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

+ **ITA 196/2022**

**PR. COMMISSIONER OF
INCOME TAX-1**

..... Appellant

Through: **Mr. Sanjay Kumar, Ms. Easha
& Ms. Hemlata Rawat, Advs.**

versus

M/S FISERV INDIA PVT. LTD. Respondent

Through: **Mr. Sachit Jolly, Ms. Soumya
Singh, Ms. Disha Jham & Mr.
Devansh Jain, Advs.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

ORDER

% **22.03.2024**

1. The Revenue seeks to impugn the order of the Income Tax Appellate Tribunal [“ITAT”] dated 31 August 2020 and has proposed the following questions of law for our consideration:

“A. Whether on facts & in the circumstances of the case and law, the Hon' ble ITAT erred in law & on facts in deleting addition made by the AO on account of ALP adjustment of international transaction from associated enterprises?

B. Whether the Hon'ble ITAT was justified in laying down stringent standards of comparability and attempting to identify exact replica of the taxpayer for comparability analysis, whereas the Indian Law and the international jurisprudence recognize the reality that there cannot be an exact comparable in a given situation without any difference without appreciating that such astringency will defeat the purpose of flexibility provided in comparability analysis for determination of ALP?

C. Whether Hon'ble ITAT erred in excluding comparable when none of the pre-conditions mentioned in Rule 10(B)(2) of the Income Tax Rules is satisfied?”

D. The Hon'ble ITAT has erred in law and on facts in directing the TPO to exclude Larsen and Toubro Infotech Ltd., Wipro Technology Service Ltd. and Zylog Systems Ltd. as comparable ignoring the fact that Organization of Economic Cooperation and



Development (OECD) guidelines advocate use of TNMM Method as it allows comparability of the functions rather than strictly focusing on product/service comparability?”

2. The grievances essentially appears to stem from the exclusion of Larsen and Toubro Infotech Ltd. [**“L&T”**], Wipro Technology Service Ltd. [**“Wipro”**] and Zylog Systems Ltd. [**“Zylog”**] from the list of comparables for the purposes of completion of the transfer pricing exercise and determination of the Arm’s Length Price [**“ALP”**].

3. Insofar as the case of L&T is concerned, it appears to have been urged before the ITAT that although financials of that entity were on record, it was impossible to bifurcate and identify the revenues that may have been obtained by it from software development services and products with precision. It is this aspect which appears to have weighed upon the ITAT which ultimately proceeded to hold as follows:

“11.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. On perusal of the profit and loss account of the company reproduced by the learned TPO at page 36 of his order, it is evident that the revenue of Rs.2331,81,096/- has been shown from software development services and products and there is no separate segment of the software development services available in the annual report of the company. In such a huge turnover, the composition of revenue from the software development services and from sale of the software products is not separately available in the annual report. In such circumstances, the company cannot be termed as functionally similar at entity level with the assessee, who was engaged in providing software services to its associated enterprises. In view of the aforesaid dissimilarity, we direct the learned AO/TPO to exclude this company from the final set of the comparables.”

4. That then takes us to the rejection of Wipro as a comparable and in respect of which the ITAT found that Wipro had rendered similar



services pertaining to software development and consequently was functionally similar to the assessee. However, the aforesaid comparable came to be excluded in light of the tainted and controlled transactions which it had with Citi Technology Services Ltd. The relevant facts in that respect have been noticed by the ITAT in paragraphs 14.3 and 14.4 of its judgment which are reproduced hereinbelow:

“**14.3** We have heard rival submission and perused the relevant material on record. As far as the function of the company is concerned, in our opinion the assessee has also rendered similar services of the software development and maintenance including information technology related services to its Associated Enterprises and, therefore, it is functionally similar to the company. But as far as the transaction of the company with Citigroup company held as tainted/ controlled transactions and exclusion of the company on this ground, in the case of **‘Element K India Private Limited (supra)**, the Tribunal has given the detailed finding to reject the company on the ground of transactions covered under:

“3 Wipro Technology Solutions Ltd:

This Comparable has been included by Id.TPO. Ld. Counsel objected for inclusion of this company in the list of comparables by arguing that apart from this company being functionally different and availability of insufficient segmental information, there were also significant related party transactions. Ld.TPO did not accept assessee’s contention of related party transactions and proceeded to include it in the final set of comparables.

On the contrary, Ld. DR submitted that there is no related party transaction during the year under consideration.

We have heard the rival submissions of both sides in the light of record placed before us.

Ld. Counsel submitted that Wipro Technology Services Limited (formerly Citi Technology Services Limited) (‘The Company’) was incorporated on 15 September 2004. The entire share capital of the Company was held by Citicorp Banking Corporation, a company incorporated under laws of Delaware, USA, upto 20 January, 2009.

It was submitted that Wipro Limited (Wipro) executed agreement with Citigroup Inc. For acquiring all of Citigroup



interest in the ITA No. 6001/Del/2015 Elemant K India Pvt. Ltd. Company w.e.f. 21 January 2009. On 21 January 2009, Wipro signed master service agreement (MSA) with Citigroup Inc. for delivery of technology infrastructure services application development and maintenance services. After acquisition by Wipro, name of Company was changed to Wipro Technology Services Limited ('WTS' or 'the Company') on 16 March 2009."

It is observed from the above that, Wipro Technology Services Ltd., which was earlier Citi Technology Services Ltd., was held by Citi Corp. Banking Corporation, USA upto 20th January, 2009. Wipro Ltd., parent company of which executed agreement with Citi Group Inc., for acquiring Citi Technology Services Ltd., now called Wipro Technology Services Ltd. On 21.1.2009, Wipro Ltd. signed master agreement with Citi Group Inc., for the delivery of technology Infrastructure Services and application development and maintenance services for the period of six years, which also includes the year under consideration. This shows that income from software development support and maintenance services was earned by Wipro Technology Services Ltd., from Citi Group Inc., by means of master service agreement entered into between Wipro Ltd., its parent company and Citi Group Inc., a third person.

It is observed that the issues raised by Ld. CIT DR in respect of comparability of this comparable has been dealt with by coordinate bench of Delhi Tribunal in Saxo India Pvt. Ltd vs. ACIT (supra) as under:

"We have noticed above from the language of Rule 10B(1)(e)(ii) that it is the net profit margin realized from a comparable uncontrolled transaction, which is considered for the purposes of benchmarking. The ITA No. 6001/Del/2015 Element K India Pvt. Ltd. epitome of 'comparable uncontrolled transaction' is that the companies or transactions in order to fall within the ambit of sub-clause (ii) of rule 10B(1)(e), should be both comparable as well as uncontrolled. 'Uncontrolled transaction' has been defined in Rule 10A(a) to mean: 'a transaction between enterprises other than associated enterprises, whether resident or non-resident.' This shows that in order to be called as an uncontrolled transaction, it is necessary that the same should be between enterprises, other than associated enterprises. Section 92B(2) provides that:

"A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the



purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise. or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise'. On going through sub-section (2) of section 92B, it is clearly borne out that a transaction with non-AE shall be deemed to be a transaction entered into between two AEs, if there exists a prior agreement in relation to the relevant transaction between third person and the AE, or the terms of relevant transaction are determined in substance between the third person and AE. When we consider section 92B(2) in combination with Rule 10A(a), it follows that transaction between non- AEs shall be construed as a transaction between two AEs, if there exists a prior agreement in relation to relevant transaction between third person and AE. If such an agreement exists, third person is also considered as an AE, and transaction with such third person becomes international transaction within the meaning of section 92B. Once there is a transaction between two associated enterprises, it ceases to be an 'uncontrolled transaction' and, thereby, goes out of reckoning under Rule JOB(I)(e)(ii).

Adverting to the facts of the instant case, we find that Wipro Technology Services Ltd. earned revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services. This agreement was, in fact, executed between the assessee's AE, Wipro Ltd., and Citigroup Inc., a third person. This unfolds that the transaction of earning revenue from software development support and maintenance services by Wipro Technology Services Ltd., is an international transaction because of the application of section 92B(2) i.e., there exists a prior agreement in relation to such transaction between Citigroup Inc. (third person) and Wipro Ltd. (associated enterprise). In the light of this structure of transaction, it ceases to be uncontrolled transaction and, hence, Wipro Technology Services Ltd., ITA No. 6001/Del/2015 Element K India Pvt. Ltd.

disqualifies to become a comparable uncontrolled transaction for the purposes of inclusion in the final list of comparables under Rule 10B(1)(e)(ii). We,



therefore, direct removal of this company from the list of comparables. "

Respectfully following the same we also direct removal of this company from the list of comparables. "

14.4 The Hon'ble Delhi High Court in the case of PCIT Vs Cashedge India Private limited (supra) has held as under:

"6. As far as the first company i.e. Persistent Systems Ltd. is concerned, the material on record – as found by the ITAT shows that this company was involved in software development, software products and marketing. Furthermore and perhaps more importantly, published segmental data was not available. In these circumstances, having regard to the specificity of the Transfer Pricing Rules under Rule 10(b) to 10(e) of the Income Tax Rules, the data of the said firm, i.e. Persistent Systems Ltd. could not have been included. Likewise as far as the Wipro Technology Services goes, it was part of the Citi Group and was during the financial year in question acquired on 21.01.2009 by the Wipro Ltd. as a subsidiary. As a part of the arrangement, the existing contracts pertaining to the work of the Citi Group continued to be with the newly created entity, i.e. Wipro Technology Services. Equally importantly, is that there was no published data as far as software development or its finances were concerned with respect to Wipro Technology Services. In these circumstances, the findings of the ITAT are purely factual and cannot be gone into as no substantial question of law arises for consideration."

5. Insofar as Zylog is concerned, the reasoning for its exclusion is identical to that ascribed to L&T Ltd. In that view of the matter and on an overall conspectus of the aforesaid, we find no infirmity in the view as expressed by the ITAT.

6. The appeal fails to raise any substantial question of law. It shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 22, 2024/kk