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

\+ ITA 967/2018

PR. COMMISSIONER OF INCOME TAX, ...Appellant

Through: Mr. Sanjay Kumar with Ms. Easha, Adv

versus

SIEMENS PRODUCT LIFECYCLE MANAGEMENT .....Respondent

Through: Mr. Himanshu S. Sinha, Mr. Bhuwan Dhoopar & Mr. Parash Biswal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **23.08.2024**

1. The Principal Commissioner impugns the order of Income Tax Appellate Tribunal [**"Tribunal"**] dated 28 January 2018 and posits the following the questions of law for our consideration:-

> "i. WHETHER on facts and in circumstances of the case, the Ld. ITAT was justified in excluding Infosys Technologies Ltd. on the basis that this company is an industry giant disregarding the facts that the TPO had already established that the profitability margin was not affected by high or low turnover.
> ii. WHETHER on the facts and circumstances of the case, the Ld. ITAT was justified in excluding 3K Technologies Ltd. as comparable when the TPO himself has established the functional similarity between the assessee and 3K Technologies Ltd.
> iii. WHETHER on facts and in the circumstances of the case, the Ld. ITAT was justified in excluding Kals Information System Ltd. as comparable disregarding the facts that the segmental data was very much available in annual report of the company and TPO had already taken the same into cosideration.
> iv. WHETHER on facts and in the circumstances of the case, the Ld. ITAT was justified in excluding the functional similarity between the assessee and Persistent System Ltd.
> v. WHETHER on the facts and circumstances of the case, the Ld. ITAT was justified in excluding Bodhtree Consulting Ltd. as

comparable- 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.

vi. WHETHER on the fact and circumstances of the case the Ld. ITAT was justified in excluding Zylog Systems Ltd. as comparable 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.

vii. WHETHER on the fact and circumstances of the case the Hon'ble ITAT was justified in directing to treat forex as operating item for both assessee as well as comparable whereas the Ld. DRP has rightly held to exclude the forex as non-operating item for both assessee as well as comparable for eliminating the difference arising out of risk management policy of individual companies."

2. As is evident from the questions which are suggested, the principle issue appears to pertain to the exclusion of Infosys Technologies Limited, 3K Technology Limited , Kals Information System, Persistent System Limited, Bodhtree Consulting Limited, and Zylog Systems Limited.

3. Mr. Sinha, learned counsel appearing for the respondents has placed for our consideration a chart which captures the reasons which prevailed upon the Tribunal to exclude the aforesaid comparables.

4. Infosys Technologies Limited apart from the ultimate conclusion arrived at by the Tribunal itself, had also formed subject of consideration in ITA 48/2020, and where the reasons which ultimately weighed upon the Tribunal for its exclusion were upheld.

5. We bear in mind the undisputed fact that the respondent-assessee is stated to be a subsidiary of Siemens US and is engaged in providing Product Lifecycle Management software solutions and maintenance, enhancement and support services in connection

therewith. The assessee is also stated to be engaged in providing software related research and development activities to its holding company, a unit registered under the Software Technology Park Scheme of the Union Government. In light of nature of the activities which were undertaken by the assessee, we find no ground to interfere with the ultimate view expressed by the Tribunal in respect of the exclusion of the comparables in questions, bearing in mind the functional dissimilarity and the absence of segmental data.

6. Before us Mr. Kumar vehemently argued that Bodhtree Consulting Limited as well as Zylog Systems Limited had been factored in the transfer pricing study undertaken by the respondent-assessee itself. It is in the aforesaid context that counsel had also sought to press proposed questions (v) & (vi). However we note that an identical contention and of a perceived estoppel or a principle akin or analogous to approbate/reprobate appears to have been addressed before a Division Bench of this Court in **Pr. Commissioner of Income Tax-6 vs. Mentor Graphics (India) Pvt. Ltd.** [2023 SCC OnLine Del 5991].

7. While rejecting those contentions, the Court had on that occasion held as follows :-

> "**19.** We may note that Mr Bhatia has, however, argued quite vigorously that before the Transfer Pricing Officer (TPO), the respondent/assessee had accepted Persistent as a comparable.
> 19.1 Mr Bhatia also contended that, having taken this position, quite obviously, no objection was filed vis-à-vis this comparable before the Dispute Resolution Panel (DRP).
> 19.2. Concededly, the objection to the inclusion of Persistent was taken by the respondent/assessee for the first time before the Tribunal. Therefore, it was Mr Bhatia's submission that the Tribunal could have taken note of this aspect of the matter and, accordingly, dealt with the issue as to whether or not Persistent should be excluded as a comparable.
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> **20.** In our view, the argument, though, attractive at first blush,

> cannot carry the case of the appellant/revenue very far for the following reasons:
> (i) Firstly, the Tribunal is the final fact-finding authority.
> (ii) Secondly, the object of the exercise conducted by the statutory authorities in matters dealing with transfer pricing is to ultimately determine as to whether the transaction entered into between the respondent and its associated enterprises is at arm's length. Therefore, a position taken by an assessee at the initial stage can always be revisited and once such a step is taken, the statutory authority would have to examine it on merits and conclude finally as to whether or not, as in this case, the exclusion of comparables would help in reaching a conclusion as regards the international transaction executed between the respondent/assessee and the associated enterprises.
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> **21.** Therefore, the matter has to be examined, and not as Mr Bhatia would like to contend- which is that this is a case of approbation and reprobation, but whether the statutory authority has examined the merits and then come to a conclusion either way.
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> **22.** In this case, we find that the Tribunal has, in fact, examined the matter and concluded that Persistent as a comparable had to be excluded, as no segmental data was available.

8. In view of the aforesaid, we find no ground to entertain the appeal on the questions as proposed.

9. That only leaves us to deal with the question (vii) and which is related to foreign exchange fluctuation. It is conceded on behalf of the appellant that the aforesaid question stands answered against the Revenue in light of the decision rendered in **Principal Commissioner of Income Tax vs. Global Logic India Ltd**. [2023 SCC OnLine Del 8523].

10. In view of the aforesaid, we find no justification to entertain this appeal. The appeal raises no substantial question of law and shall consequently stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 23, 2024/*sk*