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

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Date of Decision : 28.10.2024

+ **ITA 19/2019**

PR. COMMISSIONER OF INCOME TAX-6,
NEW DELHI

.....Appellant

Through: Mr. Puneet Rai, Senior Standing
Counsel with Mr. Ashvini Kumar,
Mr. Rishabh Nangia, Junior Standing
Counsels and Mr. Nikhil Jain,
Advocate

versus

FREESCALE SEMICONDUCTOR INDIA PVT. LTD.
(NOW KNOWN AS NXP INDIA PVT. LTD.)

.....Respondent

Through: Mr. S.S. Tomar, Advocate

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 11.05.2018 passed by the learned Income Tax Appellate Tribunal (hereafter *the learned Tribunal*) in ITA No. 335/Del./2017 in respect of the assessment year (AY) 2013-14.

2. The respondent (assessee) had filed the said appeal before the learned Tribunal, assailing the assessment order dated 28.11.2016 framed under



Section 143(3) read with Section 144C (3) of the Act. The assessee was, essentially, aggrieved by the addition of ₹17,25,99,668/- made to its declared income on account of re-computation of the arm's length price (ALP) in respect of the international transactions in relation to the software development segments.

3. The assessee had furnished its transfer pricing study before the Transfer Pricing Officer (TPO) to establish that its international transactions were on ALP. The assessee had adopted Transactional Net Margin Method (TNMM) as the most appropriate method and Operating Profit/ Operating Cost [OP/OC] as the Profit Level Indicator (hereafter *PLI*) for benchmarking the international transactions. The TPO did not dispute the method adopted by the assessee. However, the TPO adopted seven additional comparables entities in the software development services segment and excluded certain other comparables, for determining the mean *PLI*. The assessee had raised certain objections which were substantially rejected; however, the Dispute Resolution Panel (DRP) accepted inclusion of two entities as suggested by the assessee as comparable entities.

4. The additional comparables selected by the TPO also included the following four entities: (i) Infosys Limited, (ii) Zylog Systems Limited, (iii) Larsen & Toubro Infotech Limited, and (iv) Acropetal Technologies Limited.

5. The TPO had suggested an addition of ₹21,41,14,047/- on account of ALP adjustments. As stated above, certain objections raised by the assessee which also required inclusion of two other companies, were accepted by the



DRP. Pursuant to the directions issued by the DRP, the TPO passed an order dated 16.11.2016 recommending final ALP adjustments of ₹17,26,00,000/-. Accordingly, the AO passed the final assessment order and made additions based on the findings of the TPO.

6. The assessee's appeal against inclusion of the four entities was accepted by the learned Tribunal. The Revenue is seeking to assail the said decision.

7. Insofar as exclusion of the Infosys Limited (hereafter *Infosys*) is concerned, the said issue is covered in favour of the assessee by several decisions of this Court including the assessee's case in respect of earlier AYs. In addition, the learned Tribunal had also noted that the exclusion of Infosys as a comparable was also accepted in other cases including in the case of *CIT v. Agnity India Technologies Pvt. Ltd.: (2013) 262 CTR (Del) 291*.

8. Infosys has been found to be functionally dissimilar to the software development segment of the assessee with a similar functional profile as the assessee. In *Principal Commissioner of Income Tax v. Alcatel Lucent India Ltd. : ITA No. 515 of 2017*, this Court had rejected a similar challenge raised by the Revenue in respect of a decision rendered by the learned Tribunal in *Alcatel Lucent India Ltd. v. Dy. CIT : [2016] 74 taxmann.com 105 (Del. Trib.)*. It is material to note that in the said case, the learned Tribunal held that Infosys was engaged in providing variety of services including software, consulting, products application design, development, re-engineering, maintenance, system integration, package



evaluation, implementation in business process management, etc. and further that its turnover was significantly higher than that of the assessee in that case. The functional dissimilarities between the entities as pointed out by the learned Tribunal in *Alcatel Lucent India Ltd. v. Dy. CIT (supra)* are equally applicable in the facts of the present case.

9. Similarly, Zylog Systems India Limited (hereafter *Zylog*) was also found functionally dissimilar as it owns substantial intangibles in the form of goodwill and product development cost. It was noted that the assessee does not hold any intangibles and earns its entire income from off-shore activities. As against the same, 85% of the revenue of Zylog was from on-site operation. We find no infirmity in the findings of the learned Tribunal that Zylog is functionally dissimilar to the assessee and therefore, cannot be included as a comparable entity for benchmarking the ALP of the international transactions in question. It is also pointed out that the exclusion of Zylog in similar circumstances was also not interfered by this Court in the case of *Principal Commissioner of Income Tax v. Alcatel Lucent India Ltd. (supra)*.

10. The third entity which was excluded by the learned Tribunal as a comparable is Larsen & Toubro Private Limited (hereafter *Larsen & Toubro*). The learned Tribunal had concluded that the said entity was functionally dissimilar as it was engaged in diversified business. In *Principal Commissioner of Income Tax v. Alcatel Lucent India Ltd. (supra)*, this court did not interfere with the decision of the learned Tribunal to exclude Larsen & Toubro as a comparable entity in similar circumstances.



11. Similarly, the learned Tribunal had also accepted the assessee's contentions and had excluded the Acropetal Technologies Limited (hereafter *Acropetal*) as a comparable entity. The learned Tribunal had noted that the activities of Acropetal were in three distinct segments – engineering design service, IT services and health care. In addition, the said entity had also acquired two US based companies, which had resulted in an increase of 43.66% in its sales during the relevant period. Indisputably, the functional differences as pointed out by the learned Tribunal cannot be considered as inconsequential.

12. Insofar as the inclusion of foreign exchange currency fluctuation and operating revenue is concerned, the learned Tribunal had accepted the same. Concededly, the said issue is covered by the decision of this Court in *Rampgreen Solutions Pvt. Ltd. v. CIT: [2015] 377 ITR 533 (Delhi)*. We find no infirmity in the decision of the learned Tribunal in this regard as well.

13. Clearly, no substantial question of law arises in the present appeal.

14. In view of the above, the present appeal is dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 28, 2024/ns

Click here to check corrigendum, if any