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

Decided on: May 05, 2015.

\+ ITA 83/2015

COMMISSIONER OF INCOME TAX-8 ..... Appellant

Through Ms. Suruchii Aggarwal and Mr. Abhishek Sharma, Advs.

versus

SUMITOMO CORPORATION INDIA PVT. LTD..... Respondent

Through Mr. C S Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Revenue is in appeal claiming to be aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) in ITA No.328/Del/2014 for AY 2009-2010. The question of law it commenced for this Court's consideration is that the impugned order directing determination of the arms length price (ALP) in the assessee's case - originally leading to adjustments to the tune of ₹88,40,13,476/-, is in consonance with the provisions of the Act.

2. Briefly the facts are that the assessee is inter alia engaged in facilitating the import and export activities both directly and indirectly on behalf of various customers – domestic and overseas. It has two distinct

business segments i.e. commission business derived on FOB value sold/purchased by the customers, and secondly trading activities undertaken by it. For the concerned AY it reported an income of ₹19.43 crores part. The matter was referred to the TPO who after considering the report, directed adjustment of ₹88,40,13,476/-. This was accepted by the AO. The TPO – (1) did not accept the assessee's report clubbing both transactions for the purpose of ALP determination; (2) rejected the TNMM (transactional net margin method) suggested by the assessee based upon previous year's orders, for ALP determination; (3) made adjustment in respect commission segment business by adopting the margin of profit for trading with non-AE of the assessee. The assessee approached the ITAT contending that the AO's order disturbed the consistent view adopted by the Revenue for past years whereby the TNMM was accepted. It was also contended that the TPO – and consequently the AO fell into error in not accepting the clubbing of transactions suggested by the assessee. Most importantly the assessee was aggrieved by comparison of what was facially incomparable i.e. after rejection of the AO's method of comparing two transactions which was deemed to be dissimilar in the first instance.

3. The ITAT in the impugned order discussed the nature of transactions and noticed that for benchmarking international transactions the AE had adopted the most appropriate method i.e. ANMM with PLI ratio (Indian law gives the dictates of Rule 10B of Income Tax Rules). The assessee had introduced three years' data as well as comparable to demonstrate its cross profit over operating cost at different levels for some of the previous years and had urged that it was better than that of comparables which indicated the profit margin to be 1.08%. The TPO had required the assessee to furnish

segmental data for commercial as well as trading business – separately. This was complied with. The transactions with the AEs under the trading segment was at 3.9% and that from non-AE transactions was at 5.82% (in the trading segment). This data was not disputed. The ITAT recorded its disapproval at the approach adopted by the AO; firstly disturbing the consistent application of TNMM method, and more importantly in adopting the profit of one segment of the business i.e. the trading transactions, and comply it to, what according to him was a dissimilar segment i.e. the commission income. The ITAT noticed that the percentage of commission from AE transactions for the concerned AY was reported on 1.83% as against 2.86% from non-AEs. The ITAT has held as follows :

> *"5. We have heard the rival submissions and perused the relevant material on record. It is noticed that the TPO relied on the view taken by him for preceding years in proposing the transfer pricing adjustment. The ld. AR also candidly admitted that the order for the current year is replica of the earlier years order passed except for the change in figures. The position which, therefore, admittedly emerges is that the facts and circumstances of the instant year are mutatis mutandis similar to those of the preceding two years. The appeal of the assessee for the AY 2007- 08, in which transfer pricing adjustment was made under similar circumstances, came up for consideration before the Tribunal in ITA No.5095/Del/2011. Vide order dated 31.01.13, the Tribunal has held that the 'Indenting transactions' are different from 'Trading transactions' in terms of functional differences, risks undertaken and assets employed, and hence both cannot be considered as uniform. The Tribunal held that the commission earned by the assessee from its AEs under the 'Indenting segment' was required to be benchmarked on the basis of commission earned by the assessee from non-AEs under 'Indenting segment'. The assessee's contention before the Tribunal that discount of 50% should be given from*

commission earned from non-AEs to make it comparable with the commission earned from AEs, was rejected. It was finally held that the commission percentage from AE transactions should be compared with the commission percentage from non-AE transactions. That is how, it was directed that such commission percentage at 2.26% from non-AE transactions should be taken as arm's length rate at which the assessee should have earned commission from AE transactions. Similar view was taken by the Tribunal in its order for the AY 2008-09 in which the commission percentage @ 2.23% from non-AE transactions was held to be arm's length rate of commission to be applied in respect of transactions with AEs. As the facts and circumstances of the instant year are admittedly similar to those of two preceding years, respectfully following the precedents, we hold that the action of the TPO/AO in determining the ALP in respect of indenting business by applying profit percentage earned by the assessee from non-AE transactions under the 'Trading business segment' cannot be upheld. It goes without saying that both the trading as well as commission businesses are functionally different from each other, apart from having varying risks and capital employed. We hold that the commission percentage from AE transactions should be benchmarked on the basis of commission rate from non-AE transactions under the 'Indenting business' and the addition on account of transfer pricing adjustment, if any, should be made in consonance with the view taken by the tribunal in the immediately two preceding years.

6. The ld. AR tried in vain to impress upon us that the view taken by the tribunal in the preceding two years should not be followed and the application of TNMM as employed by the assessee should be accepted leading to no addition on account of TP adjustment. To buttress his contention for the application of TNMM, he placed on record a copy of the order passed by the Delhi bench of the tribunal in Marubeni India P. Ltd. VS. DCIT (ITA no. 5397/Del/2912). This contention was countered by the ld. DR by stating that the TPO has applied internal RPM as the assessee's TNMM was faulted with due to the reasons

given in the order. We are not convinced with the contention of the ld. AR urging us to observe departure from earlier view taken by the tribunal for the obvious reason that when the Tribunal in identical facts has taken a particular view in assessee's own cases for the immediately two preceding assessment years, we cannot tinker with the same. We, therefore, hold that the commission percentage on the basis of FOB value of goods from transactions with non-AEs be computed and taken as arm's length rate of commission for the purposes of the transactions with AEs under the 'Indenting business' segment. In this regard, the ld. AR submitted that the percentage of commission from AE transactions for the instant year stood at 1.83% as against 2.86% from non-AEs. We find that the rates of commission now sought to be placed before us, are not emanating from the orders of the authorities below. Under such circumstances, we set aside the impugned order and remit the matter to the file of the AO/TPO with a direction to find out the rate of commission income on FOB value of the transactions with non-AEs under the 'Indenting business' segment and then apply the same rate to the FOB value of goods in AE transactions under the 'Indenting business' segment, as was directed in the earlier years. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such proceedings."

4. We have heard counsel for the Revenue, who urges that "Berry" ratio, which was suggested by the assessee is alien to Indian law. She also urged that the application of TNMM method is a matter of debate since for the previous year the question of law has been framed and is pending consideration by this Court.

5. This Court notices at the outset that the issue which it is concerned with is AY i.e. 2009-2010 involves extremely restricted one. Having clubbed the transactions for the purpose of ALP determination whether the TPO/AO could have refused to follow the logic and consider the comparable

profits from non-AE transactions in both segments is in issue. All that the ITAT did, in our view, was to cure this defect or anomaly and direct the AO to consider the margin of commission in each segment while determining the ALP. We at the same time clarify that the AO – who is now directed to carry out the exercise shall do so by applying principles in Rule 10(B) of the Income Tax Rules.

6. The appeal is disposed of but in terms of above directions. It is clarified that this Court is not in any way disturbing the Tribunal's direction to determine the rate of commission in either segment.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MAY 05, 2015
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