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

+ ITA 234/2022 & CM APPL. 33042/2022

PR. COMMISSIONER OF INCOME TAX-1, DELHI Appellant
Through: Mr. Ajit Sharma, Sr. Standing
Counsel for Revenue.

versus

M/S. CONVVERGYS INDIA SERVICES PVT. LTD & ANR.

..... Respondent

Through: Mr. Deepak Chopra and Mr. Ankur
Goyal, Advocates.

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Date of Decision: 29th July, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

CM APPL. 33042/2022

In view of the averments made in the application, the delay of 85 days in filing the appeal is condoned.

Accordingly, this application is disposed of.



ITA 234/2022

1. Present Income Tax Appeal has been filed challenging the Order dated 22nd November, 2019 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA 1934/Del./2018 for the Assessment Year (hereinafter referred to as 'AY') 2012-13.
2. Learned counsel for the Appellant states that the ITAT has erred in laying down stringent standards of comparability and attempting to identify exact replica of 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 difference and without appreciating that such stringency will defeat the purpose of flexibility provided in the comparability analysis for determination of Arm's Length Price (ALP).
3. He states that the ITAT erred in excluding Excel Infoways Ltd. by relying on the decision of the coordinate Bench of the Tribunal in ***Baxter India Pvt. Ltd.*** for the AY 2012-13. He states that upon an appeal being filed against the judgment of the Tribunal in ***Baxter India Pvt. Ltd.***, this Court had framed questions of law. He, however, states that the said appeal was disposed of on account of low tax effect. He further states that the Tribunal wrongly concluded that the Excel's ratio of employee cost to sales was merely 13.05%. He states that in response to a notice under Section 133(6) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), Excel Infoways had informed that the segmental employee cost pertaining to ITES/BPO was Rs.2.02 crores as against segmental value of Rs.7.07 crores. Consequently, as according to him, the ratio of employee cost was more than 25%, the filter selected by the Transfer Pricing Officer (TPO) was



satisfied in the present proceedings.

4. He also contends that the service revenue filter from export/ITES of 75% is not sacrosanct. He states that as in the present case, since Excel Infoways Ltd. satisfies the functional similarity test, the filter of service revenue from exports/ITES could be diluted.

5. Learned counsel for the appellant fairly states that he is not pressing the present appeal *qua* exclusion of TCSE-Serve Ltd. and Infosys BPO in view of the fact that the revenue itself has excluded TCSE-Serve Ltd. as a comparable in subsequent assessment years in the case of the assessee and Infosys BPO had acquired Portland Group Pty Ltd., Australia during the year under assessment.

6. Learned counsel for the respondent, who appears on advance notice, points out that the TPO had insisted on service revenue filter from export/ITES of 75% and had rejected the assessee's suggestion to adopt the filter of 50% export. In support of his contention, he relies upon the order passed by the TPO dated 15th February, 2016. The relevant portion of the said order is reproduced hereinbelow:-

<i>No.</i>	<i>Description of filter</i>	<i>Remarks of this office</i>
.
2	<i>Selected companies which had positive sales and ratio of other operating income to sales > 50% over the time period under consideration.</i>	<i>The filter is insufficient. Further, the correct filter in respect of operating income is that service income should be more than 75%. This will ensure that predominantly service companies are selected.</i>

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- **Companies who have export service income less than 75% of the sales were excluded**

This has been done primarily to exclude predominantly domestic companies which cannot be compared with the taxpayer, having major earnings from exports. This is because economic circumstances of such companies are different. Rule 10 B(2) also supports this view.”

7. He also states that the ITAT correctly held that Excel Infoways failed the diminishing revenue filter. In support of his statement he relied upon a chart reproduced in the impugned order by the Tribunal. The said chart is reproduced hereinbelow:-

Financial Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Revenue (INR'000)	204,161.34	203,526.39	79,096.95	76,098.95	52,7982.12	22,994.38
Operating Cost (INR'000)	42,105.89	48,794.55	55,991.57	44,541.01	41,355.78	22,896
Operating Profit	162,055.45	154,731.84	23,105.38	31,558.53	11,436.34	99
OP/TC	384.88%	317.11%	41.27%	70.85%	27.65%	0.43%

8. Having heard learned counsel for the parties, this Court is of the view that the intent of Chapter X of the Act is to compute the income in relation to a controlled transaction between an assessee and its associated enterprise having regard to the arm's length price in order to nullify the effect of transfer of income to a jurisdiction outside India, if any, in respect of the controlled transaction. The exercise of determining the arm's length price in respect of international transactions between related enterprises is aimed at determining the price which would have been charged for products and services, as nearly as possible, if such international transactions were not



controlled by virtue of their being executed between related parties. The object of the exercise is to remove the effect of any influence on the prices or costs that may have been exerted on account of the international transactions being entered into between related parties. It is clear that for the exercise of determining the arm's length price to be reliable, it is necessary that the controlled transactions be compared with uncontrolled transactions which are similar in all material aspects. In ***Rampgreen Solutions Pvt. Limited v. Commissioner of Income Tax (2015) 377 ITR 533, Delhi***, the learned Predecessor Division Bench has held as under:-

“41. Having stated the same, it may be necessary to bear in mind that supernormal profits may in certain cases indicate a functional dissimilarity or dissimilarity with respect to a feature that has a material bearing on the profitability. In such circumstances, it would be necessary to undertake further analysis to eliminate the possibility of the high profits resulting on account of any material dissimilarity between the tested party and the chosen comparable. A wide deviation in the PLI amongst selected comparables could be indicative that the comparables selected are either materially dissimilar or the data used is not reliable. The Tribunal proceeded on the basis that an adjustment could be made only in cases where supernormal profits resulted from the factors indicated in Rule 10B of the Income Tax Rules, 1962. In our view, the factors mentioned in Rule 10B are not exhaustive. The principal object of benchmarking international transactions against uncontrolled transactions is to impute an ALP to those transactions. This exercise would fail if a factor, which has a material bearing on the value or the profitability, as the case may be, depending on the method used, is ignored.

42. Before concluding, there is yet another aspect of the matter that needs consideration. The Tribunal proceeded on the basis that while applying TNMM method, broad functionality is sufficient and it is not necessary that further



effort be taken to find a comparable entity rendering services of similar characteristics as the tested entity. The DRP held that TNMM allows flexibility and tolerance in selection of comparables, as functional dissimilarities are subsumed at net margin levels, as compared to Resale Price Method or Comparable Uncontrolled Price Method and, therefore, the functional dissimilarities pointed out by the Assessee did not warrant rejection of eClerx and Vishal as comparables.

43. In our view, the aforesaid approach would not be apposite. Insofar as identifying comparable transactions/entities is concerned, the same would not differ irrespective of the transfer pricing method adopted. In other words, the comparable transactions/entities must be selected on the basis of similarity with the controlled transaction/entity. Comparability of controlled and uncontrolled transactions has to be judged, inter alia, with reference to comparability factors as indicated under rule 10B(2) of the Income Tax Rules, 1962. Comparability analysis by TNMM method may be less sensitive to certain dissimilarities between the tested party and the comparables. However, that cannot be the consideration for diluting the standards of selecting comparable transactions/entities. A higher product and functional similarity would strengthen the efficacy of the method in ascertaining a reliable ALP. Therefore, as far as possible, the comparables must be selected keeping in view the comparability factors as specified. Wide deviations in PLI must trigger further investigations/analysis.”

9. Since, in the present case Excel Infoways Pvt. Ltd. fails not only the service revenue from export/ITES filter of 75% insisted upon by the TPO but also the diminishing revenue filter as is apparent from the chart reproduced hereinabove, no interference is called for in the finding recorded by the Tribunal.



10. Consequently, no question of law arises for consideration in the present appeal. Accordingly, the same is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JULY 29, 2022
msh/KA

HIGH COURT OF DELHI



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