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

+ ITA 393/2024

THE PR. COMMISSIONER OF INCOME TAX -Appellant

Through: Mr. Ruchir Bhatia, SSC with
Mr. Anant Mann, JSC and
Mr. Pratyaksh Gupta, JSC

versus

STERIA (INDIA) LTD.Respondent

Through: Mr. Neeraj Jain, Mr. Aniket D.
Agarwal and Mr. Abhishek
Singhvi, Advocates

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MS. JUSTICE TARA VITASTA GANJU

ORDER

% **29.07.2024**

CM APPL. 42277/2024 (847 Days Delay in Refiling) in ITA 393/2024

Bearing in mind the disclosures made, the delay of 847 days in refiling the appeal is condoned.

The application shall stand disposed of.

ITA 393/2024

1. The Principal Commissioner impugns the order of the Income Tax Appellate Tribunal [**'Tribunal'**] dated 01 May 2020 and posits the following questions of law for our consideration:-

“2.1 Whether in the facts and circumstances of the case the Id. ITAT was right in law in considering BPO Infosys Pvt. Ltd. as functionally non comparable without considering the finding of the TPO w.r.t the fact that the assessee company is also enjoying brand name as in the case of the comparable i.e. BPO Infosys Pvt. Ltd. ?



2.2 Whether the Id. ITAT erred in not appreciating that Arm's Length Price of an International Transaction, as defined in section 92F(ii) of the Income Tax Act, 1961, is the price applied or proposed to be applied in an uncontrolled transaction, and consequently must remain uninfluenced by extraneous factors and post transaction events like foreign exchange fluctuation which are likely to materially affect the actual receipt or repayment but do not impact the price intended to be charged or paid?

2.3 Whether the Id. ITAT erred in not appreciating the fact that the TPO followed the provisions of Rule 10B(3) by similarly treating foreign exchange fluctuation as non-operating cost/revenue of the tested party as well as of the comparable to eliminate the differences, thereby leading to a consistent and reliable basis for comparison?

2.4 Whether on facts and in the circumstances of the case the Id. ITAT was correct in law in holding that the Assessee was not liable to withhold tax under section 195 of the Act on payment made by it to Steria France for management service fee and consequently deleting the disallowance made by Id. AO under section 40(a)(ia) of the Act?

2.5 Whether on facts and in the circumstances of the case the Id. ITAT was correct in law in holding that the Assessee was not liable to deduct tax at sources on the sum paid by the Assessee to its group entity based in France without deduction of tax at sources under section 195 of the Act on the purchase of computer software license and consequently deleting the disallowance made by Id. AO under section 40(a)(i) of the Act? ”

2. Insofar as Question No. 2.1 is concerned, it is conceded on behalf of the appellant that BPO Infosys Pvt. Ltd. [**Infosys**] was rightly excluded as a comparable bearing in mind the judgment rendered in **Principal Commissioner of Income Tax vs. Qualcomm India Pvt. Ltd.** [2023 SCC OnLine Del 6935] wherein it was observed that Infosys has a higher brand value and hence rightly excluded as a comparable.

3. That then takes us to Question Nos. 2.4 and 2.5, and in respect of which, Mr. Bhatia, learned counsel appearing in support of the appeal, submits that the view taken by the Tribunal would merit



affirmation bearing in mind the judgment rendered inter partes in ITA 380/2017.

4. However, with regards to Question No. 2.4, we are informed of a subsequent contrarian view which has been expressed by the Supreme Court in **Assessing Officer Circle (International Taxation) vs. Nestle SA** [2023 SCC OnLine SC 1372]. We consequently admit the appeal on Question No. 2.4.

5. That leaves us to examine Question Nos. 2.2 and 2.3. The issue which stands raised here pertains to foreign currency fluctuations and whether they are liable to be excluded in terms of the provisions made in Rule 10TA of the Income Tax Rules, 1962 [**Rules**]. Mr. Bhatia points out that the judgment which was relied upon by the Tribunal was rendered prior to significant amendments which came to be introduced in that Rule and which both, while computing loss as well as income, exclude foreign currency fluctuations. We accordingly admit the instant appeal on Question Nos. 2.2 and 2.3.

6. Insofar as Question No. 2.5 is concerned, undisputedly, the same would be liable to be answered in favour of the assessee in light of the judgment rendered in **Engineering Analysis Centre of Excellence (P) Ltd. v. CIT** [(2022) 3 SCC 321].

7. We accordingly admit the instant appeal on the following three questions of law:-

A. Whether the Tribunal erred in not appreciating that Arm's Length Price of an International Transaction, as defined in section 92F(ii) of the Income Tax Act, 1961 [**Act**], is the price applied or proposed to be applied in an uncontrolled transaction, and consequently must remain uninfluenced by extraneous factors and post transaction



events like foreign exchange fluctuation which are likely to materially affect the actual receipt or repayment but do not impact the price intended to be charged or paid?

B. Whether the Tribunal erred in not appreciating the fact that the TPO followed the provisions of Rule 10B(3) by similarly treating foreign exchange fluctuation as non - operating cost/revenue of the tested party as well as of the comparable to eliminate the differences, thereby leading to a consistent and reliable basis for comparison?

C. Whether on facts and in the circumstances of the case the Tribunal was correct in law in holding that the Assessee was not liable to withhold tax under section 195 of the Act on payment made by it to Steria France for management service fee and consequently deleting the disallowance made by the Assessing Officer under section 40(a)(ia) of the Act?

8. List again on 11.11.2024.

YASHWANT VARMA, J.

TARA VITASTA GANJU, J.

JULY 29, 2024/RW