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

Date of decision 16.4.2018

\+ ITA 634/2017

PR COMMISSIONER OF INCOME TAX-2 ..... Appellant

versus

M/S CHRYS CAPITAL INVESMENT ADVISORS PVT LTD

..... Respondent

\+ ITA 346/2018

PR. COMMISSIONER OF INCOME TAX ..... Appellant

versus

CHRYSCAPITAL LTD. ….. ... Respondent

\+ ITA 349/2018

PRO COMMISSIONER OF INCOME TAX- 2 ..... Appellant

versus

MIS CHRYS CAPITAL INVESTMENT ADVISORS (INDIA) PVT. LTD. .. ...Respondent

Present : Mr.Zoheb Hossain, Sr. Standing counsel for appellant.

Mr.Vikas Shrivastava, Mr.Mayank Aggarwal and Ms.Kanika Jain, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (Open Court)

1 Revenue's appeal is under Section 260A with respect to inclusion of Brescon Corporate Advisors Limited as a comparable for the purposes of

ALP determination under Section 92CA of the Income Tax Act. It is contended that neither before the Transfer Pricing Officer (TPO), nor the DRP, the assessee objected to the inclusion of Brescon Corporate Advisors Ltd. on account of functional dissimilarity. Serious objection has been taken to the finding of the ITAT. It is contended that it is solely dependent on its previous reasoning in *Xander Advisors India (P.) Ltd vs. Assistant Commissioner of Income Tax* 2014 (36) ITR (Trib) 499 (Delhi). It is pointed out that mere pronunciation of the alleged functional dissimilarity in another decision cannot be treated *per se* as a precedent by the ITAT in these circumstances and that in the absence of analysis as to the dissimilarity by the lower ranking authority, the ITAT ought not to have carried out the exercise and excluded the comparable. Learned counsel also relies upon the decision of this Court in *Chryscapital Investment Advisors (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax* (2015) 376 ITR 183 Del and especially highlights the discussion in this regard in para 41 of the judgment.

2 In the present case, undoubtedly, assessee does not appear to have sought exclusion of Brescon Corporate Advisors Limited on the ground of functional dissimilarity, rather it objected to the inclusion of that concern on the ground that it reported high profits. The *per se* exclusion of entity that might otherwise be comparable, in terms of their functional profile, was ground upon in *Chryscapital Investment Advisors (India) Pvt. Ltd.* (*supra*). In that judgment itself the exclusion of Brescon Corporate Advisors Limited on the sole filter of high profits was not accepted; the DRP was tasked with the responsibility of ascertaining the factual basis

for functional similarity or dissimilarity as it works considering the risk profile of that comparable in order to carry out necessary adjustments. *Chryscapital Investment Advisors (India) Pvt. Ltd*. (*supra*) was for Assessment Year 2008-09.

3 In the present case, the finding with respect to dissimilarity of Brescon Corporate Advisors Ltd. was rendered for A.Y. 2006-07. Though the finding rendered in the case of one entity cannot be considered per se binding, what cannot be lost sight of in the present case is that for A.Y. 2006-07 itself, the Tribunal in *Xander Advisors India (P.) Ltd. (supra)* had considered the functional profile of Brescon Corporate Advisors Ltd. and noted that as against the total amount of Rs.139,563,352/- (reported towards the financial services of Brescon Corporate Advisors Ltd). The equity related advisories constituted Rs.25,253,608/-. Furthermore and crucially in *Xander Advisors India (P.) Ltd (supra)* vis-à-vis Brescon Corporate Advisors Ltd., the Tribunal recorded a finding that no segmental data with respect to the disparage income schemes of Brescon Corporate Advisors Ltd. was available. In these circumstances, the Court is of the opinion that the exclusion of Brescon Corporate Advisors Ltd. does not per se result in any error of law.

4 For the above reasons, this question of law does not arise.

5 The second question of law urged is with respect to exclusion of Keynote Corporate Services Ltd. as a comparable. Learned counsel relies upon the order of this Court in *Principal Commissioner of Income Tax Vs. Chryscapital Ltd. (in ITA 286 of 2018 decided on 12.03.2018)* which was for 2009-2010. He submits that the impact of unusual events i.e. the

repercussion of amalgamation with another entity of the comparable was directed to be reconsidered.

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:

> *"1.The right to appeal is always given by statute and unless specific provision of appeal is there, there cannot be any right to appeal. The appeal and cross objection are at par as far as their admissibility is concerned. Following several decisions cited by the assessee, the Ld.ITAT held that the cross objection filed by the department is non-maintainable and, thus, rejected.*
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> *2. The assessee has raised the additional ground related to working capital adjustments and the assessee had also filed an application under Section 154 of the Act before the learned TPO to rectify the aforesaid error and the same is pending. The Ld. ITAT had directed the Assessing Officer to dispose of the petition filed by assessee under Section 154 pending with him.*
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> *3. The Ld. ITAT was not inclined to accept the submission of learned CIT(DR) that a decision can be applied in transfer pricing cases only if it pertain to the same assessment year because ultimately it is the FAR analysis which is relevant of the tested party as well as of comparable for selecting/rejecting a comparable. If the functional profit of a comparable vis-a-vis the tested party remains the same over the years there is no reason as to why the decision rendered in regard to one assessment year may not be applied for any other year unless it is demonstrated with facts and figures that the*

said decision was rendered in entirely different set of facts.

4. There is no estoppel against the assessee from demonstrating that a particular comparable was wrongly included in earlier year and, therefore, it should be excluded in this year. The Ld. ITAT had held that Xander Advisors India (P.) Ltd. vs. Deputy Commissioner of Income Tax, Circle -18(1) New Delhi and Temasek Holdings Advisors India (P.) Ltd. vs. Deputy Commissioner of Income Tax clearly supports the assessee's contention and, therefore, the Ld. ITAT directed for excluding Brescon Corporate Advisors Limited from the list of comparables. As far as the inclusion of ICDS securities is concerned, the same was not pressed at the item of hearing and, therefore, the same will remain in the list of comparables.

5. With regard to the inclusion of non-operating incomes while computing profits of KGMC Global Market (India) Ltd., Khandwala Securities Ltd. and Sumedha Fiscal Services Ltd., the Ld. ITAT restored the issue to the file of learned TPO to examine the contentions of both the parties and if they are found to be correct then re-determine operating margin after excluding the impugned amounts and related expenses.

6. On the issue of the AO concluding that in case of directors of the company, the sum paid as commission and bonus could have been paid as profit or dividend which is not the case here, the issue is covered in favour of assessee by the decision of Hon'ble Delhi High Court vide ITA No.417/2014 in assessee's own case for the assessment year 2008-09. The Learned ITAT found that the ground raised by the assessee is allowed.

> *7. Regarding the issue related to severance cost, the assessee relied on CIT vs.Gobald Motor Services Pvt.Ltd. 100 ITR 240, wherein, it was, inter alia, held that it was not for the revenue to question the commercial expediency of the expenditure and it is a matter entirely left to the judgment of the assessee. There could not be any other consideration for severance cost of Rs.35,10,000/- paid to Shri Girish Baliga except the services rendered by him to assessee company. The payment made to Shri Girish Baliga by the assessee company as going concern was in line with the practice prevalent in the industry. This payment cannot be held to be in capital field and was an allowable expenditure in the hands of the assessee company. In the result, the appeal of the assessee is partly allowed."*

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 findings of the ITAT cannot be faulted. No question of law arises.

8 The appeals are accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

APRIL 16, 2018/ndn