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

+ **ITA 414/2018**

PR. COMMISSIONER OF INCOME TAX-4, NEW DELHI

..... Appellant

Through: Mr.Raghvendra K.Singh, Sr. Standing
Counsel.

versus

SYMPHONY MARKETING SOLUTIONS INDIA PVT. LTD.
(NOW MERGED WITH GENPACT INDIA) Respondent

Through: Mr.Sunil Agarwal with Ms.Akansha
Aggarwal, Advocates.

+ **ITA 717/2018**

PR. COMMISSIONER OF INCOME TAX-4, NEW DELHI

..... Appellant

Through: Mr.Raghvendra K.Singh, Sr. Standing
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versus

SYMPHONY MARKETING SOLUTIONS INDIA PVT. LTD.
(NOW MERGED WITH GENPACT INDIA) Respondent

Through: Mr.Sunil Agarwal with Ms.Akansha
Aggarwal, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
07.08.2019

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Dr. S. Muralidhar, J.:

1. These are two appeals by the Revenue against the impugned orders passed by the ITAT dated 4th April 2017 and 18th August 2017 raising the same issue. While ITA 414 of 2018 questions the order dated 4th April 2017 of the ITAT in IT (TP)A No.233/Bang/2015 for the Assessment Year ('AY') 2010-11, ITA 717 of 2018 is against the order dated 18th August 2017 of the ITAT in IT (TP)A No.111/Bang/2014 for the AY 2009-10.

2. While admitting both appeals vide orders dated 11th April 2018 in ITA 414/2018 and 23rd July 2018 in ITA 717/2018 the following question was framed for consideration:

“Did the ITAT fall into error in excluding M/s Infosys BPO Ltd from the list of comparables which had been taken into account by the Assessing Officer in the facts of this case?”

3. The Assessee, which now stands merged with Genpact India, was during the AYs in question engaged in the business of providing marketing data management services to customers of Symphony Marketing Solutions, USA. It was a wholly owned subsidiary of Symphony Marketing Solutions, Mauritius and Symphony Marketing Solutions, USA.

4. Since it provided captive service to its foreign principal which was its Associated Enterprise (AE), the Assessee furnished a transfer pricing study including a set of 8 comparables with an average profit margin of 14.34% on costs. Thus the margin earned by the Assessee at 15.95% on total costs was treated as being at arm's length. The comparables engaged in IT Enabled

Services ('ITES') were treated as comparables irrespective of the verticals i.e. industries to which it caters by horizontals (functional lines like back office operations, medical transcription etc).

5. For both AYs, the Assessee's returns were picked up for scrutiny and references were made to Transfer Pricing Officer ('TPO'). The draft order of the Assessing Officer (AO) on the basis of TPO's order proposed additions to the return income leading the Assessee to file objections before the Dispute Resolution Panel ('DRP'). The DRP also confirmed the action of the TPO in selecting new comparables.

6. Specific to Infosys BPO, the DRP held that although the turnover of Infosys BPO had increased 150 times from 1997-2010, its operating margins were more or less the same i.e. around 35 to 40%. It was accordingly concluded that 'turnover has no linkage with the margins'. On the argument of the Assessee that profits derived by Infosys were predominantly pertaining to its brand, the DRP held that the Assessee had not placed any evidence or data to support such contention. It was held that even though the brand fetched a higher turnover, it did not necessarily mean that it would generate the higher margin.

7. The DRP also rejected the objection of the Assessee to the inclusion of Accentia Technology Pvt. Ltd. and Eclerx Services Ltd. on the ground that they were functionally comparable to the Assessee which was providing captive BPO services to its AEs.

8. The Assessee's appeal was allowed by the ITAT by relying on its decision *e4e Business Solutions India Pvt. Ltd. v. DCIT* in respect of each of the aforementioned comparables. The ITAT directed the exclusion of the comparables agreeing with the Assessee that they were not functionally similar to the Assessee.

9. Mr. Raghvendra K. Singh, learned Senior Standing Counsel for the Revenue, sought to support the view of the DRP that although the turnover of Infosys may have grown 150 times between 1997 and 2010 its profit margins remained more or less the same and, therefore, the mere size of the company did not make it an unsuitable comparable.

10. This Court is unable to accept the above plea. Learned Counsel for the Assessee has placed before the Court a detailed chart which shows dissimilarities between the Infosys BPO and the Assessee on several counts. Infosys provides business process management services to organisations over a wide range of industries whereas the Assessee is a routine captive service provider. The valuation of goodwill of Infosys BPO for AY 2009-10 and 2010-11 was INR 19.03 crores with no comparable value for the Assessee. The brand promotion expense for Infosys BPO for AY 2009-10 was INR 70.26 lacs and for 2010-11 INR 69.16 lacs. The corresponding figures for the Assessee are Nil. BPO Infosys incurred significant selling and marketing expenses for the two AYs in question whereas there is no such expense for the Assessee. Mainly the Assessee provides IT services only to its US based AEs whereas Infosys is among top 10 third party BPO companies in India. Even the risk profile is different while Infosys BPO is a

full-fledged risk taking enterprise, the Assessee undertakes minimal risks of 100% services provided to its AEs.

11. This Court has in several decisions held in similar circumstances as the present one that Infosys BPO Ltd. cannot be a suitable comparable. The pleas urged by the Revenue in the present case are similar to the ones urged by it in ITA 420 of 2019 (*Pr. Commissioner of Income Tax-8 v. M/s.Sanvih Info Group Pvt. Ltd.*) which was dismissed by this Court by an order dated 16th May 2019. Paras 5 to 8 of the said order apply to the case in hand:

“5. The Revenue urges that of the ten excluded comparables, the ITAT ought not to have excluded Infosys BPO Limited only on the basis of its earlier order for AY 2009-2010 since in that earlier order the ITAT had wrongly proceeded on the basis that the said comparable had to be excluded on the ground of high turnover. It is pointed out that the ITAT in arriving at the said conclusion relied on the decision of this Court in *CIT v. Agnity India Technologies Pvt. Ltd. (2013) ITA 1204/2011*.

6. Mr. Zoheb Hossain, learned senior standing counsel appearing for the Revenue refers to the subsequent decision of this Court in **Chrys Capital Investment Advisors India (P.) Ltd. v. Deputy Commissioner of Incometax, 2015 376 ITR 183 (Del)** to urge that a comparable ought not to be excluded only on the basis of ‘high turnover’. In particular he refers to the following conclusion in **Chrys Capital Investment Advisors India (P.) Ltd. (supra)**

“a. The mere fact that an entity makes high/extremely high profits/losses does not, ipso facto, lead to its exclusion from the list of comparables for the purposes of determination of ALP. In such circumstances, an enquiry under Rule 10B (3) ought to be carried out, to determine as to whether the material differences

between the assessee and the said entity can be eliminated. Unless such differences cannot be eliminated, the entity should be included as a comparable.”

7. The Court notes that there is a discussion in ***Chryst Capital Investment Advisors India (P.) Ltd.*** (*supra*) of the decision in ***Agnity India Technologies Pvt. Ltd.*** (*supra*) in the following manner.

“The assessee had during the hearing, heavily relied on OECD guidelines and another Division Bench ruling in Agnity (*supra*). This court proposes to take up the latter decision first for discussion. In Agnity (*supra*), the revenue had questioned, inter alia, the ITAT decision to exclude the data relating to Infosys. One of the reasons was that the said company was a “giant” corporation and was involved in multifarious activities. After reproducing the comparative chart and noticing the facts, the Court reasoned as follows: 6. Learned counsel for the Revenue has submitted that the Tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the Tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.”

8. It appears that the comparable discussed in ***Agnity India***

Technologies Pvt. Ltd. (supra) which was sought to be excluded was an Infosys Group Company which undoubtedly was ‘a giant corporation’. On the other hand, in ***Chryst Capital Investment Advisors India (P.) Ltd.*** the three comparables included were Brescon Corporate Advisors Limited, Keynote Corporate Services Limited and Khandwala Securities Limited and the rejected comparables were IDFC Investment Advisors Ltd., Sumedha Fiscal Services Limited and Future Capital Holdings Limited. Clearly therefore none of the comparables involved was a ‘giant corporation’ like Infosys. Consequently, this Court is not persuaded that the ITAT erred in the present case in excluding Infosys BPO Limited relying on the decision of this Court in ***Agnity India Technologies Pvt. Ltd.*** (supra).”

12. The Court would also like to refer to its decision dated 27th August 2017 in ITA 924 of 2016 (***Pr. Commissioner of Income Tax-1 v. New River Software Services Pvt. Ltd.***) wherein in Para 11 it was observed as under:

“11. As regards the exclusion of M/s. Infosys BPO, the same is covered in favour of the Assessee and against the Revenue by the decision in ***Commissioner of Income Tax v. Pentair Water India (P) Ltd. [2016] 69 taxmann.com 180 (Bom)*** and the decision dated 10th July, 2013 of this Court in ITA No.1204/2011 (***CIT v. Agnity India Technologies Pvt. Ltd.***).”

13. For the aforementioned reasons the question of law framed is answered in the negative i.e. in favour of the Assessee and against the Revenue. The appeals are accordingly dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 07, 2019/tr