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

+ ITA 486/2022

PR. COMMISSIONER OF INCOME TAX-1Appellant

Through: Mr. Vipul Agrawal, SSC with
Mr. Giran Naushad and Ms.
Satakshi Shairwal, Advs. for
Revenue.

versus

M/S. AVAYA INDIA PRIVATE LTD.Respondent

Through: Mr. Shashwat Bajpai, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

10.12.2024

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1. The Principal Commissioner impugns the order rendered by the **Income Tax Appellate Tribunal**¹ dated 03 December 2018 for **Assessment Year**² 2010-11 and posits the following questions of law for our consideration:

“A. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in laying down stringent standards of comparability and attempting to identify exact replica of the assess. ee for comparability, analysis, whereas, Indian and International Tax jurisprudence recognizes that there cannot be an exact comparable without any differences in a given situation and therefore such stringency will defeat the purpose of flexibility provided in comparability analysis for determination of Arm’s Length Price?

B. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in relying upon other cases without examining its facts in respect of the present case and subsequently directed exclusion of comparables on the basis of parity?

¹ Tribunal

² AY



C. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in excluding Infosys BPO Ltd. as a comparable for benchmarking the international transaction of ITES segment, without appreciating the fact that the said company is functionally similar to the assessee and qualify all the filters applied by the Ld. TPO?

D. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in excluding Fortune Infotech Ltd as comparable for benchmarking the international transaction of ITES segment, without appreciating the fact that the said company is functionally similar to the assessee and qualify all the filters applied by the Ld. TPO?

E. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in excluding TSR Darashaw Ltd. as a comparable for benchmarking the international transaction of Market Support Services segment, without appreciating the fact that the said company is functionally similar to the assessee and qualify all the filters applied by the Ld. TPO?

F. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in law in excluding HCCA Business Services Pvt. Ltd. as a comparable for benchmarking the international transaction of Market Support Services segment, without appreciating the fact that the said company is functionally similar to the assessee and qualify all the filters applied by the Ld. TPO?

G. Whether the ITAT, in the facts and circumstances of the case and in law, has erred in strictly applying the principles of comparability of functional profile of the comparables while making transfer pricing adjustments for the calculation of ALP without appreciating that only broad functional comparability is required to be considered under TNMM?"

2. The dispute arises in the backdrop of the exclusion of Fortune Infotech Limited, TSR Darashaw Ltd., HCCA Business Services Pvt. Ltd. and Infosys BPO Ltd. from the list of comparables shortlisted for the purposes of a transfer pricing study.

3. Insofar as Infosys BPO Ltd. is concerned, we find no justification to admit the appeal on the question of law pertaining to that entity bearing in mind the decision rendered by our Court in **Principal Commissioner of Income Tax vs. E-ValueServe Sez**



(Gurgaon) Pvt. Ltd.³

4. For the purposes of evaluating the challenge which stands raised, we take note of the following description of the streams of business in which the respondent/assessee was engaged, and which has been recorded by the Tribunal in the following terms:

“2. Briefly stated facts relevant to the controversies raised appeal before us, that the assessee is a subsidiary of Avaya International LLC, USA. The assessee was engaged in providing programming and application support for switching integration and PBX systems and specifically dealt with IVR, call centre, AIC CMS technologies. The assessee also provides marketing support services to its Associated Enterprises (AEs), which includes assistance in advertising and promotion of the product sold by ‘Avaya’ group. The assessee also provides back-office services to its AEs, which included provision of services relating to indirect billing, fixed assets, accounts payable, accounts receivable etc.

2.1 During the year under consideration, the assessee provided software development services (CSD), information technology enabled services (ITES), marketing support services (MSS) to its associated Enterprises (AEs) on cost-plus basis, purchased fixed assets and availed legal, finance, human resource, IT support and other support services from AEs.”

5. Insofar as Fortune Infotech Limited is concerned, the Tribunal has while examining the challenge which stood raised to its exclusion observed as follows. It appears to have been urged on behalf of the assessee that the said entity was carrying on functions which were dissimilar to the ITes segment of the assessee. Basis the above, the Tribunal has observed that Fortune Infotech Limited was developing software in-house whereas the assessee was not the owner of any of the software that was being utilized by it in the course of its business. This becomes evident from a reading of para 9.2, and which is extracted hereinbelow:

³ ITA 948/2018 dated 09 September 2024



“**9.2** We have heard the rival submission of the parties and perused the material on record including Annual Report of the company. We agree with the contention of the Ld. DR that the company was engaged only in the ITes segment and RPT during the year is less than the threshold limit of 25% adopted by the Ld. TPO. However, on the issue of use of software developed in-house by the company is concerned, the ITes segment of assessee cannot be compared. The assessee is not owner of any of the software and thus as far as assets are concerned, the company is not comparable to the ITes segment of the assessee. The company has been excluded as comparable in the case of Equant solutions India Private Limited (supra) on identical ground. Thus respectfully, following the finding of the coordinate bench in the case of Equant solutions India Private Limited(supra), we direct the Ld.AO/TPO to exclude the said company from the set of the final comparables.”

6. Insofar as TSR Darashaw Ltd. is concerned, the Tribunal has held as under:

“**10.2** We have heard the rival submissions of the parties and perused the material on record including the Annual Report of the company. We found that the company is engaged in the activity of record management, handling payroll etc which are more in the nature of back-office support services instead of marketing support services rendered by the assessee under comparison. The company has been found to be dissimilar to the function of marketing and other technical support services in the case of Ciena India Private Limited(supra). The relevant finding of the Tribunal is reproduced as under:

“46. Keeping in view the stark functional dissimilarity between the assessee company vis-a-vis comparable company and by following the decisions rendered by coordinate Bench. We are of the considered view that since the comparable company is into under record management activity vide which it undertakes storage, retention and retrieval of physical or electronic records and also into Payroll and Trust Fund Activity and is handling Payroll and Retirement Funds, it has no functional comparability with the assessee company to be a suitable comparable. So, we order to exclude this company as a valid comparable.”

7. Proceeding then to HCCA Business Services Pvt. Ltd., the Tribunal has come to render the following conclusions:

“**11.2** We have heard the rival submission and perused the relevant material on record. The company TSR Darashaw Ltd, which was



also engaged in payroll processing etc has been directed to be excluded by us in earlier Paras of this order. To have consistency in our finding, the company is also held is functionally dissimilar to the MSS segment of the assessee. Accordingly, we direct the AO/TPO to exclude the company from the final set of comparables.”

8. However, the exclusions of the latter two entities would have to be examined bearing in mind the streams of business which had been identified insofar as the respondent/assessee was concerned as well as the nature of revenue which it generated in the course of providing back-office support services.

9. We, consequently, are of the opinion that the appeal would merit further consideration and consequently admit the same on the following questions of law:

A. Whether the Tribunal, in the facts and circumstances of the case and in law, has erred in excluding Fortune Infotech Limited as a comparable for benchmarking the international transaction of ITes segment, without appreciating the fact that the said company is functionally similar to the assessee and qualifies all the filters applied by the **Transfer Pricing Officer**⁴?

B. Whether the Tribunal, in the facts and circumstances of the case and in law, has erred in excluding TSR Darashaw Ltd. as a comparable for benchmarking the international transaction of the **Market Support Services**⁵ segment, without appreciating the fact that the said company is functionally similar to the assessee and qualifies all the filters applied by the TPO?

⁴ TPO

⁵ MSS



C. Whether the Tribunal, in the facts and circumstances of the case and in law, has erred in law in excluding HCCA Business Services Pvt. Ltd. as a comparable for benchmarking the international transaction of the MSS segment, without appreciating the fact that the said company is functionally similar to the assessee and qualifies all the filters applied by the TPO?

10. Let the appeal be called again on 23.01.2025.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

DECEMBER 10, 2024/DR