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

\+ ITA 279/2016

PRINCIPAL COMMISSIONER OF INCOME-TAX-02 ..... Appellant
Through: Mr. Sanjay Kumar, Advocate.

versus

M/S CASHEDGE INDIA PVT. LTD ..... Respondent
Through: Mr. Sachit Jolly with Mr. Gautam Swarup, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R

% 04.05.2016

1. The Revenue proposes two questions of law, i.e., (1) the correctness of the exclusion of two comparables in the transfer pricing exercise carried out in the assessee's case, and the remand in the case of one comparable company; and (2) the refusal in the impugned order to give effect to the "Safe Harbour Rules" under Section 92 CA(3) so as to exclude the element of gain on account of foreign exchange fluctuation, in respect of which relief was claimed by the assessee.

2. The facts are that the assessee carried out the business for software development; it was in the past as indeed in the present case for assessment year 2010-11 filed its return along with transfer pricing reports in form No.3CEB of the Income Tax Rules. The

Assessing Officer ("AO") referred the matter for consideration to the Transfer Pricing Officer ("TPO") under Section 144C of the Income Tax Act. The TPO *inter alia* held that the data of three comparable companies, i.e., Persistent Systems Ltd., Zylog Systems Ltd. and Wipro Technology Services had to be included. This was objected to by the assessee which had approached the Dispute Resolution Panel ("DRP"); the latter by its order dated 14.11.2014 rejected the assessee's contentions.

3. The Income Tax Appellate Tribunal ("ITAT") to which the assessee appealed excluded its companies holding that the inclusion of Persistent Systems Ltd. and Wipro Technology Services (WTS) was unwarranted. It, however, remitted the issue with respect to Zylog Systems Ltd. to ascertain the audited segmental data for ultimately deciding the comparable component in issue. So far as the question of fluctuation of foreign exchange was concerned, the ITAT ruled that the relevant provision, i.e., "Safe Harbour Rules" had not been notified for the concerned assessment year and were, therefore, inapplicable.

4. The Revenue urges that the Tribunal fell into error. It seeks to firstly urge that the filters proposed by the assessee, i.e., 75% service filter (an extent of income derived from services rendered by the assessee) as opposed to the income derived from other businesses meant that Persistent Systems Ltd. was a comparable. Likewise, urged the counsel for the Revenue that Wipro Technology Services could not have been excluded as was done by the ITAT in its impugned order. Learned counsel also urged that the ruling of foreign

exchange fluctuation was not justified in law.

5. The proceedings before the TPO clarified that the assessee had not proposed Persistent Systems Ltd. or Zylog Systems Ltd. There is no doubt that it did propose 75% service built up. However, the TPO *suo motu* appears to have included the data of three companies holding that they were functionally similar. The question as to whether indeed they are functionally similar as contended by the Revenue.

6. As far as the first company, i.e., Persistent Systems Ltd. is concerned, the material on record - as found by the ITAT - shows that this company was involved in software development, software products and marketing. Furthermore and perhaps more importantly published segmental data was not available. In these circumstances, having regard to the specificity of the Transfer Pricing Rules under Rule 10 (b) to 10 (e) of the Income Tax Rules, the data of the said firm, i.e., Persistent Systems Ltd. could not have been included. Likewise as far as the Wipro Technology Services goes, it was part of the Citi Group and was during the financial year in question acquired on 21.01.2009 by the Wipro Ltd. as a subsidiary. As a part of the arrangement, the existing contracts pertaining to the work of the Citi Group continued to be with the newly created entity, i.e., Wipro Technology Services. Equally importantly, is that there was no published segmented data as far as software development or its finances were concerned with respect to Wipro Technology Services. In these circumstances, the findings of the ITAT are purely factual and cannot be gone into as no substantial question of law arises for

consideration.

7. As far as the question, i.e., foreign exchange fluctuation element is concerned, the records clearly reveal that the Safe Harbour Rules came into force later whereas the facts of this case pertain to the assessment year 2010-11 (Financial year 2009-10). As a consequence, the impugned order cannot be interfered with. No question of law thus arises. The appeal is consequently dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

MAY 04, 2016
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