THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.05.2013

+ ITA 271/2013 & ITA 277/2013

CIT VI ..... Appellant

versus

VERIZON INDIA PVT LTD ..... Respondent

Advocates who appeared in this case:
For the Appellant : Mr Kiran Babu
For the Respondent : None

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM Nos. 8856/2013 & 8916/2013

Exemptions are allowed subject to all just exceptions.

CM Nos. 8857/2013 & 8917/2013

Delay in re-filing is condoned.

ITA Nos. 271/2013 & 277/2013

1. These appeals by the revenue raise a common issue in respect of the very same respondent / assessee and are, therefore, being disposed of together. The appeals arise from the common order dated 30.08.2012 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.

4187/Del/2012 and ITA No. 2766/Del/2011 relating to the assessment years 2004-05 and 2005-06, respectively.

2. The issue sought to be raised in the present appeals pertains to the adjustment made by the Transfer Pricing Officer and the consequent additions made by the Assessing Officer in the assessment orders pertaining to both the assessment years. The respondent / assessee entered into a service agreement with its associated enterprise in Singapore namely Verizon Communications Singapore Pvt Ltd. Since it was an associated enterprise, the Assessing Officer referred the matter to the Transfer Pricing Officer for determining the arms length price. The Transfer Pricing Officer compared the services provided by the respondent / assessee to its associated enterprise with four companies – Engineers India Ltd, RITES Ltd, TCE Consulting Systems Engineers Ltd and Water & Power Consultancy Services Ltd. Thereafter, the Transfer Pricing Officer made the adjustment, which resulted in the Assessing Officer making the additions in respect of both the years. The assessee went up in appeal in respect of both the assessment years before the Commissioner of Income Tax (Appeals).

3. Before the Commissioner of Income Tax (Appeals), four questions were formulated:-

> "(1) Whether the reference made by the Assessing Officer to the T.P.O. mechanically is bad in law making the TPO's order void-ab-initio?

(2) Whether the mechanical acceptance of TPO's recommendation by the AO makes the assessment order bad in law?

(3) Whether the TPO was justified in considering the current year data?

(4) Whether the comparables selected in the order of the TPO are functionally non-comparable to the appellant?"

4. Question Nos. (1) to (3) were held against the respondent / assessee and in favour of the revenue. However, question No. 4 above was decided by the CIT (Appeals) in favour of the respondent / assessee. This resulted in the filing of two appeals by the respondent /assessee, being, ITA No. 4187/Del/2010 and ITA No. 2766/Del/2011 before the Tribunal insofar as question Nos. (1) to (3) were concerned. The revenue also filed cross objections in respect of both the assessment years, being aggrieved by the decision of the CIT (Appeals) in respect of question No.4.

5. The Tribunal examined the issue of whether the four comparables selected by the Transfer Pricing Officer were functionally comparable to the services rendered by the respondent / assessee to its associated enterprise. In this context, the Tribunal examined each of the four entities namely EIL, RITES Ltd, TCE Consulting Engineers Ltd and Water & Power Consultancy Services Ltd and found that these four entities were not functionally comparable in respect of the services rendered by the respondent/assessee to its associated enterprise in Singapore. It has been established on facts that while the services rendered by the respondent /

assessee were in the nature of marketing services, the services rendered by the so-called four comparables were in the nature of engineering services. On facts, the Commissioner of Income Tax (Appeals) as well as the Tribunal have held that the two services, that is, marketing services and engineering services, were functionally different and were, hence, not comparable. The Tribunal arrived at the following conclusion:-

> "23. A perusal of the above demonstrates that the assessee has not conducted a proper T.P.study and has wrongly chosen these 4 comparables. When on facts, we are of the opinion that the T.P.study wherein these 4 comparables taken were wrong as apparently there is no functional comparability, we cannot approve such T.P.study, even if the T.P.O. has accepted it. Wrong facts have to be corrected. There can be no estoppel in such factual situation. The Ld.CIT(A) has the power to accept fresh claim of the assessee. Marketing support services cannot be compared with turn key Engineering services. We agree with the view of the First Appellate Authority that EIL, Rites, Wapcos and TCE are engineering companies that provide end-to-end solutions and whereas the assessee company provides marketing support services to the parent company, which is in the nature of support service and hence not functionally comparable. She rightly concluded that the risk provision is vastly different and hence on this count also they are not comparable. This factual conclusions are not disputed by the Ld.D.R.
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> 24. On these facts we find no infirmity in the Commissioner of Income Tax (Appeals) admitting a ground by the assessee, wherein it argued that the comparables selected by it in the T.P. report are erroneous."

6. It would be relevant to point out that in view of the above conclusion arrived at by the Tribunal, the respondent / assessee did not press the cross objections and the same were dismissed as non-pressed.

7. We have heard the learned counsel for the appellant and examined the matter in detail and find that the conclusion arrived at by the Tribunal on facts clearly demonstrates that the services rendered by the respondent / assessee to its associated enterprise are in the nature of marketing services which are entirely different to the set of services in the nature of engineering services rendered by the so called four comparables. Consequently, the adjustment arrived at by the Transfer Pricing Officer and the addition made by the Assessing Officer cannot be sustained on the basis of the Transfer Pricing Study with regard to the four companies which were clearly functionally not comparable. So, no question of law arises for our consideration.

8. The appeals are dismissed.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

MAY 29, 2013
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