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

Judgement reserved on: 18.01.2023

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Judgement pronounced on: 18.07.2023

+ **ITA 1068/2018**

THE COMMISSIONER OF INCOME TAX -4..... Appellant

Through: Mr Shlok Chandra, Jr. Standing
Counsel.

versus

GE INDIA BUSINESS SERVICES PVT. LTD Respondent

Through: Mr Sachit Jolly with Mr Rohit Garg
and Ms Disha Jham, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

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RAJIV SHAKDHER, J.:

PREFACE:

1. This is an appeal preferred by the appellant/revenue against the order dated 27.04.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] concerning Assessment Year (AY) 2010-11.

1.1 The appellant/revenue's principal grievance articulated before us is the exclusion of four out of five comparables selected by the Transfer Pricing Officer ("TPO"), for the purposes of benchmarking international transactions relating to offshore outsourcing services provided by the

respondent/assessee to its Associated Enterprises (AEs).

BACKGROUND:

2. Before we proceed further, it may be necessary to record the following broad facts, which have led to the institution of the instant appeal:

3. On 30.09.2010, the respondent/assessee filed its Return of Income (ROI), wherein it declared its taxable income as Rs.12,16,81,262/-.

3.1 Initially, the ROI was processed under Section 143(1) of the Income Tax Act, 1961 [in short, "Act"]. However, the respondent/assessee's case was picked up for scrutiny, and accordingly, notice under Section 143(2) of the Act was served upon it.

4. It is during scrutiny that it came to light that the respondent/assessee had entered into international transactions, which involved providing Information Technology Enabled Services (ITES) to its AEs.

5. Since the value of the transactions during the relevant period was more than Rs.15 crores, the AO referred the matter to the TPO, in terms of the provisions of Section 92CA of the Act, for determination of the Arm's Length Price (ALP) concerning the transactions in issue.

5.1 As required, the respondent/assessee had submitted a Transfer Pricing Study Report ("TP Study Report"), which adopted the Transactional Net Margin Method ("TNMM method") to arrive at the ALP concerning international transactions entered into by the respondent/assessee with its AEs, regarding ITES.

5.2 As per the respondent/assessee's TP Study Report, the price charged by it concerning transactions entered into with its AEs in respect of ITES was at Arm's Length. This conclusion was arrived at in the TP Study Report

by working out the Profit Level Indicator (“PLI”), having regard to the ratio between Operating Profit (OP) and Total Cost (TC) of eight comparable entities.

5.3 As per the TP Study Report, the average OP/TC of the comparable entities worked out at 8.36% whereas insofar as the respondent/assessee was concerned, it worked out at 16.94%. It is based on this that the respondent/assessee had taken the stand before the TPO, that the transactions executed with its AEs were at Arm's Length.

5.4 The eight comparables adverted to in the TP Study Report were examined and analysed by the TPO. The TPO, after applying various filters concluded that the comparables were not suitable for determining the ALP. Interestingly, the TPO, upon further analysis concluded that some of the comparables that had been rejected by the respondent/assessee [as noticed in the TP Study Report] were, in fact, suitable. The TPO, thus, zeroed down on the following seven comparables:

Sl.No.	Name of the Comparable	Remarks of office
1.	Accentia Technology	<i>You have rejected this company on the ground mentioned in Accept/Reject matrix Dissimilar that 'Performs Functions'. However, the annual report of the company has been perused. This is very much an ITES company and it passes all filters also. Hence, this is a robust comparable in your case.</i>
2.	Cosmic Global Limited	
3.	Fortune Infotech Limited	<i>You have rejected this company on the ground mentioned in Accept/Reject matrix that company is having RPT in excess of 20%. However, the annual report of the company has been perused. RPT of the comparable company has been computed and it found to be less than 25% of Sales (24.52%). Hence, this is a suitable comparable in your case.</i>
4.	Igate Global Solutions Limited	<i>You have rejected this company on the ground mentioned in Accept/Reject matrix that engaged in</i>

		<i>Consulting and BPO segment and proper segmental results are not given. However, the annual report of the company has been perused and it is found that this company is dominantly an ITES company and passes all filters also. Hence, this is a suitable comparable in your case.</i>
5.	<i>Infosys BPO Limited</i>	<i>You have rejected this company on the ground mentioned in Accept/Reject matrix that 'Significant difference in scale of operations. Assessee in its search itse(f has not applied High turnover Filter '. As per the functional profile of the company this is very much on ITES company and it passes all filters also. Hence, this is a suitable comparable in your case.</i>
6.	<i>TCS E-Serve International Ltd. Y</i>	<i>You have rejected these companies on the ground mentioned in Accept/Reject matrix that these company are having RPT in excess of 20%. However, the annual report of the companies has been perused and it is found to be less than 25% of Sales (12.09% and 2.70% respectively). Hence, these are suitable comparables in your case.</i>
7.	<i>TCS E-Serve Ltd.</i>	

5.5 After noting the OP/TC of each of the seven comparables, the TPO worked out and pegged the average profit margin at 36.80% via his order dated 09.01.2014. The TPO treated the services rendered by the respondent/assessee as ITES/Business Processing Outsourcing (BPO) services, and applying the TNMM Method concluded, that an upward transfer pricing adjustment amounting to Rs.4,80,19,591/- was required to be made. In reaching this conclusion, the TPO *inter alia* took into account, the following four comparables:

- (i) Accentia Technologies Pvt. Ltd. [in short, "ATPL"].
- (ii) I-Gate Global Solutions Ltd. [in short, "I-Gate"]
- (iii) Infosys BPO Ltd. [in short, "Infosys"]
- (iv) TCS E-Serve International Ltd. [TCS International]

6. Based on the said order of the TPO, on 31.01.2014, the AO framed a draft assessment order, whereby an addition of Rs.4,80,90,591/- was made, in line with the order of the TPO dated 09.01.2014.

7. Being aggrieved, the respondent/assessee filed its objections with the Dispute Resolution Panel (“DRP”). The DRP via order dated 24.10.2014 rejected the objections preferred by the respondent/assessee.

8. Consequently, a final assessment order was passed by the AO under Section 143(3) read with Section 144C of the Act. Thus, Rs.4,80,19,591/- was added [after making cumulative adjustments] to the total income of the respondent/assessee on account of the transfer pricing adjustment.

9. It is this which impelled the respondent/assessee to prefer an appeal with the Tribunal.

10. The Tribunal via the impugned order excluded the following four comparables from the list selected under the TNMM Method for arriving at the ALP concerning international transactions entered into by the respondent/assessee with its AEs.

1. ATPL
2. I-Gate
3. Infosys
4. TCS International

11. The exclusion of the aforementioned four comparables, as noticed at the very outset, has propelled the appellant/revenue to prefer the instant appeal. In support of the appeal, the arguments were advanced by Mr Shlok Chandra, learned senior standing counsel, while on behalf of the respondent/assessee, submissions were made by Mr Sachit Jolly.

SUBMISSIONS ON BEHALF OF THE APPELLANT/REVENUE:

12. The submissions made by Mr Shlok Chandra, in support of the appeal, can be broadly paraphrased as follows:

(i) The aforementioned four comparables were wrongly excluded by the Tribunal, on the assumption that the functional profile of the respondent/assessee was similar to an entity going by the name Rampgreen Solutions Pvt. Ltd., whereas in the judgment passed by a coordinate bench of this Court involving Rampgreen Solutions Pvt. Ltd., the following observations have been made :

“4.1 The Assessee is a wholly owned subsidiary of vCustomer, USA, (an Associated Enterprise - hereafter „AE“). The Assessee is engaged in providing voice-based customer care to the AE’s clients. The Assessee renders Call Center services, which fall within the broad description of Information Technology Enables Services (hereafter „ITeS“). The Assessee has two units registered under the Software Technology Park Scheme of the Government of India, which are located at [in] New Delhi and Pune. The Assessee is remunerated for the voice call services on [a] cost plus basis. The Assessee explained that the AE undertakes all activities such as marketing and enters into contracts with its customers seeking voice call services.”

[See judgment dated 10.08.2015 passed in ITA No.102/2015 titled ***Rampgreen Solutions Pvt. Ltd. Vs. Commissioner of Income Tax***].

As would be evident from the aforesaid observations, the functional profile of the respondent/assessee is not similar to Rampgreen. The respondent/assessee is a BPO, and has been set up as a captive service provider for provisioning outsourcing services to GE Group companies. It provides ITES and Financial Support Services [FSS]. Therefore, it cannot be held that Rampgreen has a functional profile which is similar to that of the respondent/assessee.

(ii) Insofar as TCS International is concerned, the Tribunal has discarded

the said comparable, once again, on the ground that there was functional dissimilarity, without giving any reasons. The Tribunal had relied upon the judgment rendered by it in *Rampgreen Solutions Pvt. Ltd. vs DCIT Circle 20(2)* dated 04.11.2015 [“Rampgreen Solutions Pvt. Ltd.”], wherein it was observed that TCS International was providing software development services and therefore, was not functionally similar to Rampgreen, which was engaged in provisioning non-development software services.

(iii) The Tribunal, while seeking to ascertain functional similarity to determine the ALP by using the TNMM Method should have borne in mind, factors referred to in the provisions of Rule 10B of the Income Tax Rules, 1962 [in short, "Rules"]. In other words, the Tribunal should have also borne in mind, the business environment; the nature and functions performed by the tested party and comparable entities; value addition in respect of products and services provided by the parties; the business model; and the assets and resources employed. [See *Li & Fung India Pvt. Ltd. Vs. CIT*, 361 ITR 85 (Delhi)].

SUBMISSIONS ON BEHALF OF THE RESPONDENT/ASSESSEE:

13. Mr Sachit Jolly, on the other hand, resisted the admission of the appeal, based on the observations and findings returned by the Tribunal *via* the impugned order.

13.1 Mr Jolly contended that the respondent/assessee was, even according to the appellant/revenue, in the business of ITES/BPO services.

13.2 The Tribunal had excluded three out of the four comparables i.e., ATPL, I-Gate and Infosys, upon concluding that these entities had been subjected to an extraordinary event and therefore, did not fall in the category

of fit comparables.

13.3 Insofar as the fourth comparable was concerned i.e., TCS International, the Tribunal has observed in paragraph 10 of the impugned order, that it was providing software development services and hence, was not functionally similar to an entity such as the respondent/assessee, which was provisioning non-development software services. Thus, TCS International was excluded as a comparable by the Tribunal on this ground.

13.4 The decision of the Tribunal in *Rampgreen Solutions Pvt. Ltd.* concerning AY 2010-11 dated 04.11.2015, on which reliance was placed by the Tribunal while deciding the respondent/assessee's appeal before it, was sustained by a coordinate bench of this Court via judgment dated 27.05.2016 passed in ITA No.340/2016 titled, *Principal Commissioner of Income Tax-07 v. M/s Rampgreen Solutions Pvt. Ltd.* Although a Special Leave Petition (SLP) has been filed against the said judgment of the coordinate bench, no final judgment has been rendered in the matter. What is noticeable though, by its absence, is that in the instant appeal, the appellant/revenue has not made an averment, that the facts and circumstances obtaining in *Rampgreen Solutions Pvt. Ltd.* do not apply to the present case.

13.5 None of the questions of law, as proposed, give rise to a substantial question of law, requiring this Court's intercession.

ANALYSIS AND REASONS:

14. Having heard the learned counsel for the parties and perused the record, what has come to the fore is the following:

(i) The respondent/assessee, in the TP Study Report had referred to eight comparables, which were not accepted by the TPO. The TPO, however,

chose seven comparables, which are also mentioned in the TP Study Report but had been excluded on "qualitative grounds" being found unsuitable.

(ii) After the matter travelled to various forums, the controversy between the disputants now centres around the exclusion of the following four comparables i.e., ATPL, I-Gate, Infosys and TCS International.

(iii) There is no dispute about the method to be adopted for arriving at the ALP. The TP Study Report presented by the respondent/assessee adverts to the TNMM method. The TPO has accepted this method for arriving at the ALP.

(iv) The appellant/revenue appears to accept the fact that the respondent/assessee is in the BPO business, and that it was set up as a captive service provider for provisioning offshore outsourcing services, primarily targeted towards GE entities.

(v) It also appears, that the respondent/assessee provided ITES and FSS to various GE Group companies, *albeit*, on a cost-plus basis. This aspect is evident upon perusing the order dated 09.01.2014 passed by the TPO.

(vi) The respondent/assessee had made a grievance before the Tribunal concerning five comparables, which included the aforementioned four entities. The fifth comparable was an entity going by the name TCS E-Serve Ltd. Via the impugned order, the Tribunal remitted the issue relating to the inclusion or exclusion of the said entity i.e., TCS E-Serve Ltd. to the AO/TPO, for fresh consideration, after taking into account the relevant aspects affecting the comparability analysis.

15. Given these factors, *qua* which there is no dispute, what falls for consideration is: whether the exclusion of the four comparables hereinabove

by the Tribunal was merited?

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.

17. Given the extraordinary event, the Tribunal did not consider ATPL as a comparable to determine the ALP.

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, the 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.

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.

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.

21.1 Likewise, quite clearly, the services offered by TCS International [not TCS E-Serve Ltd.] could not be used as a comparable, since the respondent/assessee was, admittedly, in the business of ITES/BPO/FSS. For each of these services that the respondent/assessee offered, it purchased, it appears, proprietary software and did not develop, maintain and update its own software for the use of its customers.

22. The issue at hand, in our view, turned on findings of fact. Mr Chandra's submission that no reasons were provided by the Tribunal is not, in our view, an accurate reading of the impugned order.

23. We find upon perusal of the appeal, the appellant/revenue has raised no ground, that would have us conclude that the findings returned by the Tribunal, as discussed above, are perverse.

CONCLUSION

24. Therefore, in our view, no substantial question of law arises for consideration.

25. The appeal is, accordingly, dismissed.

26. Parties will, however, bear the burden of their respective costs.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

JULY 18th, 2023

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