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

% *Date of decision: 18.10.2023*

\+ **ITA 586/2023**

PRINCIPAL COMMISSIONER OF INCOME TAX-7 DELHI ..... Appellant

Through: Mr Sunil Agarwal, Sr Standing Counsel with Mr Utkarsh Tiwari and Mr Shivansh B Pandya, Advs.

versus

QUALCOMM INDIA PVT LTD ..... Respondent

Through: Ms Ananya Kapoor, Adv.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM Appl.54269/2023

1. Allowed, subject to just exceptions.

CM Appl.54268/2023 ***[Application moved on behalf of the appellant/revenue seeking condonation of delay of 79 days in filing the appeal]***

2. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in filing the appeal.

2.1 According to the appellant/revenue, there is a delay of 79 days.

3. Ms Ananya Kapoor, who appears on behalf of the respondent/assessee, says that she would have no objection if the prayer

made in the application is allowed.

3.1 It is ordered accordingly.

4. Consequently, the delay is condoned. The application is disposed of, in the aforesaid terms.

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5. This appeal concerns Assessment Year (AY) 2014-15.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 19.01.2023 passed by the the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. The appeal is confined to the exclusion of three comparables. The three comparables which are in issue and have been excluded are the following:

(i) Infobeans Technologies Ltd. [in short, "Infobeans"];

(ii) Cybercom Datamatics Information Solutions Ltd. [in short, "Cybercom"] and

(iii) Infosys BPO Ltd. [in short, "Infosys"].

8. The record discloses that the respondent/assessee is operating in the following segments: Software Development Services, Information Technology Enabled Services (ITES), Business Support Services and Technical Support Services.

8.1 However, what is not in dispute is that the comparisons, as regards functions, were made taking into account the Software Development Services and ITES carried on by the respondent/assessee.

9. As regards the three comparables adverted to hereinabove, the Tribunal, in our view, has returned findings of fact as to why they are not comparable.

10. As regards Infobeans, the Tribunal notes that it is into diversified

activities which includes sale of products. In this context, the Tribunal has adverted to the profit and loss account of Infobeans which shows that it has received revenue from operations amounting to Rs.32,96,59,883/-.

10.1. The Tribunal also records that the notes to account (i.e., Note no.20) indicates that it is in the business of sale of software, which is sold both abroad and domestically.

10.2. The other finding, which has been recorded by the Tribunal is that Infobeans also pays sales tax and MODVAT.

10.3. Thus, based on the functional dissimilarity between the assessee and Infobeans, the said comparable was rejected.

11. As regards Cybercom, the findings of fact recorded by the Tribunal are that it is into diversified activities which includes provision of software services. It is indicated that segmental details concerning various segments are not available in public domain.

11.1. Importantly, the Tribunal highlighted that, unlike the respondent/assessee, Cybercom is the business of providing technical services. Based on this finding, the Tribunal has excluded Cybercom as a comparable.

12. This brings us to the third comparable i.e., Infosys. The Tribunal has discarded this comparable not on the ground of functional dissimilarity, but on the ground of risk-bearing capacity.

12.1. Insofar as Infosys is concerned, it is noticed that it is in the BPO business. Furthermore, it has a brand value and has incurred significant expenses with regard to sales and marketing expenditure. The turnover of Infosys *vis-à-vis* the BPO sector, according to the Tribunal, is Rs.2,323/- crores. As against this, it is noticed that the turnover of the

respondent/assessee from the BPO sector is Rs.96 crores.

12.2. In sum, it is the Tribunal's conclusion that Infosys BPO is a risk-bearing entity having diversified activities. The respondent/assessee, on the other hand, which has a turnover of only Rs.96 crores in the BPO sector and hence cannot be compared.

13. Clearly, the findings returned by the Tribunal are findings of fact, and that no question is proposed by the appellant/revenue that the findings are perverse. Therefore, in our view, Infobeans, Cybercom and Infosys were rightly rejected as comparables.

14. This brings us to the other issue which has been articulated in the appeal on behalf of the appellant/revenue, which is the adjustment made by the Transfer Pricing Officer (TPO) on account of interest on receivables.

15. We may note that the Dispute Resolution Panel (DRP) has allowed working capital adjustment, contrary to the directions issued by the TPO. This is evident upon perusal of the following directions issued by the DRP:

> *"...2.5.1 The Panel has considered the taxpayer's contention with regard to the adjustments on account of working capital and also the arguments of the TPO.*
> *2.5.2 Working capital adjustments is utilized when a tested party exhibits different working capital intensities relative lo a set of comparables. This is illustrated through two key areas of working capital adjustments:*
> *i. Inventory and accounts receivable adjustments; and*
> *ii. Accounts payable adjustments*
>
> *In brief, the profit of the comparable is to be adjusted as under depending on trade receivables/debtors, trade payables/creditors and inventories. Interest cost will be high if the trade receivables/debtors time cycle is large. Interest cost will be low if the company can pay its liabilities after a larger period of gap then pay it in a shorter period. Holding of inventory as also interest costs.*
> *2.5.3 As working capital requirements affect the margins or prices, costs or profits because this is a implicit cost which is recovered/ recoverable*

from the customers: therefore, this DRP is of the opinion that in view of the Rule 10B(3) and to improve the comparability, in the facts of the present case, while comparing the margins of tested party with that of the comparables, adjustment be made for working capital for which the reliable data is to be provided by the taxpayer.

2.5.4 ***The TPO has stated that the taxpayer has not demonstrated that there is a difference in the levels of working capital employed by it vis.-a-vis. the comparables, the nature of assets employed and the difference in asset intensity, which affect prices and consequently profits. With regard to this objection, as discussed above, the holding of inventories, trade debtor/creditors, trade receivable/payable has always an interest cost. Therefore there is definitely a connection in the level of working capital and price at which one is willing to offer its services/goods. Hence this ground of rejecting taxpayer's claim of working capital adjustment by the TPO is not tenable****."*

[Emphasis is ours]

16. It has been argued on behalf of the respondent/assessee that once working capital adjustment is allowed, then no adjustment on account of interest on receivables is required to be made.

17. We may note that, as far as the Tribunal is concerned, it has followed its decision for AY 2015-16.

18. The Tribunal has noted the assertions made on behalf of the respondent/assessee that it permitted a ninety (90) days credit period. On behalf of the appellant/assessee, it had been emphasized that once the credit period exceeded ninety (90) days, interest had to be charged. It is on this account that adjustment was ordered with regard to the receivables.

19. The Tribunal, as indicated above, has relied upon its decision dated 01.11.2021 for AY 2015-16 and concluded that the said issue needed to be restored to the Assessing Officer (AO) for verifying the respondent/assessee's claim, keeping in view its aforementioned decision, *albeit*, after providing reasonable opportunity of hearing to the

respondent/assessee.

20. In our view, on this score as well, no interference is called for with the order of the Tribunal.

21. We may note that in support of her submission that once working capital adjustment is made, no further adjustment is required to be made on account of interest received on receivables, Ms Kapoor has relied upon the judgment of a coordinate bench of this court dated 25.04.2017 in ITA 765/2016, titled ***Pr. Commissioner of Income Tax-V vs. Kusum Health Care Pvt. Ltd.***

22. Mr Sunil Agarwal, learned senior standing counsel, who appears on behalf of the appellant/revenue, qua this aspect submits has since a specific amendment was brought about in Section 92B of the Income Tax Act, 1961 [in short, "Act"] with the insertion of the Explanation, therefore, adjustment ought to have been made.

22.1. This very aspect has been considered by the court in ***Kusum Health Care Pvt. Ltd.*** case. The following observations made in the said judgment, being apposite, for convenience are set forth hereafter:

> *"8. Aggrieved by the said order, the Assessee filed an appeal before the ITAT. By the impugned order dated 31th March 2015, the ITAT set aside the assessment order. The ITAT noted that the Assessee had undertaken working capital adjustment for the comparable companies selected in its transfer pricing report. It was further noted that "the differential impact of working capital of the Assessee vis-à-vis its comparables had already been factored in the pricing/profitability" which was more than the working capital adjusted margin of the comparables and, therefore, "any further adjustment to the margins of the Assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified.*
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> *xxx xxx xxx*
>
> *10.* ***The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression "receivables" does not mean that de hors the context every item of "receivables" appearing in the accounts of an entity, which may have***

dealings with foreign AEs would automatically be characterised as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way. 11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi).

11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi).

12. Consequently, the Court is unable to find any error in the impugned order of the ITAT giving rise to any substantial question of law for determination. The appeal is, accordingly, dismissed."

[Emphasis is ours]

24. Thus, for the foregoing reasons, we are of the view that no interference with the impugned order is called for.

25. Also, we find that no substantial question of law arises for our

consideration.

26. The appeal is accordingly disposed of.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

OCTOBER 18, 2023/pmc