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

\+ ITA 838/2018

PR. COMMISSIONER OF INCOME TAX-6,
NEW DELHI .....Appellant
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia and Mr. Nikhil Jain, Advs.

versus

FREESCALE SEMICONDUCTOR INDIA PVT. LTD. (NOW KNOWN AS NXP INDIA PVT. LTD.) .....Respondent
Through: Mr. Vishal Kalra and Mr. S.S. Tomar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MS. JUSTICE TARA VITASTA GANJU

O R D E R

% 29.07.2024

1. The Principal Commissioner impugns the order of the Income Tax Appellate Tribunal ["**Tribunal**"] dated 08 December 2017 and raises the following questions for our consideration:-

> "2.1 Whether the Ld. ITAT erred in directing to exclude Infinite *Data Systems Pvt. Ltd., Infosys Ltd., Einfio Chips Bangalore Ltd.* and *TSR Darashaw Ltd.* even though these companies perform similar function as that of the Assessee?
>
> 2.2 Whether the Ld. ITAT erred in allowing cherry picking of low margin companies and excluding high margin companies although all these companies perform similar functions?"

2. We note that the dispute itself pertains to the exclusion of certain comparables in the course of the transfer pricing study. The Tribunal has taken note of the gamut of activities which are undertaken by the respondents-assessee and which has come to be

recorded in the following terms:

> "2. According to the transfer pricing study report submitted by the assessee, the assessee has the functions of software development segment as per page No. 176 of the paper book. <u>According to that assessee is carrying on in activity from its Noida unit and Bangalore unit with regard to the low end chip design/software development services. Assessee is provided with the detailed specification from the group companies and based on these specifications received from the above company the assessee perform functions are related to development of software that can be embedded in the semiconductor chips. The complete initialization of the process the group companies conceptualize the product and create the architectural design specification. Thereafter a part of the development functions is outsourced to the free scale Indian assessee and other group companies. According to the assessee it carries on low-level chip designing and develop the software tools/applications. It does not have any research and development activities but only provides captive service is based on complete and detailed specifications provided by the group</u>. It also follows a quality review process at each stage of the writing and integration of the internal protocol. However, it is not exposed to the risk arising out of the quality failure or failure to meet the timelines. It has its normal assets and it does not carry much risk as compares with an independent enterprise. This functional profile remains undisputed."

3. As is manifest from the above, the assessee is stated to be engaged in the manufacture and design of chips as well as software development services in connection therewith. The dispute inter partes in this appeal relates to the exclusion of E-Infochips Bangalore Limited ["**E-Infochips**"], Infinite Data Systems Private Limited ["**Infinite Data**"] and Infosys Technologies Limited ["**Infosys**"].

4. Insofar as E-Infochips is concerned, we note that the Tribunal in the absence of segmental information and any material which may have been able to establish that it was functionally comparable, had upheld its exclusion. We take note of the findings in this respect which appear in paras 13 to 15 of the order of the Tribunal and are reproduced herein:

"**13.** The Ld. AR has also objected against the inclusion of the Einfo chips Bangalore Ltd. Assessee has objected before the Ld. transfer pricing officer that this company is functionally not comparable, segmental data are not available, it has abnormal supernormal profits, it has the fluctuating trends, it has a significant intangibles and fails 10% RPT Filter, the Ld. transfer pricing officer rejected the claim of the assessee stating that annual report of the above comparable company shows that it is functionally comparable as it develops software for its clients and do not perform any IT enabled services. The Ld. dispute resolution panel also confirmed the action of the Ld. transfer pricing officer. The Ld. authorised representative reiterated the same arguments which were raised before the Ld. Lower authorities. Over and above ld AR relied up on decision of the coordinate bench in ITA No. 1051/KOL /2015 for assessment year 2009 - 10 dated 19 - 10 - 2016 wherein in para No. 8.2 the above comparable company was excluded.

14. The Ld. departmental representative vehemently submitted that the Ld. Transfer pricing officer and the Ld. Dispute resolution panel has given enough reasons for inclusion of the above comparable and the Ld. authorised representative could not state anything further that how the order of the Ld. transfer pricing officer and the Ld. dispute resolution panel is erroneous but merely citing a decision does not help the case of the Ld. authorised representative as it was compared with the functions of the that appellant in that case.

15. We have carefully considered the rival contention. From the business profile of the above company it is evident that it is engaged in the IT and IT enabled services. Further as stated in the order of the coordinate bench at para No. 8.2 in ITA No. 1051/Kol/2015 that segmental information is not available in case of IT and ITES services provided by the above comparable. The assessee has further stated that it is providing the wide range of services such as software, firmware, hardware, field programmable gate array, application specific integrated circuits quality assurance and testing. The Ld. transfer pricing officer himself has stated that the reference to the website of the company is not of much help as it may not have information which pertain to the assessment year 2010 - 11 . <u>We have carefully perused the balance sheet of the E info chips Bangalore Ltd provided to us at page No. 637 - 654 of the paper book wherein it was noted that at page No. 651 the earnings of the assessee was shown to be software development services and consultancy charges. In Item No. 9 it is stated that the company is engaged in development and maintenance of computer software, production and sale of software. At page No. 652 while giving the segmental information, it was also maintained that the</u>

company is primarily engaged in software development and IT enabled services which is considered as the only one reportable segments and therefore there is no segmental information available with respect to the software development activities as well as IT enabled services. In view of this the above comparable is required to be excluded from the comparability analysis of the software development service segment of the assessee. Accordingly we direct the Ld. transfer pricing officer to exclude E info chips Bangalore Ltd."

5. Similar was the position which it found in respect of Infinite Data Systems Pvt. Ltd. and which was an entity stated to be involved in technical consulting, design and development of software amongst other allied activities. The exclusion of this comparable as also that of E-Infochips is sought to be additionally sustained on the view expressed by the Court in **Pr. Commissioner of Income Tax vs. United Health Group Information Services** [order dated 21.12.2017 in ITA 1180/2017].

6. Proceeding then to the exclusion of Infosys, the Tribunal had taken note of the said entity having created a software product titled "Finacle" and which is utilised worldwide in the banking industry. The Tribunal following its decision rendered in the assessee's own case for Assessment Year 2007-08 and directed the Transfer Pricing Officer to exclude the said comparable and which had been upheld by this Court in ITA 613/2015,.

7. We note that insofar as the enlistment of TSR Darawswa Limited ["**TSR Darawswa**"] is concerned, the same was sought to be taken note of in the context of market support services provided by the respondent-assessee. However, and undisputedly the support services that were extended by the assessee was in respect of its own products, TSR Darawswa on the other hand was found to be engaged in providing share registry and related financial services.

8. In view of the aforesaid, we find no error in the order of the Tribunal. No substantial question of law arises. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J

TARA VITASTA GANJU, J

JULY 29, 2024/rsk