$~15

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

\+ ITA 978/2019

THE PR. COMMISSIONER OF INCOME TAX-9

..... Appellant

Through: Mr.Aseem Chawla, Sr.SC with Ms.Pratishtha Chaudhary, Adv.

versus

XL INDIA BUSINESS SERVICES PVT. LTD ..... Respondent

Through: Ms.Ananya Kapoor, Mr.Salil Kapoor and Mr.Tarun Chanana, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% **15.04.2024**

1. The Principal Commissioner assails the order of the Income Tax Appellate Tribunal [**'ITAT'**] dated 03 August 2018 and has framed the following questions for our consideration:-

> "2.1 Whether the Ld. ITAT was justified In law in rejecting high margin comparables contested by the taxpayer and allowing to retain other low margin comparables in the final set of the TPO unopposed by the taxpayer, which were discharging similar nature of even while ignoring the decision of the Hon'ble Supreme Court in the case of Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport with regard to the "Doctrine of Election" and the "Doctrine of Approbation and Reprobation", wherein it has been laid down that a litigant cannot change and choose its stand to suit its convenience?
>
> 2.2 Whether the Ld. ITAT was justified in law 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

differences without appreciating that such stringency will defeat the purpose of flexibility provided III comparability analysis for determination of ALP?

2.3 Whether in the facts and circumstances of the case, the Hon'ble ITAT is justified in law in rejecting *M/s* Accentia Technology Pvt. Ltd. from the final list of comparables and has failed to establish the fact as to how amalgamation of the company has affected the FAR profile of the company; making it a non-comparable to the tested party?

2.4 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law rejecting *M/s* I gate Global Solutions Ltd. from the final list of 11 comparables and has failed to establish the fact as to how amalgamation of the company has affected the FAR profile of the company; making it a non-comparable to the tested party?

2.5 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law in rejecting M/s I gate Global Solutions Ltd. from the final list of comparables, ignoring the fact that in TNMM method on basis of minor functional differences comparable cannot be excluded?

2.6 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law in rejecting M/s Infosys BPO Ltd. from the final list of comparables and erroneously establishing relationship between goodwill/giant size with profitability of the company?

2.7 Whether in the facts and circumstances of the case, the ld. ITAT is justified in law in excluding TCS E-Serve Ltd, and TCS E-Serve International Ltd as functionally dissimilar ignoring the fact that the TPO himself has established functional similarity as per rule 10B(2)?

2.8 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law in remanding the comparables named Caliber Point Business and R. Systems International Ltd. (segmental) to the file of TPO to examine the quarterly result and work out the proportionate profit margin to benchmark with the PLI of the assessee ignoring the fact that data required to get quarterly results is not available in public domain?

2.9 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law in directing the inclusion of three comparables namely Microgenetic System Ltd, CG-VAK Software & Export Ltd. (segmental) and Informed Technologies India Ltd. relying on the decision of Hon'ble Delhi High Court in the case of Chryscapital Investment India Pvt. Ltd. vs. Dy. CIT, (Supra) ignoring that facts of the said case are entirely different and decision is not applicable to this case?

2.10 Whether, in the facts and circumstances of the case, the Ld. ITAT is justified in excluding all the above comparables when none of the preconditions specified in Rule 10(B)(2) of the LT. Rules are satisfied?

2.11 Whether in the facts and circumstances of the case, the Ld. ITAT is justified in law and on facts in deleting In addition made amounting to Rs.80,72,451/-on account of payments given to entities specified under section 40A (2)(b) of the Act, 1961?"

2. The principal issues which were canvassed on the instant appeal pertain to the exclusion of comparables which came up for discussion before the Transfer Pricing Officer [**'TPO'**]. As would be manifest from the record, the TPO after taking into consideration the nature of business which was being undertaken by the respondent- assessee had shortlisted and finalized the following 11 comparables:-

No.	Company Name	OP/TC (%)
i.	Accentia Technologies Services Ltd.	43.07
ii.	Capgemini Business Services (India) Ltd.	27.32
iii.	Cosmic Global Ltd.	18.28
iv.	E4e Healthcare	31.03
v.	Fortune Infotech Ltd.	22.80
vi.	I-gate Global Ltd.	24.54
vii.	Infosys BPO Ltd.	31.46
viii.	Jindal Intellicom Ltd.	13.62
ix.	Omega Healthcare	15.31
x.	TCS E-Serve International Ltd.	53.80
xi.	TCS E-Serve Ltd.	53.38
	Average profit margin	**31.33**

3. Out of the aforementioned entities, the TPO ultimately took into account Cosmic Global Ltd., E4e Healthcare, Jindal Intellicom Pvt. Ltd. and Fortune Infotech Ltd. Based on the aforesaid and on computing the average PLI of the aforenoted comparables to be 31.33%, an adjustment of INR 67,87,84,800/- was suggested.

4. On the basis of the aforesaid order of the TPO, the Assessing Officer [**'AO'**] passed an order referable to Sections 143(3) read along with Section 144C of the Income Tax Act, 1961 [**'Act'**] and determined the total taxable income of the respondent-assessee to be INR 7,52,54,490/-.

5. Aggrieved by the aforesaid, the assessee preferred an appeal. The Commissioner of Income Tax (Appeals) ['**CIT(A)**'] in the course of consideration of the appeal excluded the following comparables from the final list:-

A) M/s. Accentia Technology Pvt. Ltd.

B) M/s. I-Gate Global Solution Ltd.

C) M/s. Infosys BPO Ltd.

The order of the TPO rejecting the other comparables was upheld by the CIT(A). It is this order of the CIT(A) which was taken in appeal by the appellant as well as the respondent assessee before the ITAT.

6. The ITAT after due consideration dismissed the appeal of the Department and partly allowed the appeal of the assessee.

7. Mr. Chawla, learned counsel for the appellant has placed for our consideration the following chart insofar as the rejected comparables are concerned:-

S. No.	Comparable(s)	Remarks
1.	M/s Accentia Technology Pvt. Ltd. (Refer Substantial Question of Law 2.3)	Refer **Commissioner of Income Tax-4 vs. GE India Business Services (P.) Ltd. [2023] 152 taxmann.com 517 (Delhi)** [S. No. 2 of the compilation, Refer Para 16 & 21] *"16. The Tribunal, in the impugned order has noted that insofar as ATPL is concerned, it cannot be considered as a comparable, since, in the period under consideration, an entity going by the name Asscent Infoserve Ltd.*

		amalgamated with ATPL." *"21. To our minds, the Tribunal was right in excluding ATPL, I-Gate and Infosys on the grounds that an extraordinary financial event had occurred, rendering them unfit comparables to determine the ALP.* Refer **Principal Commissioner of Income-tax v. Ameriprise India (P.) Ltd. [2017] 88 taxman.com 966 (Delhi)** [S. No. 3 of the compilation, Refer Para 2 & 3] *"2. The comparables so excluded were M/s Accentia Tecnologies, iGate Global Consultants Ltd and Infosys BPO. The exclusion was on the ground that in respect of each comparable, certain extraordinary events had occurred during the previous periods which distorted the profitability thereby increasing the margin."* *"3. Quite apart from the act that tribunal's findings cannot be characterized as unreasonable, court also notices that even if the figures of comparables were to be included, no adjustment would be permissible due to the fact that the margin of variation would be within the limits of the "Safe harbor Provision" embodied in the Rules framed by the board in exercise of its power under section 92CA(3). In the circumstance, no questions of law arise, the appeal is dismissed.* Refer **Principal Commissioner of Income Tax vs. Chryscapital Investment Advisors (P.) Ltd. [2018] 97 taxmann.com 69 (Delhi)** (S. No. 4 of the compilation, Refer para 6 & 7) *"6. In this case, the ITAT took note of the fact that the profitability of M/s Keynote Corporate Services arose unusual to 185% from the reported level of 94%. The ITAT recorded finding as follows….* *"7. The Revenue urged that the amalgamation as a matter of fact placed during Financial year 2005-06, it was reported that the scheme of amalgamation was approved by the High Court on 21.12.2006 though w.e.f. the year 1988. In the circumstances, the financial restructuring of the company took place later. Given all these peculiar circumstances, the finding of the ITAT*

		cannot be faulted. No question of law arises.
2.	M/s I Gate Global Solutions Ltd. (Refer Substantial Question of law 2.4 & 2.5)	Refer **Commissioner of Income Tax-4 v. GE India Business Services (P.) Ltd. [2023] 152 taxmann.com 517 (Delhi)** [S. No. 1 of the compilation, Refer Para 18 & 21] *"18. A similar position obtained insofar as I-Gate was concerned. It was discovered that an entity going by the name I-Gate Global Solutions Sdn. Bhd. had amalgamated with I-Gate. In the period in issue, financials of I-Gate included the results of the amalgamating company. It was for this reason that I-Gate was found to be unfit for comparison to determine the ALP.* *"21. To our minds, the Tribunal was right in excluding ATPL, I-Gate and Infosys on the ground that an extraordinary financial event had occurred, rendering them unfit comparables to determine the ALP.* Refer **Principal Commissioner of Income Tax v. Chryscapital Investment Advisor (P.) Ltd. [2018] 97 taxmann.com 69 (Delhi)** [s. No. 4 of the compilation, Refer Para 6 & 7] *"6. In this case, the ITAT took note of the fact that the profitability of M/s Keynote Corporate Services arose unusual to 185% from the reported level of 94%. The ITAT recorded finding as follows......* *"7. The Revenue urged that the amalgamation as a matter of fact placed during Financial year 2005-06, it was reported that the scheme of amalgamation was approved by the High Court on 21.12.2006 though w.e.f. the year 1988. In the circumstances, the financial restructuring of the company took place later. Given all these peculiar circumstances, the finding of the ITAT cannot be faulted. No question of law arises.*
3.	M/s Infosys BPO Ltd. (Refer Substantial Question of Law 2.6)	Refer **Commissioner of Income Tax-4 v. GE India Business Services (P.) Ltd. [2023] 152 taxmann.com 517 (Delhi)** [S. No. 1 of the compilation, Refer Para 19 & 21] *"19. As regards Infosys, it got revealed that it had acquired an entity i.e. McCamish Systems*

		LLC in the relevant period. The Tribunal considered this as an extraordinary financial event and hence excluded it from the final set of comparables. *"21. To our minds, the Tribunal was right in excluding ATPL, I-Gate and Infosys on the ground that an extraordinary financial event had occurred, rendering them unfit comparables to determine the ALP.* Refer **Principal Commissioner of Income-tax v. Ameriprise India (P.) Ltd. [2017] 88 taxman.com 966 (Delhi)** [S. No. 3 of the compilation, Refer Para 2 & 3] *"2. The comparables so excluded were M/s Accentia Tecnologies, iGate Global Consultants Ltd and Infosys BPO. The exclusion was on the ground that in respect of each comparable, certain extraordinary events had occurred during the previous periods which distorted the profitability thereby increasing the margin."* *"3. Quite apart from the act that tribunal's findings cannot be characterized as unreasonable, court also notices that even if the figures of comparables were to be included, no adjustment would be permissible due to the fact that the margin of variation would be within the limits of the "Safe harbor Provision" embodied in the Rules framed by the board in exercise of its power under section 92CA(3). In the circumstance, no questions of law arise, the appeal is dismissed.*
4.	TCS E-Serve Ltd. (Refer Substantial Question of Law 2.7)	Refer **Principal Commisisoner of Income Tax v. B.C. Management Services (P) Ltd. [2018] 89 taxmann.com 68 (Delhi)** [S. No. 5 of the compilation, Refer Para 13 & 14] "*13. 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.* Refer **Avaya India (P.) Ltd. v. Assistant Commissioner of Income Tax [2019] 108 taxmann.com 222 (Delhi)** [S. No. 6 of the compilation, Refer para 24, 27 & 29] "*29. For all of the aforementioned reasons, the Court finds merit in the contention of the Assessee that both the impugned comparables viz., TCS E-Serve Limited and TCS E-Serve International Limited ought to be excluded from the list of comparables for the purposes of determining the ALP of the international transactions involving the Assessee and its AEs.* ***[SLP was filed by revenue but was dismissed due to low tax effect, but question of law has been left open]*** Refer **Chryscapital Investment Advisors (India) (P.) Ltd. vs. Deputy Commissioner of Income-tax [2015] 56 taxmann.com 417 (Delhi)** [S. No. 7 of the compilation, Refer Para 44(a)] "*44(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.*
5.	TCS E-Serve Ltd. (Refer Substantial	Refer **Commissioner of Income Tax-4 v. GE India Business Services (P.) Ltd. [2023] 152 taxmann.com 517 (Delhi)** [S. No. 1 of the

	Question of Law 2.7)	compilation, Refer Para 20 & 21] *"20. Insofar as TCS International is concerned, the Tribunal noted that it is in the business of rendering software development services [which, inter alia, includes maintenance and updation of software], as per the requirements of the users. In comparison, the respondent/ assessee was providing non-development software services, which involved the purchase of software for provisioning services..* *"21. To our minds, the Tribunal was right in excluding ATPL, I-Gate and Infosys on the ground that an extraordinary financial event had occurred, rendering them unfit comparables to determine the ALP.*
6.	Caliber Point Business (Refer Substantial Question of Law 2.8)	ITAT has remanded the comparable
7.	R. Systems International Ltd. (Refer Substantial Question of Law 2.8)	ITAT has remanded the comparable
8.	Microgenetic System Ltd (Refer Substantial Question of Law 2.9)	ITAT has relied upon **Chryscapital Investment Advisors (India) (P.) (Ltd.) v. Deputy Commissioner of Income-tax [2015] 56 taxmann.com 417 (Delhi)** to include the comparable
9.	CG-VAK Software & Export Ltd. (Refer Substantial Question of Law 2.9)	ITAT has relied upon **Chryscapital Investment Advisors (India) (P.) (Ltd.) v. Deputy Commissioner of Income-tax [2015] 56 taxmann.com 417 (Delhi)** to include the comparable
10.	Informed Technologies India Ltd. (Refer Substantial Question of Law 2.9)	ITAT has relied upon **Chryscapital Investment Advisors (India) (P.) (Ltd.) v. Deputy Commissioner of Income-tax [2015] 56 taxmann.com 417 (Delhi)** to include the comparable

8. As is manifest from the above, the exclusion of those comparables in identical situations has been affirmed and upheld by this Court in terms of the judgements aforenoted. In view of the aforesaid, we find no ground to interfere with the view ultimately expressed by the ITAT.

9. We also bear in consideration the admitted position that the ITAT has insofar as Caliber Point Business and R Systems International Ltd. are concerned, remanded the matter. Similarly and bearing in mind the judgment rendered by the Court in **Chryscaptial Investment India Pvt. Ltd. vs. Dy. CIT** [2015 SCC OnLine Del 9065], it has directed the inclusion of Microgenetic Systems Ltd., CG-VAK Software & Export Ltd. and Informed Technologies India Ltd.

10. The aforesaid procedure as adopted is not shown to suffer from any manifest or patent illegality and in any case does not give rise to any substantial question of law.

11. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 15, 2024

RW