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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ITA 1111/2018****PR. COMMISSIONER OF INCOME TAX-4, DELHI ..... Appellant**Through: **Mr. Asheesh Jain, Senior Standing  
Counsel for Revenue with Mr. Adarsh  
Kumar Gupta, Advocate.**

versus

**ITOCHU INDIA PRIVATE LTD. .... Respondent**Through: **Mr. Piyush Kaushik, Advocate.**+ **ITA 1129/2018 & CM APPL. 42818/2018 (for delay)****THE PR. COMMISSIONER OF INCOME TAX -4 ..... Appellant**Through: **Mr. Ruchir Bhatia, Advocate.**

versus

**M/S ITOCHU INDIA (P) LTD. .... Respondent**Through: **Mr. Piyush Kaushik, Advocate.**+ **ITA 1130/2018 & CM APPL. 44228/2018 (for delay)****THE PR. COMMISSIONER OF INCOME TAX -4 ..... Appellant**Through: **Mr. Ruchir Bhatia, Advocate.**

versus

**M/S ITOCHU INDIA (P) LTD. .... Respondent**Through: **Mr. Piyush Kaushik, Advocate.****CORAM:  
JUSTICE S.MURALIDHAR  
JUSTICE I.S.MEHTA****ORDER**

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**13.05.2019**



1. These three appeals by the Revenue are directed against the separate orders by the ITAT for Assessment Years (AYs) 2009-10, 2007-08 and 2008-09 respectively.
2. The common issue sought to be urged by the Revenue in all three of these appeals concerns determination of the arms length price (ALP) of the international transactions entered into by the Assessee during the AYs in question.
3. The admitted facts of the Assessee is that it a wholly owned subsidiary of Itochu Corporation of Japan ('ICJ') and is in the business of rendering support services in relation to facilitation and market support to its Associated Enterprises (AEs) in order to facilitate sourcing transactions of its AEs with prospective sellers. The Assessee is known as a '*Sogo Shosha*'. company.
4. The question that arose in *Li & Fung India Pvt. Ltd. v. Commissioner of Income Tax (2014) 361 ITR 85 (Del)* before this Court was regarding the determination of the ALP in respect of transactions entered into by an Assessee (similarly situated as the Assessee in the present case). IN that context, it was observed by this Court as under:

“This Court is of the opinion that to apply the transactional net margin method, the assessee’s net profit margin realized from the international transactions had to be calculated only with reference to the cost incurred by it and not by any other entity either third party vendors or the associated enterprise. Textually, and within the bounds of the text must the Assessing Officer/ Transfer Pricing Officer operates, rule 10B (1) (e) does not enable



consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the transactional net margin method, Rule 10B (1) (e) recognizes that "the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise (emphasis supplied). It thus contemplates a determination of the arm's length price with reference to the relevant factors (costs, assets, sales, etc.) of the enterprise in question, i.e., the assessee, as opposed to the associated enterprise or any third party. The textual mandate, thus, is unambiguously clear."

5. In other words in *Li & Fung India Pvt. Ltd. (supra)*, this Court set aside the approach of the Transfer Pricing Officer ('TPO') for proposing an additional 5% mark-up on the free on board value of exports to third parties as the same would tantamount to application of Transactional Net Margin Method ('TNMM') in an erroneous manner.

6. The Court is informed that the Revenue's appeal against the above decision for the AY 2006-07 is pending in the Supreme Court. However, there is no stay of the operation of the said judgment.

7. In *Principal Commissioner of Income Tax v. Mitsui & Co. India Pvt. Ltd. (2016) 384 ITR 360 (Del.)*, while dealing with another Sogo Shosha Company, this Court followed its earlier decision in *Li & Fung India Pvt. Ltd. v. Commissioner of Income Tax (supra)* and dismissed the Revenue's appeal against the orders of the ITAT that followed the decision in *Li & Fung India Pvt. Ltd. (supra)*. In the present case as well the ITAT has

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followed the decision of this Court in *Li & Fung India Pvt. Ltd.* (*supra*).

8. What requires to be noticed also is that in relation to this very Assessee for AYs 2011-12, 2012-13 and 2013-14, the Assessee's determination of ALP has been accepted by the Assessing Officer. This fact has been noticed by the ITAT in the impugned order for the AY in question as well.

9. This Court has already held that including the FOB value of the AE's contract in the operating cost in order to determine its margin not to be sustainable in law. The ITAT has rightly held that the TPO has "artificially enhanced the cost base of the taxpayer and proposed a mark up of the FOB value of goods sourced by AEs and as such this approach is not available in TNMM under Rule 10 B(1) (e)." Further, the observation of the ITAT that the TPO "has wrongly recharacterized the business function of the taxpayer from a business support service provider to a trader" also suffers from no legal infirmity.

10. No substantial question of law arises. The appeals and pending applications are dismissed.

  
S. MURALIDHAR, J.

  
I.S. MEHTA, J.

MAY 13, 2019

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