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

+ ITA 437/2023

PRINCIPAL COMMISSIONER OF
INCOME TAX-07, DELHI

..... Appellant

Through: Mr. Sunil Agarwal, SSC with
Mr. Shivansh B. Pandya, JSC,
Mr. Utkash Tiwari & Mr.
Amaan Ahmed Khan, Advs.

versus

FISERV INDIA PRIVATE LTD. (AS
SUCCESSOR OF OPEN SOLUTIONS
SOFTWARE SERVICES PVT. LTD.)

..... Respondent

Through: Mr. Sachit Jolly, Ms. Disha
Jham, Ms. Soumya Singh &
Mr. Devansh Jain, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

21.02.2024

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CM APPL. 40633/2023 (86 Days Delay in filing)

1. This is an application filed by the appellant seeking condonation of 86 days delay in filing the appeal. For the reasons stated in the application, the delay of 86 days in filing the appeal is condoned.

2. Application is disposed of.

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3. The Commissioner of Income Tax-07 seeks to impugn the order dated 18 October 2022 and has proposed the following questions of law for our consideration:



- A. Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal [“ITAT”] has not erred in reviewing its decision in ITA Nos. 6692/Del/2018, while deciding Miscellaneous Applications filed under Section 254(2) of the Income Tax Act, 1961 [“Act”]?
- B. Whether on the facts and circumstances of the case and in law, the ITAT has review power under Section 254(2) of the Act in view of decision of the Supreme Court in Civil Appeal no. 7110 and 7111 of 2021 in the case of **CIT vs Reliance Telecom Ltd.** [(2022) 440 ITR 1 (SC)]?

4. The impugned order has been passed by the ITAT on a Miscellaneous Application moved by the respondent-assessee subsequent to the appeal itself having been disposed of on 29 September 2020. It becomes relevant to note that in the order of 29 September 2020, the ITAT while considering whether Persistent Systems Ltd. [“PSL”] should be accepted for the purposes of comparability had recorded the following findings in paras 12 and 21:

“12. We have carefully considered the rival contentions with respect to the above comparable and find that the orders of the coordinate bench in ITA No. 7078/Del/2014 for AY 2010-11 vide para No. 8 has excluded the Persistent Systems Pvt. Ltd from the comparable analysis. In that order it was held that Persistent Systems as software services and products in its income segment, however, there is no segmental information available. The Id DR could not show us any reason that FAR of the assessee for AY 2010-11 is different in this year. Therefore, respectfully following the decision of the coordinate bench in assessee’s own case we direct the Id TPO/ AO to exclude the Persistent Systems Ltd from the comparable analysis.

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21.In view of the above facts, we do not find any infirmity in the order of the learned transfer pricing officer as well as the direction of the learned that DRP in holding that persistent



Systems Ltd is a good comparable. Therefore, we reject the argument for its exclusion.”

5. Insofar as Sasken Communication Technology Ltd. [“**Sasken**”] is concerned, the ITAT had upon a consideration of the submissions addressed held as follows:

“**25.** We have carefully considered the rival contention and find that only objection of the assessee is that above comparable company has different margin shown in the show cause notice and order of the TPO. In the show was notice at page number four of the order the margins of this comparable was shown to be 7.28% whereas in the TP order as well as the effect order passed by the TPO on direction of the learned dispute resolution panel the margin of this comparable were taken at 33.2%. There is no justification or reasons were found in the TP order for change in the margins and the basis of such changes. Therefore, we set aside this comparable to the file of the learned transfer pricing officer to show assessee how he has changed the above margin and on what basis the margins have gone up to 33.2% from 7.28%.”

6. As would be ex facie evident from a reading of paras 12 and 21 of the original order, the ITAT had clearly rendered incompatible and inconsistent findings. In fact we are constrained to observe that paras 12 and 21 were clearly contradictory. It was thus not only imperative but also expedient in the interest of justice for the ITAT to recall its order of 29 September 2020 and correct a manifest error apparent on the record. If that route had not been adopted, it would have left the Transfer Pricing Officer [“**TPO**”] as well as the Assessing Officer with an unresolvable quandary.

7. We further note from a reading of the order dated 18 October 2022 that the ITAT has presently kept the issue of comparability vis-a-vis PSL open for its own consideration, and insofar as Sasken is concerned the matter has been remitted to the file of the TPO. In that view of the matter no prejudice as such stands caused to the appellant.



8. We consequently find that the appeal raises no substantial question of law. It shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.
FEBRUARY 21, 2024/kk