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

\+ ITA 461/2024

PR. COMMISSIONER OF INCOME TAX -7 .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh Nangia and Mr. Nikhil Jain, Advocates.

versus

SBI BUSINESS PROCESS MANAGEMENT SERVICES PVT. LTD. (NOW MERGED WITH SBI CARDS AND PAYMENTS SERVICES LTD.) .....Respondent

Through: Mr. Himanshu S. Sinha, Mr. Prashant Meharchandani and Mr. Jainender Singh Kataria, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 23.08.2024

CM APPL. 48498/2024 (815 days delay in refilling)

Bearing in mind the disclosures made, the delay of 815 days in refilling the appeal is condoned. The application shall stand disposed of.

ITA 461/2024

1. The Principal Commissioner seeks to assail the order of the Income Tax Appellate Tribunal [‘**Tribunal**’] dated 20 May 2021 and posits the following questions of law for our consideration: -

> “3.1 Whether in the facts and circumstances of the case the Hon’ble ITAT was right in law in considering Eclerx Services Limited as functionally non comparable on the ground that it is a KPO service company whereas KPO service is part of ITES. Further, this company cannot be treated as suitable comparable merely on the ground that it is making significant amount of expense under the

head marketing and advertisement and was possessing intangible of significant amount?

3.2 Whether in the facts and circumstances of the case the Hon'ble ITAT was right in law in considering TCS E Serve, as functionally non comparable without considering the findings of the TPO with respect to the fact that the assessee company is also enjoying brand name SBI like in the case of the comparable company i.e. TATA. Further, can brand value of a company be treated as selecting criteria of suitable comparable?

3.3 Whether in the facts and circumstances of the case the Hon'ble ITAT was right in law in considering BPO Infosys Pvt. Ltd. as functionally non comparable without considering the findings of the TPO with respect to the fact that the business of the comparable company is also covered in the ITeS business and this company passes all the filters applied by the TPO. Further, should acquisition and investment made by the comparable company be treated as an extraordinary event for the purpose of selection/rejection comparable when profile of the company remains the same?

3.4 Whether in the facts and circumstances of the case the Hon'ble ITAT was right in law in considering Acropetal Technologies Ltd. as functionally non comparable on the ground that it is engaged in services not related with ITeS whereas as per annual report it is engaged in software development services related to healthcare services as well as engaged in engineering design services which is under IT Enabled Services?

3.5 Whether in the facts and circumstances of the case the Hon'ble ITAT was right in law in considering E4e Healthcare Services Pvt. Ltd. as functionally non comparable on the ground that it is engaged in services not related with ITeS whereas as per annual report it is engaged in healthcare receivable cycle management services which is under IT Enabled Services?

3.6 Whether exclusion of the comparable entities can be sustained as done by the Hon'ble ITAT without determining the specific characteristics of the transactions; FAR (functions performed, assets deployed and risk assumed) analysis; contractual terms and market conditions as prescribed in Rule 10B(2) of the I.T. Act, 1962?

3.7 Whether in the facts and circumstances of the case the Hon'ble ITAT was right in law in deleting the disallowance made by the Assessing Officer amounting to Rs. 10,90,21,322/- on account of License fee?"

2. Insofar as the activities undertaken by the respondent-assessee are concerned, the Tribunal has captured the same in paragraph 3 of its order and which is reproduced hereinbelow:-

"3. SBI Business Process Management Services Pvt. Ltd. (earlier

known as GE Capital Business Process Management Services Private Limited) which was a Joint Venture in which GE Consumer Mauritius Investment Ltd II held 60% and SBI held 40%) now merged with SBI Cards and Payment Services Limited (earlier known as SBI Cards and Payment Services Pvt. Limited) was engaged in providing IT enabled services to banks who issued credit cards. It was carrying out back end activities of card operations, i.e., transaction processing on cards, billings, updating of collections, statements of account, resolving card- member queries, etc. The assessee not being a captive service provider, rendered the aforementioned services to various credit card companies in India and entire revenue in the present financial year (of Rs. 183.11 crores) is earned from unrelated parties. In order to provide these services, the assessee had obtained software licenses, data server '"management services, CIS training from its Associated Enterprises ("AE") located in Australia and USA.

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The Transfer Pricing addition made by the Transfer Pricing Officer ("TPO") is in respect to services mentioned at S.No.2. There has been no Transfer Pricing dispute in the preceding years. For purposes of benchmarking the transaction of ITeS Services, the assessee used three- year weighted average of 7 comparables and the OP/TC was calculated at 4.91% (working capital adjusted margin was 0.95%)while the OP/TC of the assessee was 2.95%. The transactions were considered to be at arm's length on the basis of permissible range of 5%. The TPO vide order dated January 21, 2016 rejected the comparability analysis in respect to transaction of ITeS Services and conducted a fresh benchmarking study on the basis of additional/ modified quantitative filters. The TPO arrived at a final list of 10 comparables out of which 3 comparables were chosen by the assessee and fresh 7 comparables were introduced by the TPO. Further, the TPO rejected the working capital and risk adjustment and recalculated the margin of the assessee.

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Proportionate Adjustment made by the TPO i.e. adjustment made only on the international transactions entered with the related parties. Aggrieved by the order of the TPO, the assessee filed its objections before the DRP. The DRP vide order dated September 14, 2016 directed the TPO to re-compute margin of comparables and allowed working capital adjustment. The rest of the contentions of the assessee were rejected. Subsequently, the DRP passed a rectification order dated March 24, 2017 under Rule 13 of the Income Tax (Dispute Resolution Panel) under which it directed the exclusion of BNR Udyog Ltd. from the final list of comparables. The assessment order dated 17/11/2016 was passed and as per the DRP under Rule 13 of the Income Tax (Dispute Resolution Panel) Rules 2009 passed order dated 24/3/2017 thereby rectifying the earlier order."

3. As is manifest from the above, the assessee was only providing IT enabled services to banks and financial institutions and carrying on back-end activities pertaining to credit card operations. It is in the aforesaid backdrop that the Tribunal has ultimately come to exclude the comparables which were suggested and which were concerned with Knowledge Process Outsourcing [‘**KPO**’] activities.

4. Insofar as the aspect pertaining to the license fee disallowances and whether they were liable to be treated as capital or revenue in character, the Tribunal has noticed the consistent view which had been taken in this respect as would be evident from a reading of paragraph 16 which is extracted hereunder:-

> “16. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this issue is covered by the order of the Tribunal in assessee’s own case and there is no appeal filed by the Revenue before the Hon’ble High Court. The Tribunal in A.Y. 2007-08, 2008-09, 2010-11 and 2011-12 held as under:
> *“7. We have considered the rival submissions, perused the orders of the authorizes below, material available on record and gone through the case laws cited by both the parties. From the above narration of facts, we find that the arguments advanced by both the parties rest on the vital question whether under the facts and circumstances of the case, the payment of licnese fee, connectivity charges and co-ordination charges amounting to Rs.2,19,60,467/- made by the assessee to GECC(USA) under the end-user agreement shall fall within the category of capital expenditure or revenue expenditure? The stand of the assessee is that it is in the nature of revenue expenditure and deductible u/s 37(1) of the Act whereas the Id. Authorities below have put it in the category of capital expenditure and disallowed the claim of assessee. The basic reasons of Assessing Officer for giving the license fee a treatment of capital expenditure are that the agreement provides exclusive right to use vision plus software which provides enduring benefits to the assessee; that the consideration is in respect of grant of licnese and that the information was not only in relation to use of license, but co-ordination and connectivity services were also provided by GECC(USA). He, therefore, held that the acquisition of license granted by the licensor in itself is a capita asset, being “intangible asset”, which having long validity is capital in nature.*

We have gone through the End-User license agreement dated 07.07.2000 and we do not find substance in the conclusion arrived at by the Id. Authorities below. It is notable that in terms of clause 2.2 and 2.3, the assessee company is specifically restricted to make copies of the software and make it available to any other period. There is also a bar on the assessee for use of software for the purpose other than that mentioned in clause 2.2 of the agreement. In terms of clause 2.3, the assessee does possess no right either to sell it or alienate in any other manner. The relevant clauses No. 2.2 and 2.3 of the license agreement are reproduced as under:

> *"2.2 GECC shall provide the Licensed Program, any revisions to the Licensed Program and any updates to the Licensed Program to GECPBMS for its business use only in accordance with this agreement. "*
>
> *2.3 GECBPMS undertakes that it shall not;*
>
> *(a) make the licensed program or any part thereof available to any period other than its employees on a "need to know" basis;*
>
> *(b) copy the Licensed Program or any part thereof, other than for archival backup purposes;*
>
> *(c) use the Licensed Program for any purpose other than as permitted by clause 2.2 of license, sell or otherwise alienate the Licensed Program in any manner whatsoever; or*
>
> *(d) Duplicate, market, license or develop software programs that compete with the Licensed Program and/or exploit commercially the Licensed Program in any manner whatsoever. "*

Similarly, clause 5 and its sub-clauses give the right of termination of license agreement to either parties under various circumstances. It is worthwhile to note that in case of default, if any, committed by the assessee, the rights of assessee to use the software would stand terminated forthwith. Under clause 5.5, the assessee is required to deliver the licensed program back immediately to GECC(USA) after removing the same from its systems on termination of agreement. Clause 5.5 of the agreement reads as under:

> *"5.5 Upon termination of this Agreement the right to use the Licensed Program shall end and GECBPMS shall, with immediate effect:*
>
> *(a) deliver to GECC the Licensed Program; and*
>
> *(b) purge all copies of the licensed program stored in any CPU or other storage medium or facility, which for any reason cannot be delivered to GECC. In addition, an officer of GECBPMS shall certify in writing to GECC that all proprietary material relating to the Licensed Program has been delivered to GECC or purged and that the use of the Licensed Program and any portion thereof has been discontinued."*

Under clause 3.1, the license agreement allows GECC to receive

license fee from assessee on quarterly basis as mutually agreed upon. The agreement provides for periodic payment for use of software to GECC, which is subject matter of renewal and revision every calendar year. No case is made out by the department to assume that the periodic payment made by the assessee were the installments for acquisition of such software and the payment was not for mere usage of software. It is a matter of fact on record that M/s GECC(USA) itself has received the right to use the software internally including its group entities for its business and it does not have any right to commercially exploit the software. The assessee is vested with limited right to use the licensed program during the currency of license agreement. The agreement nowhere provides any exclusive right to the assessee, but the assessee was vested with the right to use the licensed program for facilitating its business operations enabling the assessee day-to-day management of business and to work with more efficiency. In view of all these terms of agreement and the facts & circumstances attending to the case, we are of the considered opinion that end user license agreement in the instance case does not have the effect of any enduring benefit for holding the same as capital in nature. The Id. DR has failed to rebut the contention of the assessee that the impugned software is an application software and is being used for accounting purposes. Such software are used by various banks and financial institutions. Moreover, the Id. CIT(A) in succeeding assessment years 2008- 09, 2010-11 and 2011-12 has categorically gave finding of fact that the software is a application software which is routine in nature and used for accounting purposes. Therefore, in view of decisions in the case of CIT vs. Asahi India Safety Glass Ltd. (supra) and CIT vs. Amway India Enterprises (Supra), we are of the considered opinion that the right to use the visions plus software program does not have any effect of providing enduring benefit and the payment made to GECC(USA) is only the license fees and not the price for acquisition of capital asset. The assessee did not acquire any ownership on the software and after termination of license agreement, all the rights and title remained with GECC(USA). The Id. DR failed to dislodge the findings of the Id. CIT(A) given in the orders passed for subsequent years after considering the same license agreement and various decisions of Hon'ble High courts and Supreme Court. It is also a matter of record that the assessee has returned its income for the relevant previous year at Rs. 152.88 crores whereas the amount expended towards use of routine application software is Rs. 2.19 crores which is 1.43%. This shows that implies that this software only is not the soul of assessee's business as argued by the Id. DR. In the case of southern Switchgear Ltd. (supra), the technical knowledge and information remained with the assessee even after termination of agreement which constituted enduring benefit to the assessee whereas in the present case, the software in question is an

application software and after termination of license agreement, said software was to be delivered back to the licensor and the same cannot be made to use by the assessee in any manner. Similarly in the case of Jones Woodhead and Sons (India) (supra) retied on by the Assessing Officer is also distinguishable on facts inasmuch as in that case the agreement between the assessee and the foreign collaborator was in relation to setting up of a new business and the foreign collaborator besides furnishing information and technical know-how, rendered valuable assistance in setting up of the factory itself. No such situation arises in the present case. In view of this discussion and relying on various decisions cited by assessee, we are of the considered opinion that the license fee etc. paid by the assessee to M/s GECC(USA) is revenue expenditure deductible u/s 37 of the Act. The appeal of the assessee is accordingly allowed."

This view was again taken in A.Y. 2010-11, 2011-12 by the Tribunal and allowed this issue in favour of the assessee. For A.Y. 2007-08, the Hon'ble High Court has affirmed the order of the Tribunal in favour of the assessee (ITA No.766/2014 & CM 20436/2014 CIT vs. GE Capital Business Process Management Services Pvt. Ltd. order dated 24.12.2014), but this issue was not contested by the Revenue in the High Court. Thus, the issue of disallowance of license fee is attains finality and is in favour of the assessee as held by the Tribunal. Hence, Ground No. 3.1 to 3.8 are allowed."

5. We find that although the appeal for one of the concerned AYs was brought to the High Court, this issue was not raised on that occasion. It is the aforesaid backdrop that the Tribunal following the rule of consistency has chosen not to interfere with the view expressed by the lower authorities.

6. Bearing in mind the aforesaid, we find no ground to entertain the instant appeal. The appeal raises no substantial question of law and shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 23, 2024/*vp*