys Technologies operations at full fledged risk and performs the services of application design, software engineering and the technology lapse. As per the management discussion and analysis for the year ended on 31.03.2007 it generates revenue on fixed time frame. It also has revenue from sale of use licenses for software applications. It has the software development expenditure also and its prime software is Finacle which is used worldwide as pioneer in banking industry. The Director's report states that this particular software currently works in 54 countries and 91 banks. The Finacle software is a modular solution to

> the core banking and treasury, wealth management, consumer and corporate e-banking requirements of universal retail and corporate banks worldwide. Furthermore, the Hon'ble High Court in CIT Vs. Agnity India Technologies Pvt. Ltd. 36 Taxmann.com 289 (Del) wherein, in para No.6 on the similar arguments has approved the order of the coordinate bench for exclusion of this company compared with a company which is engaged in the business of development of software. In the present case, the assessee is not even the developer of the software but merely providing software support services. In view of this respectfully following the decision of the Hon'ble Delhi High Court we direct the ld Transfer Pricing Officer to exclude Infosys Technologies Ltd. from the comparability analysis of software support systems segment of the assessee while determining Arm's length price of international transactions. In the result we allow the plea of the assessee as per ground No.6 of the appeal and accordingly, allow that ground."

7. Further, Delhi High Court in **CIT v. Agnity India Technologies Pvt. Ltd. 36 Taxmann.com 289 (Del)** had held that in similar line of business as that of the assessee the Infosys Technologies Ltd. could not be treated to be a comparable while determining Arm's Length Price of International Transactions.

8. Referring to the judgment of the Apex Court in **CIT v. Agnity India Technologies Pvt. Ltd. 2013 SCC Online Del 2521,** relied upon by

the learned counsel for the revenue, in view of the factual matrix noticed hereinbefore, suffice it to observe that the said pronouncement being based on its own facts does not advance the case of the revenue.

9. In view of the above, no error could be pointed out by learned counsel for the revenue in the findings recorded by the Tribunal warranting interference by this Court. No question of law, much less, substantial question of law arises in the appeal. Consequently, finding no merit in the appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

March 19, 2019
gbs

(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned **Yes**

Whether Reportable **Yes**